seq # 9 ES
x Lmchan FAN
09/02/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No.: 21162/09

NOTICE OF CROSS MOTION

Assigned Justice: Francis A. Nicolai

FILED
MAY 18 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Julius W. Cohn and the exhibits annexed thereto Plaintiff will cross move before this Court at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601 on the 2nd day of September, 2010 at 9:30 a.m. in the forenoon of said day or as soon thereafter as counsel can be heard for an Order granting Plaintiff leave to serve and file a Second Amended Complaint in the form annexed hereto, together with such other and further relief as to this Court may seem just, proper and equitable, together with the costs and disbursements of this action.

Dated: White Plains, New York
August 20, 2010

RECEIVED
AUG 25 2010
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

Yours, etc.,

COHN & SPECTOR

By: _____
Julius W. Cohn
Attorneys for Plaintiff
200 East Post Road
White Plains, NY 10601
(914) 428-0505

4c

TO: **BENOWICH LAW, LLP**
Attorneys for The Nature Conservancy
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400

OXMAN, TULIS, KIRKPATRICK, WHYATT & GEIGER
Attorneys for Noel B. Donohoe and Joann Donohoe and
Robert Burke and Teri Burke
120 Bloomingdale Road
White Plains, NY 10601
(914) 422-3900

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorneys for Robert Burke & Teri Burke
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Index No.: 21162/09

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

AFFIRMATION IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTIONS FOR REARGUMENT AND/OR RENEWAL

Defendants.

----------X

JULIUS W. COHN, an attorney at law duly licensed to practice in the State of New York, under penalty of perjury hereby affirms and subscribes as follows:

1. I am a member of the law firm of Cohn & Spector, attorneys of for Plaintiff Seven Springs, LLC ("Seven Springs"), and am fully familiar with all of the facts and circumstances heretofore had herein. I make this Affirmation in opposition to the Defendants' motions for reargument and/or renewal (where requested) and in support of the Plaintiff's cross motion for leave to serve and file a Second Amended Complaint in the form annexed hereto.

THE CROSS MOTION TO SERVE AND FILE THE PROPOSED SECOND AMENDED COMPLAINT SHOULD BE GRANTED

2. The within cross motion seeks to serve and file a Second Amended Complaint (attached hereto as **EXHIBIT "A"**). The cross motion should be granted. As the Court is aware, in the absence of prejudice or surprise to the opposing party, leave to amend the Complaint should be freely granted, Trataros Construction, Inc. v. New York City Housing Authority, 34 A.D.3d 451, 452-453, 823 N.Y.S.2d 534. The fact that the proposed Amended Complaint is a Second Amended Complaint does not take away from the fact that such amendment shall be freely granted, CPLR §3025(b), WMC Mortgage Corp. v. Vandermulen, 63 A.D.3d 1050, 880 N.Y.S.2d 574 (2nd Dept. 2009). Further, as can be seen from

47

a reading of the proposed Second Amended Complaint, it is neither "palpably insufficient nor patently devoid of merit", WMC Mortgage Corp., ***supra***, Lucido v. Mancuso, 49 A.D.3d 220, 232, 851 N.Y.S.2d 238.

3. A review of the proposed Second Amended Complaint clearly indicates that it brings to the Court additional facts and clearly resolves all of the issues raised by the Defendants. The instant action has not even entered the discovery phase. It has not gone beyond the initial pleading phase. Accordingly, there is no prejudice to the Defendants and the Complaint is drafted "to comply with the facts as they unfold", Bogoni v. Friedlander, 197 A.D. 2d 281, 610 N.Y.S. 2d 511 (1st Dept. 1994). Thus, as can be seen from a perusal of the proposed Second Amended Complaint, it recites facts uncovered during the discovery phase of the related action involving Seven Springs's easement and real property rights in the declaratory judgment action commenced by it in 2006 and pending before this Court (Index No. 9130/2006, "the related action"). The proposed Second Amended Complaint also sets forth statements with even greater specificity than the Amended Complaint (Exhibit "2" to TNC's motion papers), substantiating Plaintiff's allegations of *prima facie* tort, injurious falsehood and slander of title, some of which statements were made in 2008 and 2009.

Based upon the above, the Court should grant the cross motion and allow the service and filing of Plaintiff's proposed Second Amended Complaint..

DEFENDANTS' REARGUMENT MOTIONS MISAPPLY THE LAW ON A CPLR §3211 MOTION

4. Basically Defendants, *inter alia*, reargue that it was a misapprehension of the law by this Court to decide as it did. TNC, in its Memorandum of Law, argues that this Court "misapprehended - or at the very least misapplied - the standard applicable" to a motion to dismiss (or at least to Defendant The Nature Conservancy's - "TNC's" motion to dismiss). Such is not the case. What TNC urges is that the standard that would apply to a summary judgment motion apply to a CPLR §3211 motion, and that is simply

not the law. As stated, generally, in Lucido, ***supra***, and in Guggenheimer v. Ginzberg, 42 N.Y.2d 268 (1977) the criteria for reviewing a motion to dismiss a Complaint requires that the Court accept the allegations as set forth in the Complaint (and/or as amended) and any Affidavits submitted in opposition to a motion to dismiss such Complaint as true, and to resolve all inferences which reasonably flow therefrom in favor of the Plaintiff. That is the standard.

5. As set forth above, the Plaintiff is not required to establish the merit of the proposed amendment in the first instance, see Lucido, ***supra***, and Millard v. Michael Eigen Jewelers, 5 Misc.3d 1022(A), 2004 WL 2792448 (N.Y. Sup. 2004).

PLAINTIFF'S MOTION TO REARGUE AND/OR RENEW IS WITHOUT LEGAL BASIS

6. At the outset, Defendant TNC moves for reargument or renewal without the required delineation, CPLR §2221. With the exception of a footnote in the Supporting Affirmation of TNC's attorney, Leonard Benowich, Esq., dated July 20, 2010 ("the Benowich Affirmation") at p. 10, footnote 14, there is no required delineation between reargument and renewal in TNC's motion, CPLR §2221. TNC's motion should fail for this purpose alone as he fails to identify a reargument motion from a renewal motion "specifically as such" (CPLR §2221(d)(1) (reargument); (CPLR §2221(e)(1) (renewal)

7. The Defendants' motions are simply a rehash of the arguments they made prior to the issuance of this Court's decision from which they now seek leave to reargue. Reargument is not intended to afford unsuccessful parties successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted, Bush v. The City of New York, 195 Misc. 2d 882, 762 N.Y.S. 2d 775; Alpert v. Wolf, 194 Misc. 2d 126, 751 N.Y.S. 2d 707, **affirmed**, 2 Misc. 3d 140(A), 784 N.Y.S. 2d 918. Additionally, should the Court grant Plaintiff's cross motion for leave to serve and file the Second Amended Complaint, Defendants' arguments that Plaintiff has not stated a claim for *prima facie* tort are no longer applicable or valid.

8. To the effect that all of the Defendants may claim that the proposed Second Amended Complaint fails to state a *prima facie* tort, injurious falsehood or slander of title, such arguments are without merit. A simple reading of the proposed pleading demonstrates proper recitation of each element of each tort with sufficient particularity. Additionally, the Plaintiff's claim as stated in the prior, Amended Complaint is much broader than and is not limited simply to Defendants' wrongful seeking of and obtaining a preliminary injunction. Defendants' attempts to limit the thrust of the Amended Complaint are disingenuous.

9. This Court correctly addressed all of the issues raised in the prior motion practice and did not limit itself to an argument that solely involved the Defendants' obtaining of a preliminary injunction in the declaratory judgment action. Further, this Court acknowledged in the prior decision that such conduct also constitutes a valid cause of action for slander of title.[1] Given the fact that the instant action is at the initial pleading stage and that no discovery of any type or kind has taken place, the advancing of the proposed slander of title and injurious falsehood claims, in addition to the *prima facie* tort claim, is not prejudicial to the Defendants who have been on notice of such possible claims since the inception of the declaratory judgment action in 2006 in which the initial Complaint and the Amended Complaint alleged continuing wrongs by the Defendants in interfering with and preventing the Plaintiff from accessing, utilizing and developing its property. Accordingly, there is no valid bar of any statute of limitations. The proposed Second Amended Complaint not only relates back to the original actions but alleges continuing wrongs by the same parties arising out of the same subject matter, Rivera v. Fishkin, 48 A.D.3d 663, 852 N.Y.S.2d 284 (2nd Dept. 2008). As stated in Plaintiff's prior Reply Memorandum of Law in opposition to Defendants' motions to dismiss, an amended pleading in a subsequent action can be deemed to relate back

[1]That cause of action is stated in the Second Amended Complaint (**EXHIBIT "A"**), that amended pleading forming the subject matter of the instant cross motion.

to the commencement of a separate prior action, Town of Guilderland v. Texaco Refining and Marketing, Inc., 159 A.D.2d 829, 552 N.Y.S.2d 704 (3rd Dept. 1990) [It is permissible to relate back to the original commencement of the action not only a claim the Plaintiff seeks to add in the same action, but even one sought to be added to a separate but connected action]. Accordingly, there is no viable statute of limitations bar to any of Plaintiff's claims.

THE DEFENDANT' CLAIMS OF "COLLATERAL ESTOPPEL" AND "PRIVILEGE" DO NOT APPLY

10. The Donohoe Defendants claim that they should be granted reargument on the following basis (Affirmation of Stuart E. Kahan dated July 29, 2010, ¶9):

> "Despite this court's delineation of the Donohoe Defendants' collateral estoppel argument, there is no indication that the court considered this argument in support of the motion to dismiss the complaint . . ."

11. By virtue of what the Donohoes claim is this Court's "delineation", it is clear that this Court was aware of and took the "collateral estoppel" argument into account but simply discredited it. The Court was correct in discrediting the argument. The Court's reference to the "collateral estoppel" argument demonstrates that it was considered, and since the granting of a preliminary injunction is not a determination of the merits, Kaplan v. Queens Optometric Association, 293 A.D.2d 449, 739 N.Y.S.2d 461 (2nd Dept. 2002), it is clear that the Court gave it no shrift.

12. Further, the Donohoe Defendants also seem to argue that collateral estoppel bars a showing that the seeking and obtaining of a preliminary injunction was committed in bad faith or upon fraud and misrepresentation. Such is not the case. Indeed, there is no absolute privilege from such wrongful conduct, as urged by various of the Defendants.

13. Any claim of "privilege" made by the Defendants does not apply and this Court should not grant reargument in connection with any such claim. The Defendants cannot use a claim of

"privilege" as a cloak for *prima facie* tort, injurious falsehood or slander of title. While, generally, a party may not be held in damages for asserting his rights in court, a cause of action in *prima facie* tort will lie where prior litigation was instituted solely with the intent of harming another party without either excuse or justification, Serrano v. Flight Motel, Inc., 95 Misc.2d 669, 408 N.Y.S. 2d 198 (Sup. Ct. Queens Co., 1978). The absolute privilege attaching to testimony in judicial proceedings should not be applied if a party manipulated the legal process or initiated litigation in order to defame or injure another party under the protective cloak of privilege, Andrews v. Steinberg, 122 Misc. 2d 468 (Sup. Ct. NY Co. 1983). Harm intentionally done is actionable if not justified; to such action the stringent rules of libel and slander do not apply and consequently the defense of privilege may not be interposed, Schauder v. Weiss, 276 A.D. 967 (2nd Dept. 1950), citing American Guild of Musical Artists v. Petrillo, 286 N.Y. 226 at 231 and Salmond on the Law of Torts, 10th Ed. at 588, 589.

THE PLAINTIFF HAS NOT WAIVED A CAUSE OF ACTION FOR SLANDER OF TITLE

14. In the decision from which the Defendants seek reargument, the Court acknowledged that the allegations of the Amended Complaint support a valid claim for slander of title. The proposed Second Amended Complaint (**EXHIBIT "A"**) specifically alleges the torts of slander of title and injurious falsehood, in addition to alleging a *prima facie* tort. Again, since the action is in its initial stages and has not gone beyond the pleading stage, the Defendants cannot be heard to claim prejudice; also, the torts of injurious falsehood and slander of title relate back and are also ongoing. The Defendants recently and continually have made allegations that constitute the commission of such torts, without basis in fact or law. Accordingly, the Second Amended Complaint properly states such causes of action. The proposed Second Amended Complaint sets forth specific statements and conduct both relating back to 2006 and continuing thereafter. The Court found sufficient specificity in the Amended Complaint and there is even greater specificity in the proposed Second Amended Complaint relative to the three torts alleged.

ANY CLAIM OF A "SLAPP SUIT" HAS NO BASIS IN LAW OR FACT

15. Defendants' assertion that this is a SLAPP SUIT is, as stated previously in prior motion practice, without merit. The Defendants totally fail to demonstrate in any way that any of the Plaintiff's allegations in either the Amended Complaint or the proposed Second Amended Complaint fall within or are violative of Civil Rights Law §76-a. Further, the declaratory judgment action involves a dispute between private parties to the fee title of areas of Oregon Road and to the easement area of Oregon Road, Villanova Estates, Inc. v. Fieldston Property Owners Association, Inc., 23 A.D. 3d 160, 803 N.Y.S. 2d 521 (1st Dept. 2005). Plaintiff's claims are predicated upon ownership rights and such rights may be enforced in an action at law for money damages, Suffolk Business Center v. Applied Digital Data Systems, 78 N.Y. 2d 383, 387, 576 N.Y.S. 2d 65, 581 N.E. 2d 1320 (1991)).

WHEREFORE, it is respectfully requested that the Defendants' motions for reargument and (where stated) for renewal be in all respects denied and Plaintiff's cross motion for leave to serve and file the Second Amended Complaint in the form annexed be in all respects granted, together with such other and further relief as to this Court may seem just, proper and equitable.

Dated: White Plains, New York
August 20, 2010

JULIUS W. COHN, ESQ.

A

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Index No.: 21162/09

Plaintiff,

-against-

SECOND AMENDED COMPLAINT

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Plaintiff, Seven Springs, LLC, by its attorneys, Cohn & Spector, Esqs., for its second amended complaint against defendants, The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joanne Donohoe, sets forth and alleges:

1. Plaintiff, Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump Organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant The Nature Conservancy (hereinafter "TNC") is a 501(c)(3) corporation authorized to do business in the State of New York, and has a place of business located in the Town of North Castle, Westchester County, New York.

3. Upon information and belief, TNC is also known as Nature Conservancy Inc.

4. Upon information and belief, Defendants Robert Burke and Teri Burke (collectively referred to herein as "Burke") are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York. Upon information and belief, Burke acquired title to real property known as 2 Oregon

Hollow Road, Armonk, New York pursuant to deed dated April 29, 1993 and recorded May 12, 1993 in Liber 10576, Page 243. The Burkes' deed expressly excludes any grant of any "right, title and interest" in Oregon Road.

5. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe (collectively referred to herein as "Donohoe") are residents of the State of new York residing at 4 Oregon Hollow Road, Armonk, New York. Upon information and belief, Donohoe acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York pursuant to deed dated July 27, 1994 and recorded August 9, 1994 in Liber 10929, Page 35. The Burkes' deed expressly excludes any grant of any "right, title and interest" in Oregon Road.

6. On or about June 12, 2006 title to the property owned by Realis Associates, which is adjacent to the Burke and Donohoe properties referred to above, was transferred to Seven Springs. The deed from Realis Associates to Seven Springs specifically provides that "the premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in Liber 10567, Page 243, and as set forth in deed from Realis Associates to Noel B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 8, 1994 in Liber 10929, Page 35", "together with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof." Furthermore, the description of the property includes a road widening easement for the future widening of Oregon Road approximately twenty-five (25) feet in width, along the easterly boundary line, said easement being as shown on the Subdivision Map of Property known as Oregon Trails, filed in the Westchester County Clerk's Office on December 9, 1986, as Map No. 22547.

7. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

8. Seven Springs acquired title to the Seven Springs Parcel from the Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325, Page 243, which deed more particularly describes the Seven Springs Parcel.

9. Rockefeller University acquired title to the Seven Springs Parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County Clerk's Office on May 24, 1984 in Liber 7923, Page 639.

10. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in Liber 7115, Page 592.

11. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's Office on March 7, 1973 in Liber 7115, Page 577.

12. Upon information and belief, Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester county clerk's office on May 30, 1973 in Liber 7127, Page 719.

13. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's Office on May 30, 1973 in Liber 7127, Page 719.

14. Plaintiff, through all its grants in its chain of title, received an express easement over Oregon Road in all directions including to the south over Oregon Road to the public paved portion of Oregon Road in the vicinity of Pole 40 at the intersection of Oregon Hollow Road and Oregon Road.

15. The deed referred to in paragraph 11 hereof, from the Foundation to Yale University, contains (at Liber 7115, Page 585) the following language:

> "Together with all right, title and interest, if any, of the party of the first part, in and to any streets and roads abutting the aforesaid premises to the center lines thereof, together with the appurtenances and all of the estate and rights of the party of the first part in and to said premises . . ."

16. Plaintiff, through all its grants in its chain of title, received fee simple absolute to its premises and to the bed of Oregon Road to the midpoint thereof where said road abuts its property on the northerly and westerly boundaries.

17. Upon information and belief, months prior to TNC's taking title to its own property by deed dated May 25, 1973, TNC was intimately involved in negotiations with the Foundation as to the property descriptions, boundaries and rights concerning the Foundation's intended conveyances of portions of its real property to both Yale University and TNC, it originally being unknown to TNC as to which property conveyance from the Foundation would occur first.

18. As set forth above, the Foundation first conveyed property to Yale University as set forth in paragraph "11" hereof and subsequently conveyed TNC's property to TNC on May 25, 1973.

19. Upon information and belief, prior to the taking of title to TNC's property, TNC was in continual verbal and written communication with the Foundation resulting in TNC's receipt from the Foundation of property descriptions, boundary lines and surveys of the lands conveyed and/or to be conveyed to both Yale University and TNC.

20. Upon information and belief, prior to TNC's taking of title to its own property on May 25, 1973, TNC received a survey bearing a legend, a portion of which reads:

> "Survey showing land owned by Eugene and Agnes E. Meyer Foundation to be conveyed to The Nature Conservancy"

21. Upon information and belief, prior to TNC's taking of title to its own property on May 25, 1973, TNC received a survey bearing a legend, a portion of which reads:

> "Survey showing land owned by Eugene and Agnes E. Meyer Foundation to be conveyed to Yale University"

22. Upon information and belief, prior to TNC's taking title to its property on May 25, 1973 TNC received a survey of the property to be conveyed to it, which survey bore the seal of Robert M. Henrici, Licensed Land Surveyor No. 41533.

23. Upon information and belief, prior to TNC's taking title to its property on May 25, 1973 TNC received a survey of the land previously conveyed by the Foundation to Yale University, which survey bore the seal of Robert M. Henrici, Licensed Land Surveyor No. 41533.

24. Upon information and belief, when TNC acquired title to its property from the Foundation it was fully aware of the abutting landowner (Yale University), the parameters of both properties and both properties' respective relationships to each other, including the fact that each abutted Oregon Road.

25. The Foundation's deed to Yale University and the Foundation's deed to TNC contain identical provisions which grant fee title to the midpoint of Oregon Road and express easements over Oregon Road where each such property abuts Oregon Road.

26. The deed dated May 25, 1973 by which the Foundation conveyed portions of its property to TNC contains an express easement over Oregon Road.

27. On or about May 23, 1973, TNC entered into an unrecorded letter agreement with the Foundation by which TNC, in words or substance, agreed to "continue to maintain all or any part of the Meyer Sanctuary as a nature preserve or in a way which will conserve its essential natural character" (hereinafter, "the May 23, 1973 letter's language").

28. When the aforementioned letter agreement was entered into on May 23, 1973, the Foundation had already conveyed property to Yale University with an express easement over Oregon Road.

29. The unrecorded May 23, 1973 letter agreement between the Foundation and TNC contains no provisions restricting Yale University's easements rights over Oregon Road or abrogating any such rights, and the Foundation's deed to TNC dated May 25, 1973 contains the identical express easement over Oregon Road that was given to Yale.

30. Upon information and belief, prior to the conveyances by the Foundation to both Yale and TNC in 1973 as aforementioned, Oregon Road was an open, publicly used and maintained highway running through the Towns of North Castle and New Castle.

31. Upon information and belief, at some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used and maintained as a public highway for a period of 10 years.

32. Upon information and belief, in or about 1990 the Town Board of the Town of North Castle purportedly closed and discontinued as a public road a portion of Oregon Road pursuant to Highway Law §205.

33. Upon information and belief, Oregon Road in the Town of North Castle was purportedly closed through the section where it meets the public, paved part of the road in the vicinity of Pole 40 at the intersection of Oregon Road and Oregon Hollow Road.

34. Upon information and belief, the Town of North Castle caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road a barrier consisting of a gate and/or metal guide rail (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles.

35. Upon information and belief, in order to insure that Plaintiff could not use the portion of Oregon Road which the Town had closed to public travel, the Defendants embarked upon a plan which was maliciously designed to prevent the Plaintiff from opening and using such part of the road by asserting that Plaintiff had no right, title or interest therein, despite full knowledge of the falsity of such a position and such assertions and that Plaintiff would be injured thereby.

36. Upon information and belief, in furtherance of such plan the Defendants communicated both verbally and in writing to the Town of North Castle and to neighboring residents and homeowners in the pertinent geographic area that Plaintiff had no right, title or interest in the closed section of Oregon Road which would permit Plaintiff to access its property from the south.

37. Upon information and belief and by virtue of the foregoing, the Defendants prevented the Plaintiff from utilizing and accessing its property over Oregon Road from the south, insisting and thereby requiring that Plaintiff seek a judicial declaration of its rights to access its property over Oregon Road from the south, knowing and intending that in the interim Plaintiff would be unable to utilize its property over a protracted period of time while involved in the course of complex real estate litigation.

38. In 2006, Seven Springs commenced an action against TNC, Burke, Donohoe, Realis Associates and the Town of North Castle, which action was assigned index number 9130/2006 by the

Westchester County Clerk ("the declaratory judgment action") in which, *inter alia*, Plaintiff sought quiet title to Oregon Road and claimed its fee interest and easement rights in and to Oregon Road.

39. Upon information and belief, subsequent to the commencement of the declaratory judgment action the Town of North Castle sought and obtained a title report wherein it was requested that a search be made of the chain of title of Oregon Road, specifically for easement and access rights in favor of Plaintiff over Oregon Road, said title company being Fidelity Title, Ltd.

40. By letter dated February 16, 2006, Fidelity Title, Ltd. confirmed to counsel for the Town of North Castle that Plaintiff has a private easement for access over Oregon Road.

41. By Stipulation dated February 25, 2009 the Town North Castle stipulated with Plaintiff, *inter alia*, that:

> "Defendant North Castle agrees that it will not contest Plaintiff's position that it has easement rights over Oregon Road as shown in its title report."

42. That by a Decision of the Supreme Court, Westchester County dated August 11, 2009, entered in the Office of the Westchester County Clerk on August 12, 2009, a motion made by the Town of North Castle to dismiss the declaratory judgment action as against the Town, said motion being based upon the aforementioned Stipulation, was granted by the Supreme Court of the State of New York, County of Westchester by an Order made in the declaratory judgment action dated August 11, 2009 and entered August 12, 2009.

43. Upon information and belief, the motion made by the Town of North Castle which resulted in the Decision and Order of the Supreme Court, Westchester County, dated August 11, 2009 was opposed by Defendants TNC, Burke and Donohoe in an attempt to block the settlement between the Plaintiff

and the Town of North Castle so that there would be no acknowledgment on the part of the Town of North Castle and recognized by the Court that there is a valid private express easement over Oregon Road in favor of Plaintiff.

44. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of the Town of North Castle and to the Planning Board of the Town of Bedford.

45. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel. The only viable secondary access to the Seven Springs Parcel is from the south. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

46. The Defendants, acting solely out of disinterested malevolence, and with the exclusive intention of injuring or damaging Plaintiff, engaged in a pattern and/or consistent course of conduct designed to impede and/or prevent the Plaintiff from exercising its rights of ownership and easements, thereby affecting and reducing the economic value of the Plaintiff's property and the use and enjoyment thereof.

47. As part of the conduct described in paragraph 46 above, Defendants have continuously attempted to block the Plaintiff, its agents, servants and employees from having access to Plaintiff's property from the south, by knowingly misrepresenting that TNC was the exclusive owner of the roadbed of Oregon Road in the Town of North Castle and that Plaintiff had no right of access, usage, passage over or any title therein.

48. As part of the conduct described in paragraph 46 above, The Nature Conservancy falsely represented in written correspondence to the Towns of North Castle and New Castle that Plaintiff

did not own the half of the roadbed of Oregon Road running along its western border and situate in the Town of North Castle.

49. As part of the conduct described in paragraph 46 above, the Donohoe Defendants falsely represented to co-Defendant TNC and published to the Supervisor of the Town of North Castle that the Oregon Road roadway "belongs to the Nature Conservancy".

50. As part of the conduct described in paragraph 46 above, Defendant TNC has continually denied Plaintiff's easement rights over all or a portion of Oregon Road to the south to the portion of Oregon Road that is in the vicinity of Pole 40 and becomes a paved and public road.

51. As part of the conduct described in paragraph 46 above, Defendant TNC has continually denied that the Plaintiff has either rights by way of fee title or easement rights in Oregon Road in the Town of North Castle and has taken the position that Plaintiff must bring an action and seek court determination that it has such rights, while having knowledge that Plaintiff's deed and all of Plaintiff's predecessors' continuous chain of title contained language which grants Plaintiff an express easement over Oregon Road, such full knowledge on the part of TNC being by virtue of TNC's having prevailed as a party in an action in which TNC was in the same position as Plaintiff herein, TNC there seeking enforcement of identical language constituting an express easement over an allegedly abandoned public road, said case captioned Coleman v. Village of Head of the Harbor, et al, 163 A.D. 2d 456, 558 N.Y.S. 2d 594 (2nd Dept. 1990), *appeal denied*, 76 N.Y. 2d 712, 565 N.E. 2d 517, 563 N.Y.S. 2d 768 (hereinafter "the Coleman case"), the language being:

> "Together with all right, title and interest, if any, of the party of the first part, in and to any streets and roads abutting the aforesaid premises to the center lines thereof, together with the appurtenances and all of the estate and rights of the party of the first part in and to said premises . . ."

52. As part of the conduct described in paragraph 46 above, with specific knowledge that it had prevailed in the Coleman case, Defendant TNC sought to thwart, halt and/or prevent Plaintiff from developing its property in the Town of North Castle by writing to the then Supervisor and then Town Attorney of the Town of North Castle in April 2006:

> ". . . We also write to express TNC's disagreement with Seven Springs' claim and to request that, before the Town of North Castle considers any application by Seven Springs which is based on its claim of such a private easement, Seven Springs should be required to obtain a judicial determination that it does or does not enjoy any such private easement . . .
>
> Under these circumstances, we believe that Seven Springs should be required to establish its claim to any private easement over TNC's land in court . . ."

53. That as part of the conduct described in paragraph 46 above, TNC maliciously, knowingly and untruthfully stated in the action instituted by the Plaintiff to obtain its lawful fee and easement rights, on March 18, 2008 that Oregon Road had not been improved and that:

> "It was flattened out by use, with people walking on it just as if when people walk from a house to the beach, it became somewhat distinct.
>
> This has not been paved. It was not prepared for vehicular use, and it has simply been used and that's the appearance it has."

The intention of making such statement was to obtain an injunction based upon the false information that Oregon Road had never been used as a road to travel from north to south with vehicles or otherwise, despite the fact that TNC, at the time of the making of said statement had direct knowledge

of the absolute falsity of said statement and that TNC had produced, during the course of said litigation, absolute proof that the Town of North Castle had maintained Oregon Road as a public highway, utilizing public funds, and that TNC had also produced in said litigation proof from neighboring residents that said road had been used as a "beautiful route to Mt. Kisco" and that the same was, in fact, "a beautiful road bounded on both sides by forest and meadows."

54. That as part of the conduct described in paragraph 46 above, and in order to obstruct the aforementioned settlement with the Town of North Castle, TNC's attorney, in the aforementioned action, falsely represented on December 9, 2008 that:

> ". . . plaintiff's complaint does not allege and does not seek a declaration that it owns any part of the roadway or the roadbed of Oregon Road . . ."

55. As part of the conduct described in paragraph 46 above, on the same date, December 9, 2008, the attorney for the Burke and Donohoe Defendants stated, *inter alia*:

> ". . . But right now, today, as I stand here, the Nature Conservancy's position along with my client's position is that there is no easement . . ."

56. As part of the conduct described in paragraph 46 above and with knowledge that their position that the Plaintiff does not have a private express easement over Oregon Road, the Defendants have attempted to manipulate legal process, requiring the Plaintiff to litigate in the aforementioned action in order to obtain its lawful rights, and have sought to justify and protect their actions in the aforementioned action and in the instant action under the protective cloak of privilege which, by reason of their actions and sham defenses does not and should not inure to their benefit.

57. As part of the conduct described in paragraph 46 above, counsel for TNC, on March 18, 2008, notwithstanding the Coleman case in which his client was the prevailing party under identical circumstances, falsely stated:

> ". . . It's not plain from the deeds that they have that right . . "

58. The statements made and communicated by Defendants were and are false and untrue.

59. Upon information and belief, at the time the Defendants made and communicated said statements., Defendants had no reasonable cause to believe the statements were true, or Defendants knew the statements were false or demonstrated a reckless disregard for its truth.

60. Notwithstanding Defendants' knowledge of the falsity of the statements or reckless disregard for its truth, Defendants intentionally communicated the statements, even though Defendants knew, or should have known, that it would result in harm to Plaintiff's interest in the Seven Springs Parcel.

61. Defendants communicated the statements maliciously with the intention to injure Plaintiff.

62. That the Defendants have sought and obtained preliminary injunctive relief prohibiting Plaintiff from exercising its full rights to the easement.

63. That TNC has counterclaimed against Plaintiff for trespass over Oregon Road on the false allegations that Plaintiff has no rights of any kind in Oregon Road and that the closed section of Oregon Road is and never was a road open to vehicular passage.

64. Plaintiff would have been able to develop the entire Seven Springs Parcel but for the Defendants' actions.

65. That the Defendants continue to unlawfully, intentionally and wrongfully deprive Plaintiff of its right to access the easement and the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel by a system of conduct on their part, which intends to harm Plaintiff.

66. As a result of the Defendants' actions, Plaintiff, its visitors, tradespeople and the residents of the manor house are inconvenienced and derived of the benefit of the easement, and, more particularly are required to travel significantly greater distances to access the Seven Springs Parcel from the north instead of the south.

67. Defendant's actions were (I) effected by dishonest, unfair and/or improper means; (ii) committed without reasonable justification; and/or (iii) where otherwise motivated solely by malice and ill-will to Plaintiff as they were intended to, and actually did, cause injury to Plaintiff by preventing Plaintiff from exercising its property rights over the easement area by preventing Plaintiff from directly accessing the Seven Springs Parcel over Oregon Road, by preventing the development of the Seven Springs Parcel, and by preventing Plaintiff from exercising its full use and enjoyment of the easement and Seven Springs Parcel.

68. Upon information and belief, said Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence is the sole motivation for Defendants action.

69. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendants and will suffer continuing damages.

70. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NY A.D. 2d Dept. 48 A.D. 3d 545).

71. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law §205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that the Town of North Castle never extinguished the easement pursuant to Highway Law §205.

72. As a result of the actions of Defendants, The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the easement and Seven Springs Parcel, and the value of Seven Springs Parcel has been greatly diminished and Plaintiff has suffered and will in the future suffer damages thereby.

73. By virtue of the foregoing Plaintiff has sustained actual and special damages in an amount to be determined at trial and to include the following:

a. Real estate taxes paid to the Town of North Castle totaling $2,338,837.63, which taxes, had the Plaintiff been enabled to develop and sell its property with its easement and fee title rights in Oregon Road intact, would have either been substantially reduced or not incurred at all, but for the wrongful actions of the Defendants as described herein above.

b. On-site maintenance costs paid by the Plaintiff in the sum of $330,749.44, which costs, had the Plaintiff been enabled to develop and sell its property with its easement and fee title rights in Oregon Road intact, would have either been substantially reduced or not incurred at all, but for the wrongful actions of the Defendants as described herein above.

c. Fees paid to consultants for SEQ RA Processes totaling $1,753,781.66, which costs, had the Plaintiff been enabled to develop and sell its property with its easement and fee title rights in

Oregon Road intact, would have either been substantially reduced or not incurred at all, but for the wrongful actions of the Defendants as described herein above.

c. Corporate overhead, payroll taxes and benefits in the sum of $143,750.00 that would not have been incurred but for the Defendants' actions.

e. Diminution in value of nine prospective homes that could have been erected on the Seven Springs Parcel and sold yielding a profit of $7,000,000.00 each or $63,000,000.00 which loss would not have occurred had the Plaintiff been enabled to develop and sell its property with its easement and fee title rights in Oregon Road intact, but for the wrongful actions of the Defendants as described herein above.

74. By virtue of Defendants' unlawful, improper and intentional acts as set forth above, Plaintiff should be awarded punitive damages in an amount to be determined at trial but no less than $30,000,000.00.

AS AND FOR A FIRST CAUSE OF ACTION

75. Plaintiff repeats and reiterates the allegations as set forth in paragraphs numbered "1" through "74" as though the same were fully set forth at length herein.

76. By reason of the foregoing, Defendants are liable to Plaintiff for *prima facie* tort in the sum of $67,564,118.73.

AS AND FOR A SECOND CAUSE OF ACTION

77. Plaintiff repeats and reiterates the allegations as set forth in paragraphs numbered "1" through "76" as though the same were fully set forth at length herein.

78. By reason of the foregoing, Defendants are liable to Plaintiff for slander of title in the sum of $67,564,118.73.

AS AND FOR A THIRD CAUSE OF ACTION

79. Plaintiff repeats and reiterates the allegations as set forth in paragraphs numbered "1" through "78" as though the same were fully set forth at length herein.

80. By reason of the foregoing, Defendants are liable to Plaintiff for Injurious Falsehood in the sum of $67,564,118.73.

WHEREFORE, Plaintiff demands judgment for damages against the Plaintiffs, severally and individually:

a. On the first cause of action in the sum of $65,564,118.73, or alternatively

b. On the second cause of action in the sum of $67,564,118.73, or alternatively

c. On the third cause of action in the sum of $67,564,118.73, all together with punitive damages to be determined at trial but not less than the sum of $30,000,000.00, all together with interest thereon, and that the Plaintiff have such other and further relief as to this Court may seem just, proper and equitable, together with the costs and disbursements of this action.

Dated: White Plains, New York
August 20, 2010

COHN & SPECTOR

By: _____

Julius W. Cohn
Attorneys for Plaintiff
200 East Post Road
White Plains, NY 10601
(914) 428-0505

TO: **BENOWICH LAW, LLP**
Attorneys for The Nature Conservancy
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
Attorneys for Noel B. Donohoe & Joann Donohoe
120 Bloomingdale Road, Suite 100
White Plains, NY 10605
(914) 422-3900

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorneys for Robert Burke & Teri Burke
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

LOURDES SALVADOR, being duly sworn, deposes and says:

That I am over the age of 18 and not a party to the within action; that I reside in Middletown, New York, that on August 20, 2010, I served the within **AFFIRMATION IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTIONS FOR REARGUMENT AND/OR RENEWAL** upon:

TO: Benowich Law, LLP
1025 Westchester Avenue
White Plains, NY 10604

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
120 Bloomingdale Road
White Plains, NY 10601

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
3 Gannett Drive
White Plains, NY 10604

by depositing the same with an overnight delivery service in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. (Federal Express Tracking Nos.: 798966104542, 798966139271 and 798966056135)

Lourdes Salvador
LOURDES SALVADOR

Sworn to before me this
20th day of August, 2010

Rosemarie Muscolo

Rosemarie Muscolo
Notary Public, State of New York
4753358
Qualified in Westchester County
Commission Expires February 28, 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Index No.: 21162/09

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

AFFIRMATION IN SUPPORT OF CROSS MOTION AND IN OPPOSITION TO MOTIONS FOR REARGUMENT AND/OR RENEWAL

COHN & SPECTOR
Attorneys for Plaintiff
200 EAST POST ROAD
WHITE PLAINS, N. Y 10601-4959
Tel.: (914) 428-0505 Fax: (914) 428-0519

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: _____ Signature_____

Print Signer's Name_____

Service of a copy of the within is hereby admitted.

Dated:

_____

Attorney(s) for

PLEASE TAKE NOTICE

NOTICE OF ENTRY *that the within is a true copy of an entered in the office of the clerk of the within named Court on , 2010.*

NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on ,at M.*

Dated: White Plains, New York
August 20, 2010

COHN & SPECTOR
200 EAST POST ROAD
WHITE PLAINS, N. Y 10601-4959

Attorney(s) for Stated Plaintiff

Motion #5

seq #8
9/2/10 Original FAN

RECEIVED
JUL 28 2010
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No.: 21162/09

NOTICE OF CROSS-MOTION FOR REARGUMENT

Assigned to:
Hon. Francis A. Nicolai

Return Date: September 2, 2010

FILED
MAY 18 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

PLEASE TAKE NOTICE that upon the annexed Affirmation of Janine A. Mastellone dated August 3, 2010, the exhibits annexed thereto, this Court's Order filed on June 25, 2010, and upon all pleadings and proceedings heretofore had herein, as well as the briefing schedule set by this Court on July 23, 2010, the undersigned will move before Hon. Francis A. Nicolai at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York on the 2nd day of September, 2010 at 10:00 a.m., or as soon thereafter as counsel can be heard for an Order pursuant to CPLR § 2221, granting re-argument of the motion by defendants, ROBERT BURKE and TERI BURKE, to dismiss the plaintiff's complaint and the plaintiff's cross-motion to serve an amended complaint on the ground that the Court overlooked or misapprehended matters of fact or law; and upon granting reargument granting the motion by defendants, ROBERT BURKE and TERI BURKE dismissing the plaintiff's complaint in it entirety and denying the plaintiff's cross-motion to serve an amended complaint; and for such other further and different relief as this Court deems just and proper.

4/1

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 22149(b), answering affidavits and cross-motions, if any, shall be served so as to be received no later than seven (7) days before the motion return date.

Date: White Plains, New York
August 3, 2010

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP
Attorneys for Defendants
ROBERT BURKE and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
(914) 323-7000
File No.: 08139.00589

By: _____
JANINE A. MASTELLONE

TO: COHN & SPECTOR
Attorneys for the Plaintiff
Attention: Julius W. Cohn, Esq.
200 East Post Road
White Plains, NY 10601
(914) 428-0505

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
Attorneys for Defendants
NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

BENOWICH LAW, LLP
Attorneys for Defendant
THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,	:	Index No.: 21162/09
Plaintiff,	:	
- against -	:	**AFFIRMATION IN SUPPORT OF CROSS-MOTION FOR REARGUMENT**
THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,	:	
Defendants.	:	
	:	

JANINE A MASTELLONE, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following under the penalty of perjury:

1. I am Of Counsel to the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, attorneys of record for the defendants, ROBERT BURKE and TERI BURKE (hereinafter, the "Burke defendants"). This Affirmation is respectfully submitted in support of the Burke defendants' cross-motion for an Order pursuant to CPLR § 2221, granting reargument of the Burke defendants' motion to dismiss the plaintiff's complaint as well as the plaintiff's cross-motion to serve an amended complaint. Upon granting reargument, the Burke defendants request that this Court dismiss the plaintiff's complaint in its entirety, and deny the plaintiff's cross-motion to serve an amended complaint.

2. In an Order filed on June 25, 2010, this Court denied the Burke defendants' motion to dismiss the plaintiff's complaint and granted plaintiff's cross-motion to file an amended complaint. A copy of said Order is attached hereto as **Exhibit "A"**.

3. The Nature Conservancy ("TNC") moved by Order to Show Cause to reargue. On July 23, 2010, this Court set a briefing schedule as to the submission of the motions to reargue, indicating a return date of September 2, 2010. Therefore, this cross-motion is made returnable on the same date.

4. The Burke defendants adopt in their entirety the arguments set forth by TNC in support of its motion to reargue. Thus, so as not to burden the Court with duplicative and voluminous documentation, the Burke defendants respectfully refer the Court to the exhibits already annexed to TNC's Order to Show Cause. Additionally, the Burke defendants incorporate by reference herein, all exhibits attached to TNC's application for reargument, except for those cited herein, which are not attached to TNC's application.

5. On or about December 2, 2009, the Burke defendants moved to dismiss the plaintiff's complaint pursuant to CPLR §§ 3211(a)(1), (7) and 3211(g). Copies of the Burke defendants' Notice of Motion, Affirmation and Memorandum of Law (and accompanying exhibits) in support of the motion to dismiss are attached hereto collectively as **Exhibit "B"**.

6. Additionally, copies of the Burke defendants' Affirmation in further support of the motion to dismiss the complaint and in opposition to the plaintiff's cross-motion for leave to amend the complaint and accompanying Memorandum of Law are attached hereto collectively as **Exhibit "C"**.

7. CPLR § 2221 provides that a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

8. In addition to the arguments raised by TNC and adopted by the Burke defendants herein, it is respectfully submitted that the Court overlooked and/or misapprehended the pleading requirements based upon the Burke defendants' assertion in the motion to dismiss that the plaintiff's complaint constituted a Strategic Lawsuit Against Public Participation (SLAPP) suit in violation of the provisions of Civil Rights Law § 76-a. More specifically, the Burke defendants moved for dismissal in part, based upon CPLR § 3211(g), alleging that the plaintiff's baseless action was commenced for the sole purpose of silencing the Burke defendants, relative to the defense of claims asserted in the 2006 action.

9. Respectfully, the Court overlooked and/or misapprehended the pleading requirements in that the plaintiff failed to establish by clear and convincing evidence a substantial basis in fact or law for its purported claim. Indeed, the plaintiff's opposition to the Burke defendants' motion to dismiss, simply ignored the provisions of CPLR § 3211(g), requiring the plaintiff to demonstrate by clear and convincing evidence that the plaintiff's claim, even as amended, has a substantial basis in law or fact. Where a moving party demonstrates, as the Burke defendants have done here, that an action is a SLAPP suit, the Court must dismiss the action unless the responding party demonstrates that the claim has substantial basis in law or fact. *Matter of Related Properties, Inc., v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dep't 2005).

10. Here, the plaintiff failed to demonstrate his claim was substantially based in law or fact by clear and convincing evidence. Further, this Court erred in not considering the more stringent pleading requirements in determining the Burke defendants' motion to

dismiss. Accordingly, this Court should grant reargument and upon reargument grant the Burke defendants' motion to dismiss and deny plaintiff's cross-motion to amend the pleadings.

WHEREFORE, it is respectfully requested that the Burke defendants' motion be granted in its entirety and for such other, further and different relief as this Court deems just and proper.

Dated: White Plains, New York
August 3, 2010

JANINE A. MASTELLONE

SUPREME COURT - STATE OF NEW YORK
WESTCHESTER COUNTY

FILED AND ENTERED
ON 6/25 2010
WESTCHESTER
COUNTY CLERK

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT: HON. FRANCIS A. NICOLAI
Justice

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No.: 21162/09
Motion Date: 3/19/10

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

DECISION

Defendants.

----------X

The following papers numbered 1 to 60 read on this motion.

	PAPERS NUMBERED
Notice of Motion/Affirmation/Exhibits 1-6/Memorandum of Law, TNC	1-9
Notice of Motion/Affirmation/Exhibits A-H/Memorandum of Law, Burke	10-20
Notice of Motion/Affirmation/Exhibits A-C/Memorandum of Law, Donohoe	21-26
Notice of Cross Motion/Affidavit/Exhibits A-K/Affidavit/ Memorandum of Law, Plaintiff	27-41
Reply/Opposition Affirmation/Exhibits 7-9/Memorandum of Law, TNC	42-46
Reply /Opposition Affirmation/Exhibits 1-2/Memorandum of Law, Burke	47-50
Reply/Opposition Affirmation/Exhibits A-G/Memorandum of Law, Donohoe	51-59
Reply Memorandum of Law, Plaintiff	60

Upon the foregoing papers, it is ORDERED that the motions by defendants to dismiss plaintiff's complaint and the cross motion of plaintiff for an order granting plaintiff leave to serve and file an amended complaint, are decided as follows.

On September 22, 2009, Seven Springs, LLC commenced this action against the named defendants seeking to recover money damages from defendants for defendants' actions in denying and precluding plaintiff from exercising its rights to an easement, which provides access to plaintiff's property over a road known as Oregon Road in the Town of North Castle, New York.

Plaintiff's complaint alleges the following single cause of action. Plaintiff is a New York Limited Liability Company, which owns 213 acres of real property ("the parcel") in the Towns of New Castle, North Castle and Bedford, Westchester County. At some time prior to 1973, Oregon Road, abutted by plaintiff's parcel, became a public highway by virtue of its having been used as a public highway for a period of ten years. In or about 1990, the Town of North Castle closed a portion of Oregon Road, pursuant to Highway Law §205, as the road was no longer used for public travel. The closed portion of the road ends at a legally opened public street that has been improved and paved. At some point, the Town of North Castle erected a barrier gate and/or metal guardrail ("gate") obstructing and impeding access to or from Oregon Road to the south by persons in vehicles, coming from plaintiff's parcel. Plaintiff's development of its parcel requires a secondary access to the parcel. Defendants have improperly taken the position that plaintiff has no right to access the parcel from the south over Oregon Road and have willfully deprived plaintiff of its right to develop its parcel; damages are continuing.

The complaint alleges further that defendants, The Nature Conservancy ("TNC"), Robert Burke and Teri Burke ("Burkes") and Noel B. Donohoe and Joann Donohoe ("Donohoes") have no valid basis, in law or fact, to maintain a gate or any other obstruction or barrier over Oregon Road, obstructing plaintiff's access to its parcel over Oregon Road. Defendants' actions have diminished the financial value of the parcel warranting compensative and punitive damages.

Defendants TNC, the Burkes and the Donohoes have moved to dismiss plaintiff's complaint on the grounds that the complaint fails to state a cause of action. Subsequent to the making of defendants' motions, plaintiff has cross moved for leave to amend the complaint, annexing a proposed amended complaint.

Litigation History

On May 15, 2006, Seven Springs, LLC commenced an action in this Court, inter alia, against TNC, the Burkes and the Donohoes under Index No. 9130/06, seeking declaratory judgment and injunctive relief, inter alia, a determination that plaintiff has an easement over the portion of Oregon Road south of the TNC parcel, which was not closed to the public.

In that action, defendants moved to dismiss plaintiff's complaint contending that plaintiff had no implied private easement over the relevant portion of Oregon Road and that any easement was extinguished when the relevant portion of Oregon Road ceased to be a town highway pursuant to Highway Law § 205(i). The Court, LaCava, J., granted defendants' motion. The Appellate Division, Second Department reversed, finding that plaintiff sufficiently stated a cause of action based upon an implied private easement arising in January, 1973 when a parcel of land bounded by a road and used at the time as a public highway was conveyed to plaintiffs' predecessor in interest. Additionally, defendants failed to establish as a matter of law that the private easement was abandoned or extinguished by adverse possession. The Appellate Division further found that the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements as Highway Law 205 does not provide for compensation to the owners of any private easements, which would be extinguished. Seven Springs, LLC v. Nature Conservancy, et al., 48 AD 3d, 545.

In the same action, the Court, R. Bellantoni, J., by decision and order dated April 19, 2008, granted TNC's motion for a preliminary injunction enjoining during the pendency of said action, plaintiff, its agents, employees and contractors, and all persons having knowledge of the order from .... "entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve("Nature Preserve") with any vehicle, equipment or machinery, and for any purpose other than to walk or hike upon same (provided, however, that surveyors employed or retained by plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by hand by one person), and performing any work upon any land owned by TNC, including the portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees, roadway grading, excavation; paving or preparing a roadway for paving, rock and/or debris removal)" .... The Court directed TNC to file a $100,000. undertaking.

The injunction is currently in place and there has been no judicial determination as to plaintiff's alleged right of ingress or egress to the subject premises.

On or about March 14, 2008, plaintiff commenced an action in this Court entitled Seven Springs, LLC v. The Town of North Castle, Index No. 5484/08, which was settled by stipulation in February, 2009. Therein plaintiff sought quiet title to Oregon Road and claimed the right to utilize said road and defendant claimed that it had properly closed the road, effectively precluding any intended use of the road by plaintiff or any others.

Plaintiff's Cross Motion

Plaintiff has moved for leave to serve an amended complaint. In accord with CPLR 3025(b) that such leave shall be freely given, plaintiff's cross motion is granted. Plaintiff's amended complaint in the form annexed to plaintiff's motion papers as Exhibit A is deemed served. The allegations of plaintiff's amended complaint have been addressed in defendants' reply papers and considered by the Court.

Plaintiff's amended complaint reiterates many of the allegations of plaintiff's complaint. Recounting that the Town of Bedford Planning Board required that the plaintiff have a secondary access to the subject parcel, the amended complaint alleges that the only viable secondary access to the parcel, and the only means by which access can be had to any public highway, street, road or avenue from the parcel to the south, is via the road known as Oregon Road. The Town of Bedford Planning Board's refusal to permit development of the parcel would not have occurred but for defendants' actions.

Within a single cause of action and not separately stated and numbered, CPLR 3014, plaintiff reiterates its prima facie tort allegations and additionally alleges that, that defendant made statements impugning plaintiff's title to the parcel and the easement, asserting that plaintiff has no right, title or interest to the easement. The statements were commonly and naturally interpreted to be disparaging, were communicated to third parties, including Town Boards, and were intentional, reckless, negligent or malicious, as well as false and known by defendants to be false and harmful to plaintiff. Defendants' actions were effected by dishonest, unfair and/or improper means, committed without reasonable justification and/or were otherwise motivated solely by malice and ill-will to plaintiff as they intended to, and actually did, cause injury to plaintiff by preventing plaintiff from exercising its property rights over the easement area, accessing the parcel over Oregon Road, preventing plaintiff's development of the parcel and exercising its full use and enjoyment of the easement and the parcel. Disinterested malevolence is the sole motivation for defendant's actions and it is causing plaintiff continuing damages.

The amended complaint cites the Appellate Division decision, supra, alleging that by reason thereof it has been judicially determined that the Town of North Castle never extinguished the easement pursuant to Highway Law 205. Nor do defendants have any right, title and interest in and to Oregon road or the easement area.

Plaintiff seeks damages of not less than $60,000,0000.; $5,000,000. for plaintiff's inability to use its easement, $5,000,000. for plaintiff's inability to access its parcel from the south at Oregon Road and $50,000,000. for diminution in value of plaintiff's parcel.

Defendant, TNC replies that plaintiff's amended complaint should be dismissed initially because the amended complaint does not allege that TNC or the other defendants did anything actionable, sounding in a claim for prima facie tort. TNC's actions in defending itself in the 2006 action and obtaining a preliminary injunction are privileged and cannot underpin a prima facie tort claim. The amended complaint essentially seeks to attack the preliminary injunction, the proper remedy for which is an action on the undertaking. Nor has plaintiff alleged particular special damages. Additionally, the prima facie tort claim is barred by the one year statute of limitations and alleges no basis for punitive damages against TNC, which merely defended the actions against it and did not engage in conduct in the nature of moral turpitude.

The Burke defendants reply notes that plaintiff did not pursue its appellate remedy with respect to the preliminary injunction in the 2006 action and the amended complaint, in lieu of the appeal, is untimely. The Burke's opposition to plaintiff's 2006 action was not motivated only by disinterested malevolence; the preliminary injunction properly issued. The amended complaint lacks specific factual allegations of illegal actions as to liability and special damages, and indeed, falls within the parameters of a SLAPP suit, Civil Rights Law 76-A(i) (a). The proper action to contest the propriety is an action for damages under the designated undertaking. Nor has plaintiff properly pleaded special damages, nor alleged egregious tortious conduct warranting punitive damages. Plaintiff has alleged no claim which has a substantial bases in law or fact.

The Donohoe defendants reply citing the doctrine of collateral estoppel in that the amended complaint alleges issues previously considered by Bellantoni, J. with respect to the issuance of the preliminary injunction in the 2006 action, which was not appealed and is now being invoked as the reason for plaintiff's alleged damages. Plaintiff may proceed against the preliminary injunction undertaking, when, as and if it is eventually determined that the preliminary injunction should not have been issued.

Plaintiff acknowledges that its instant action simply seeks to assert plaintiffs rights to damages against defendants should it be determined that the defendant have wrongfully prevented plaintiff from using and exercising its rights with respect to the easement. The Court notes the preliminary injunction issued in favor of defendants and that the prior action in which the preliminary injunction issued is effectively dormant, supra.

On a motion to dismiss pursuant to CPLR 3211, a court must accept as true the facts as alleged within the four corners of the complaint and accord the plaintiff the benefit of every possible favorable inference to determine whether the allegations fit within any cognizable legal theory. See, Leon v. Martinez, 84 NY2d 83, 87-88, Guggenheimer v. Ginzburg, 43 NY2d 268, 275; Rovello v. Orofino Realty Co., 40 NY2d 633, 634. "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleadings has a cause of action, not whether she has stated one." Meyer v. Guinta, 262 AD2d 436.

The Court cannot determine as a matter of law that plaintiff has failed to state a cause of action for prima facie tort and/or slander of title. Plaintiff has alleged that disinterested malevolence was the sole motivation for defendants' conduct and has alleged specific and measurable loss to the value of its property and its development. See, Friehofer v. Hearst Corp., 65 NY 2d 135; Epifari v. Johnson, 65 Ad 3d 224. Additionally, plaintiff has sufficiently stated a cause of action for slander of title, having alleged the that defendants made communications falsely casting doubt as to the validity of plaintiff's title, reasonably calculated to cause harm and resulting in special damages. See, 39 College Point Corp. v. Transpec Capital Corp., 27 AD 3d 454.

Defendants' motions are denied.

Defendants shall serve their respective answers within ten (10) days of the service of a copy of this order with notice of entry. CPLR 3211(f).

This action is referred to the Preliminary Conference Part for the scheduling of a preliminary conference in due course.

The foregoing constitutes the Decision and Order of this Court.

DATED: White Plains, New York
June 21, 2010

ENTER,

HON. FRANCIS A. NICOLAI, J.S.C.

TO: DELBELLO, DONNELLAN, WEINGARTEN, WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorneys for Defendants, Robert and Teri Burke
3 Gannett Drive
White Plains, New York 10604-3407

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER
Attorneys for Noel B. Donohoe and Joann Donohoe
120 Bloomingdale Road, Suite 100
White Plains, New York 10605

BENOWICH LAW LLP
Attorney for TNC
1025 Westchester Avenue
White Plains, New York 10604

Preliminary Conference Part

B

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,	:	**Index No.: 21162/09**
Plaintiff,	:	
- against -	:	
THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE BURKE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorneys for Defendants ROBERT BURKE and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

Table of Contents

Table of Authorities

Cases

Statutes

Statutes

PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of defendants, ROBERT BURKE and TERI BURKE ("the BURKE defendants") in support of the within application for an Order pursuant to CPLR § 3211(a)(1) and (7) and 3211(g) to dismiss the plaintiff's Complaint.[1]

As will be set forth more fully herein, this action is nothing more than a baseless lawsuit attempting to intimidate and silence the BURKE defendants from defending themselves in a prior pending action relative to plaintiff's purported claim of an easement over a portion of Oregon Road in the Town of North Castle, abutting the BURKE defendants' property. Mastellone, Aff. **Exh. "B", "C"** and **"D"**. The complaint involved herein fails to properly state any legally cognizable claim against the BURKE defendants. The complaint fails to state with any requisite particularity any alleged wrongful conduct committed by the BURKE defendants, so as to give adequate notice of the claims and/or occurrences, which the plaintiff intends to prove. The complaint is virtually devoid of any information as to the dates of any alleged occurrences, or particulars as to what the BURKE defendants did, or failed to do, which would warrant the assertion of any legally cognizable claim against the BURKE defendants. Rather, it appears that the complaint is purposefully vague, in part, in order to avoid dismissal due to the expiration of the applicable statute of limitations and the complete absence of any articulable wrongful conduct by the BURKE defendants.

The complaint only alleges that the BURKE defendants, and likewise other defendants named in the action, have taken a "position" in a prior pending action that the

[1] Cited exhibits are attached to the Affirmation in Support of the Motion to Dismiss and will be referenced herein as Mastellone, Aff. **Exh. "-"**.

plaintiff does not have easement rights over Oregon Road, which the plaintiff claims to have. Notably, there has been no judicial determination that the plaintiff has any such claimed right. Further, any statements made or actions taken by the BURKE defendants in the pending litigation are absolutely privileged. Moreover, plaintiff's complaint constitutes an impermissible Strategic Lawsuit Against Public Participation (SLAPP Suit).

Noticeably absent from the complaint are any allegations as to what the BURKE defendants did or failed to do, which would entitle the plaintiff to $60,000,000 in compensatory and/or punitive damages. Likewise, the complaint is devoid of any allegations which rise to the level of misconduct required to sustain a claim for punitive damages.

Accordingly, the complaint should be dismissed as against the BURKE defendants with prejudice.

STATEMENT OF FACTS

On or about May 15, 2006, the plaintiff commenced an action pursuant to Article 15 of the Real Property Action and Proceedings Law to compel a determination of claims relative to real property, described and known as Oregon Road, located in the County of Westchester. Mastellone, Aff. **Exh. "B"** (hereinafter referred to as "the 2006 action"). Thereafter, the plaintiff filed an Amended Complaint in the 2006 action. Mastellone, Aff. **Exh. "C"**. In the 2006 action, plaintiff claims a right of ingress and egress on said Oregon Road ("the subject premises"). Mastellone Aff. **Exh. "C"**. The 2006 action alleges that the BURKE defendants own property which abuts Oregon Road. Mastellone,

Aff. **Exh. "C"**. The BURKE defendants have appeared in the 2006 action and are defending the claims raised therein. Mastellone Aff. **Exh. "D"**.

There has been no judicial determination regarding whether the plaintiff possesses an easement to the subject property. The 2006 action is currently pending and there is currently a Preliminary Injunction in place. Mastellone, Aff. **Exhibit "E"**. The Preliminary Injunction, dated April 14, 2008, prohibits the plaintiff from entering the subject premises with any vehicles or equipment and from performing any work on the premises for the plaintiff's alleged and intended development. Mastellone Aff. Exh. "E".

On or about March 14, 2008, the plaintiff commenced an action in the Supreme Court Westchester County entitled, *Seven Springs v. The Town of North Castle*, bearing Index No.: 05484/08, which sought compensatory and punitive damages against the Town of the North Castle. Mastellone, Aff. **Exh. "F"**.

The Town of North Castle subsequently settled the above referenced action pursuant to the terms reflected in the Stipulation of Settlement. Mastellone, Aff. **Exh. "G"**. Notably, there was no money damages paid to the plaintiff. Rather, under the threat of damages claimed against them, the Town of North Castle abandoned its defense of the claims asserted in the prior pending 2006 action, and the plaintiff discontinued its claim for damages against the Town of North Castle. Mastellone, Aff. **Exh. "G"**. Clearly, the action for money damages against the Town of North did what it was intended to do – intimidate the Town of North Castle to abandon the defense of the claims in the 2006 action.

On or about September 22, 2009, the plaintiff commenced the within action against the same defendants named in the 2006 action (except the Town of North Castle),

and namely; against the BURKE defendants. The complaint in the instant matter is vaguely worded, lacks specificity as to particular acts of wrongdoing allegedly committed by the BURKE defendants and seeks both compensatory and punitive damages. Mastellone, Aff. **Exh. "A"**. The complaint in the within action is noticeably similar to the complaint against the Town of North Castle. Mastellone Aff., **Exh. "A"** and **"F"**. The complaint in this action alleges nothing more than that the defendants, without specification as to the wrongful conduct committed by each specific defendant, have categorically taken the "position" in the 2006 action that the plaintiff is not entitled to a right of access to the subject property. Mastellone, Aff. **Exh. "A"**.

The complaint does not, nor can it, allege that the BURKE defendants have done anything except defend themselves in the 2006 action. This baseless lawsuit is nothing more than an attempt by the plaintiff to intimidate the BURKE defendants and silence them in the defense of the claims asserted in the 2006 action. The plaintiff's complaint is an impermissible SLAPP suit.

As will be set forth more fully herein, the Complaint is deficient and should be dismissed in its entirety.

ARGUMENT

POINT I

THE COMPLAINT FAILS TO STATE WITH PARTICULARITY ANY LEGALLY COGNIZABLE CLAIM AGAINST THE BURKE DEFENDANTS

The legal standard applicable to a motion to dismiss is well established. The Court's "task is to determine whether, 'accepting as true the factual averments of the complaint, the plaintiff can succeed upon any reasonable view of the facts state.'"

Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565, quoting, People v. New York City Tr. Auth., 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502(1983). While the Court must determine the narrow question of whether the complaint states a cognizable cause of action, the allegations in the complaint cannot be vague and conclusory. Stoianoff v. Gahoma, 670 N.Y.S.2d 204, 248 A.D.2d 525 (2d Dep't 1998). Moreover, the CPLR requires that the "[s]tatements in a pleading must give the court and parties adequate notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3013. Where the facts as alleged do not fit within any cognizable legal theory, the court must dismiss the complaint. Oszustowicz v. Admiral Insurance Brokerage Corp., 49 A.D.3d 515, 853 N.Y.S.2d 584 (2d Dep't 2008), *citing*, Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Application of these legal standards to the instant complaint yields the unmistakable conclusion that the complaint is deficient. As an initial matter it must be noted that while the caption of the complaint appears to be against multiple defendants, the body of the complaint lacks particularity as to the alleged wrongful conduct of each named defendant. Significantly, none of the purported allegations specifically identify any wrongful conduct allegedly committed by the BURKE defendants. Indeed, neither ROBERT BURKE and/or TERI BURKE are named as committing any act in the plaintiff's complaint. Rather, the plaintiff's complaint categorically alleges that the defendants have taken, and continue to take, the "position" that plaintiff has no right to access the subject parcel. Mastellone, Aff. **Exh. "A"**, ¶ 25. The complaint alleges nothing more than that the BURKE defendants have defended themselves in a prior

pending action; a right to which the BURKE defendants are undeniably entitled. Mastellone, Aff. **Exh. "A" and "B"**.

Further, the complaint is also devoid of any particular time period within which the defendants are alleged to have taken a "position" so as to give notice to the defendants as to the time of the occurrence, as is statutorily required. CPLR § 3013. Plaintiff has failed to adequately allege any particular time period for the BURKE defendants alleged wrongful conduct.

The complaint is further deficient as it fails to state any legally cognizable claim against the BURKE defendants.

A. The Complaint Fails to Allege Any Claim in Contract

The vaguely worded Complaint does not allege that the BURKE defendants were in privity of contract with the plaintiff or that the BURKE defendants breached any contractual agreement with the plaintiff. To establish a cause of action for breach of contract, the complaint must allege (a) the formation of a contract between the plaintiff and the BURKE defendants; (b) performance by the plaintiff; (c) the BURKE defendants failure to perform; and (d) resulting damage. See, Furia v. Furia, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dep't 1986). Moreover, the complaint must allege the provisions of the contractual agreement upon which the claim is allegedly based. Sud v. Sud, 211 A.D.2d 423, 621 N.Y.S. 37 (1st Dep't 1995).

Here, there are no allegations in the complaint of the existence of any contractual agreement between the plaintiff and the BURKE defendants. The complaint fails to allege any breach of any specific term or provision of a contractual agreement. Moreover, no such contract exists and thus, the plaintiff's complaint must be dismissed.

B. The Complaint Fails to Allege Any Claim Sounding in Tort

The vaguely worded Complaint does not allege any claim sounding in tort. The complaint does not and cannot allege that the BURKE defendants owned any non-contractual duty to the plaintiff which was purportedly breached. The complaint is simply devoid of any wrongdoing by the BURKE defendants.

A finding of liability must be premised upon the breach of a duty. "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant [owed] a duty to the plaintiff." Pulka v. Edelman, 40 N.Y.2d 781, 390 N.Y.S.2d 393 (1976) *quoting*, Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339, 342 (1928). "In the absence of duty, there is no breach and without a breach there is no liability. Id., *quoting*, Kimbar v. Estis, 1 N.Y.2d 399 at 405, 153 N.Y.S.2d 197 (1956). The existence and scope of a duty is a question of law for the court to decide. Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 746 N.Y.2d. 170 (2002).

Applying these principles here, the complaint is completely deficient. The complaint fails to allege that the BURKE defendants owed any duty whatsoever to the plaintiff. Likewise, the complaint fails to allege that the BURKE defendants breached any purported duty to the plaintiff. The complaint is devoid of any allegation of wrongdoing by the BURKE defendants. The complaint simply alleges that the defendants have categorically taken the "position" in a prior pending action that the plaintiff does not have easement rights to the property. Said allegation falls far short of the pleading requirements and utterly fails to establish any duty or breach of duty owed to the plaintiff by the BURKE defendants. Indeed, this baseless action is nothing more than

an attempt to intimidate and silence the BURKE defendants from defending themselves in the 2006 action.

Any purported claim sounding in tort may also be barred by the applicable statute of limitations. As indicated the complaint lacks any specific reference to any particular time period so as to give notice to the defendants as to the time of the occurrence as statutorily required. CPLR § 3013. At one point in the complaint, reference is made to the date of June 12, 2006, or the date that the plaintiff acquired the subject property. To the extent that the vaguely worded complaint alleges a claim sounding in negligence, it is barred by the applicable statute of limitations of three (3) years.[2] See, CPLR § 214. To the extent that the vaguely worded complaint alleges a claim sounding in intentional tort, it is barred by the applicable statute of limitations of one (1) year. See, CPLR § 215. Based upon the lack of specificity; however, the BURKE defendants cannot be said to have reasonable notice of the transactions or occurrences by which the plaintiff alleges to have been wrong so as to assert proper and viable defenses against the plaintiff's claims.

C. The BURKE Defendants are Undeniably Entitled to Defend Themselves in the Prior Suit

The complaint in this matter fails to allege any wrongdoing by the BURKE defendants. Rather, the complaint alleges that the BURKE defendants have simply defended themselves in a prior action seeking declaratory relief. Mastellone, Aff. **Exh. "A"**. No cause of action exists against the BURKE defendants for simply defending themselves in another pending action. Moreover, any actions or statements made by the BURKE defendants during the course of the pending litigation, relative to any "position" taken, as alleged by the plaintiff, are privileged.

[2] Plaintiff's complaint in the instant matter was not filed until September 22, 2009.

The actions and statements made by the defendants during the course of litigation in the 2006 action are absolutely privileged. Park Knoll Associates v. Schmidt, 59 N.Y.2d 205, 464 N.Y.S.2d 424 (1983). See also, Weiner v. Weintraub, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968); Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); Allan and Allan Arts, Ltd., v. Rosenblum, 201 A.D.2d 136, 615 N.Y.S.2d 410 (2d Dep't 1994). It has been held that statements made during the course of litigation are afforded absolute privilege because "'the interest of society requires that whenever [persons] seek the aid of courts of justice, either to assert or to defend rights of person, property, [or] liberty, speech and writing therein must be untrammered and free . . . the law gives to all who take part in judicial proceedings . . . a right to speak and to write.'" Id at 139; *quoting*, Park Knoll Associates v. Schmidt, 89 A.D.2d at 170, rev'd on other grounds 59 N.Y.2d 205 (1983). Statements made by litigants are absolutely privileged such that those may speak freely, "insulated from harassment and fear of financial hazard." Park Knoll Associates v. Schmidt, 59 N.Y.2d 205, 209, 464 N.Y.S.2d 424 (1983).

Here, the plaintiff's complaint alleges no specific acts or omissions by the BURKE defendants. Rather, the complaint is vaguely worded with no reference to particular occurrences or dates of occurrences. The complaint simply alleges that the defendants have taken a "position" in the 2006 action that the plaintiff has no right to access the subject premises. Even if true, such statements made by the BURKE defendants are absolutely privileged. No independent cause of action exists for the BURKE defendants defending themselves in the 2006 action.

Moreover, there has been no declaration that the plaintiff has any rights to the subject property such that any claim of interference with the plaintiff's intended development of the property even exists. Thus, any "position" taken by the defendants in the 2006 cannot be said to be interfering with any right judicially determined in favor of the plaintiff. Indeed, there is currently an injunction in place precluding the plaintiff from performing any work upon the subject premises. Mastellone, Aff. **Exh. "E"**. Again, the complaint is devoid of any specific actions or omissions by the BURKE defendants which allegedly caused the plaintiff any harm.

Accordingly, the plaintiff's complaint should be dismissed.

POINT II

PLAINTIFF'S COMPLAINT CONSTITUTES AN IMPERMISSIBLE SLAPP SUIT

Plaintiff's complaint constitutes an impermissible Strategic Lawsuit Against Public Participation (SLAPP suit), based upon the provisions of Civil Rights Law § 76-a, subject to dismissal pursuant to CPLR §§ 3211(g) and 3211(a)(7). See, CPLR § 3211(g). Indeed, this baseless action was commenced for the sole purpose of silencing the BURKE defendants, relative to the defense of claims asserted in the 2006 action. Plaintiff's $60 million claim for damages is intended to intimidate the BURKE defendants to succumb to the plaintiff's claimed right of easement as alleged in the 2006 action. While the BURKE defendants have asserted that any statements or actions taken relative to the defense of the 2006 action are absolutely privileged, it is further asserted that any "position", as vaguely worded by the plaintiff in the complaint, is a communication or action, protected under the provisions of Civil Rights Law § 76-a. Accordingly, the plaintiff's complaint should be dismissed.

In 1992 the New York State Legislature enacted Civil Rights Law §§ 70-a and 76-a "to provide heightened protections for defendants in actions which involve 'public participation' often referred to as [Strategic Lawsuit Against Public Participation] SLAPP suits." Hariri v. Amper, 51 A.D.3d 146, 854 N.Y.S.2d (1st Dep't 2008). Civil Rights Law § 76-a relative to actions involving public petition and participation states as follows:

1. For purposes of this section:

(a) An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

(b) "Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission. See, Civ. R. § 76-a.

The Court of Appeals has commented about SLAPP suits stating the following:

"In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities required approval of public boards. Termed SLAPP suits, strategic lawsuits against public participation, such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with defense costs and the threat of liability and to discourage those who might with to speak out in the future." 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 137, 589 N.Y.S.2d 825 (1992).

Here, plaintiff's complaint alleges that the defendants have continued to take the "position" that the plaintiff is not entitled to an easement or use of the subject premises for plaintiff's intended development. While vaguely worded, to the extent that the plaintiff's complaint is alleging that the defendants have contested or will contest plaintiff's alleged entitlement to an easement and/or development of the subject property, plaintiff's complaint constitutes an impermissible SLAPP suit. This vaguely worded lawsuit, devoid of any specific allegations of wrongdoing by the BURKE defendants and gratuitously alleging $60 million in compensatory and punitive damages, cannot be said to be anything more than an attempt to intimidate the BURKE defendants and silence them in the defense of the claims (or their "position") asserted in the 2006 action. The BURKE defendants should not be required to defend themselves in the 2006 action under the threat of liability in a baseless, legally deficient lawsuit. This would be contrary to the intended purpose of New York's Anti-SLAPP legislation.

CPLR § 3211(g) provides for a mechanism by which a defendant(s), may seek dismissal of a complaint, which is commenced for such a purpose. More specifically, where a moving party demonstrates that an action is a SLAPP suit, the complaint must be dismissed, unless the responding party can demonstrate that the cause of action has a substantial basis in law. See, CPLR § 3211(g). See also, Matter of Related Properties, Inc., v. Town Board of Town/Village of Harrison, 22 A.D.3d 587, 802 N.Y.S.2s 221 (2d Dep't 2005). Here, the plaintiff's complaint falls far short of alleging any wrongdoing by the BURKE defendants. The BURKE defendants have sufficiently demonstrated that the plaintiff has failed to assert any legally cognizable claim against them.

Accordingly, the plaintiff's complaint should be dismissed in its entirety.

POINT III

PLAINTIFF'S CLAIM SEEKING PUNITIVE DAMAGES SHOULD BE DISMISSED AS PLAINTIFF IS NOT ENTITLED TO SUCH AN AWARD IN THIS MATTER

Plaintiff's claim seeking punitive damages should be dismissed as the plaintiff is not entitled to such an award in this matter. As asserted *infra*, the plaintiff's complaint contains unsupported, vague and unidentified actions, which are allegedly "unlawful, improper and intentional" without specification as to the acts or conduct allegedly committed by the defendants. The complaint does not allege any conduct which would warrant a claim for punitive damages.

The leading New York case concerning punitive damages is Walker v. Sheldon, 10 N.Y.2d 401, 223 N.Y.S2d 488 (1961). In Walker, the New York Court of Appeals recognized that historically "[p]unitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil or reprehensible motives. . ." 10 N.Y.2d at 404, 223 N.Y.S.2d at 490. Citing a prior observation, the Court further noted that "[I]t is not the form of the action that gives the right to the jury to give punitory damages, but the moral culpability of the defendant." 10 N.Y.2d at 404-5, 223 N.Y.S.2d at 491 (*citing*, Hamilton v. Third Ave. R.R. Co., 53 N.Y. 25, 30).

Applying these principles, the Court held that punitive damages were warranted in a fraud or deceit action where "the fraud is aimed at the public generally, is gross and involves high moral culpability" and where "the defendant's conduct evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a

criminal indifference to civil obligations." 10 N.Y.2d at 405, 223 N.Y.S.2d at 491. Thus, the Court of Appeals set a very high standard for the award of punitive damages. More recent decisions by the Court of Appeals have added that the standard is to be strictly applied. See, Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339, 343 (1994).

In Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 612, N.Y.S.2d 339 (1994), the Court considered whether the plaintiffs were entitled to punitive damages in claims of fraud and breach of duty with regard to insurance coverage. Dismissing all claims for punitive damages, the Court held that "[p]unitive damages are not recoverable for an ordinary breach of contract, as their purpose is not to remedy private wrongs but to vindicate public rights." 83 N.Y.2d at 613, 612 N.Y.S.2d at 342. The Court further noted, applying principles set forth in Walker that only where a breach of contract involves "a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations,'" are punitive damages recoverable, and then only "if the conduct was 'aimed at the public generally.'" Id. In Rocanova, the Court emphasized, "a party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." Id.

In the present case, the plaintiff has made no allegations concerning wrongs committed against the public generally. Plaintiff's Complaint makes broad allegations against all defendants without any allegations as to how the public was effected. Further, the plaintiff's allegations certainly do not allege conduct, which rises to the nearly

criminal level necessary to justify an award of punitive damages. Therefore, this Court should dismiss the plaintiff's claim, which demands punitive damages.

CONCLUSION

The plaintiff's Complaint as against the BURKE defendants should be dismissed in its entirety with prejudice.

Dated: White Plains, New York
December 2, 2009

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP

By: Janine A. Mastellone

JANINE A. MASTELLONE
Attorneys for Defendants ROBERT
BURKE and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
(914) 323-7000
File No. : 08139.00589

TO: DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Krissie Taylor, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Westchester County;

That on the 2nd day of December, 2009, deponent served the within document(s) entitled Memorandum Of Law In Support Of The Burke Defendants' Motion To Dismiss The Complaint upon:

DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Krissie Taylor

Krissie Taylor

Sworn to before me this
2nd day of December 2009

Notary Public

JANINE A. MASTELLONE
NOTARY PUBLIC, State of New York
No. 02MA6160620
Qualified in Putnam County
Commission Expires Feb. 12, 2011

2603091.1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC, Plaintiff, - against - THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE, Defendants.	**Index No.: 21162/09** **NOTICE OF MOTION TO DISMISS THE COMPLAINT**

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Janine A. Mastellone, dated December 2, 2009, the exhibits annexed thereto, and the supporting memorandum of law, defendants, ROBERT BURKE and TERI BURKE, will move this Court, located at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains New York 10601, on the 7th day of January, 2010, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order of this Court pursuant to CPLR § 3211(a)(1), (7) and 3211(g), dismissing the Complaint, and each and every cause of action asserted therein; and granting such other, further and different relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR § 2214(b), answering Affidavits, if any, must be served, so as to be received by the undersigned, not less than seven (7) days prior to the return date of this motion.

Dated: White Plains, New York
December 2, 2009

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: _____
JANINE A. MASTELLONE
Attorneys for Defendants ROBERT BURKE
and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

TO: DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC, Plaintiff, - against - THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE, Defendants.	**Index No.: 21162/09** **AFFIRMATION IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT**

JANINE A. MASTELLONE, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under the penalty of perjury:

1. I am associated with the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, attorneys for the defendants, ROBERT BURKE and TERI BURKE ("the BURKE defendants"). I am familiar with the facts and circumstances of this matter, based upon a review of the file maintained by this office.

2. This Affirmation is respectfully submitted in support of the BURKE defendants' application, for an Order pursuant to CPLR § § 3211(a)1, 7 and 3211(g), seeking dismissal of the plaintiff's complaint. As will be set forth more fully in the accompanying memorandum of law, the complaint should be dismissed with prejudice in all respects. The complaint fails to state any legally cognizable claim against the BURKE defendants. The complaint fails to state with particularity the alleged wrongful conduct committed by the BURKE defendants, so as to adequately give notice of the claims and/or occurrences, which the plaintiff intends to prove. Further, it appears that the complaint is purposefully vague in order to avoid dismissal due to the expiration of the applicable statute of limitations and the complete absence of any wrongdoing

whatsoever by the BURKE defendants. The complaint also constitutes an impermissible Strategic Lawsuit Against Public Participation (SLAPP) suit.

3. This action was commenced on or about September 22, 2009, by the filing of a Summons and Complaint in the Supreme Court, Westchester County. A copy of the plaintiff's Summons and Complaint is attached hereto as **Exhibit "A"**.

4. Prior to the filing of the September 22, 2009 action, and on or about May 15, 2006, the plaintiff commenced an action pursuant to Article 15 of Real Property Action and Proceedings Law, in Supreme Court Westchester County, to compel the determination of claims, including the plaintiff's right of access to a parcel of property located at or near Oregon Road ("the subject premises"). The action is entitled, *Seven Springs, LLC, v. The Nature Conservancy, Realis Associates, The Town of North Castle, Robert Burke, Teri Burke, Noel b. Donohoe, and Joann Donohoe*, bearing Index No.: 9130/06 ("the 2006 action"). A copy of the plaintiff's Summons and Complaint in the 2006 action is attached hereto as **Exhibit "B"**. Thereafter, the plaintiff amended the Complaint, a copy of which is attached hereto as **Exhibit "C"**.

5. The BURKE defendants have appeared in the 2006 action and are defending the claims asserted therein. A copy of the BURKE defendants' Answer in the 2006 action is attached hereto as **Exhibit "D"**.

6. In conjunction with the 2006 action, an application for injunctive relief was made. A copy of the Preliminary Injunction Order relative to the 2006 action, dated April 14, 2008, is attached hereto as **Exhibit "E"**.

7. Pursuant to the Order, plaintiff is enjoined from entering the property and/or performing any work on the property for the purpose of any intended development. See, **Exhibit "E".**

8. Upon information and belief this injunction is currently in place. There has been no judicial determination or declaration as to the purported right of ingress and egress of the plaintiff to the subject premises.

9. On or about March 14, 2008, the plaintiff commenced an action in the Supreme Court Westchester County entitled, *Seven Springs v. The Town of North Castle*, bearing Index No.: 05484/08, which sought damages against the Town of North Castle. A copy of the plaintiff's Summons and Complaint as against the Town of North Castle is attached hereto as **Exhibit "F".**

10. Upon information and belief, in or about February 2009, the plaintiff settled its action against The Town of North Castle. A copy of the Stipulation of Settlement between the plaintiff and The Town of North Castle is attached hereto as **Exhibit "G".**

11. The within application is made within the BURKE defendants', time to Answer, or otherwise move, as granted by Court Order. A copy of the Court's Order relative to the BURKE defendants' time to Answer or move is attached hereto as **Exhibit "H".**

12. No previous application for the relief requested herein has made to this Court or any other Court or Justice.

WHEREFORE, it is respectfully requested that the plaintiff's complaint be dismissed in its entirety and for such other, further and different relief as this Court deems just and proper.

Dated: White Plains, New York
December 2, 2009

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: _____
JANINE A. MASTELLONE
Attorneys for Defendants ROBERT BURKE
and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

TO: DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

Exhibit "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09
Date Filed: 9/22/09

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial. The basis of venue is the Defendants reside or have a place of business in, and the cause of action arose in, the County of Westchester.

Dated: White Plains, New York
September 22, 2009

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Poor Quality

1290511
0143500-001

TO: THE NATURE CONSERVANCY
570 Seventh Avenue
New York, New York 10018

ROBERT BURKE
2 Oregon Hollow Road
Armonk, New York 10504

TERI BURKE
2 Oregon Hollow Road
Armonk, New York 10504

NOEL B. DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

JOANN DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09
Date Filed: 9/22/09

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its complaint against defendants, The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joanne Donohoe, alleges, upon information and belief, as follows:

1. Plaintiff, Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and has a place of business located in the Town of North Castle, Westchester County, New York.

3. Upon information and belief, Defendants Robert Burke and Teri Burke (collectively referred to herein as "Burke") are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

4. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe (collectively referred to herein as "Donohoe") are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

5. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

6. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

7. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

8. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

9. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

10. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

11. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

12. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of The Nature Conservancy (the "Nature Conservancy Property").

13. The Nature Conservancy Property and the Seven Springs Parcel were part of certain lands acquired over time by Meyer.

14. The Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

15. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

16. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

17. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

18. By reason of the foregoing and the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior

deeds thereto, and the facts herein set forth, Plaintiff has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified and highlighted (the "Easement" or "Easement Area") on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access. Annexed hereto as Exhibit "A", and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986.

19. At some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used as a public highway for a period of 10 years.

20. In or about 1990 the Town Board of the Town of North Castle purportedly closed a portion of Oregon Road pursuant to Highway Law § 205 as it was no longer used for public travel.

21. The said portion of Oregon Road referred to herein that was purportedly closed and that is referred to on Exhibit "A" "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

22. Upon information and belief, The Town of North Castle caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate and/or metal guide rail (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles and depriving

Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

23. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of The Town of North Castle and to the Planning Board of the Town of Bedford.

24. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel.

25. That the Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road.

26. That the Defendants continue to unlawfully and wrongfully deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel.

27. Upon information and belief, said Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact.

28. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendants and will suffer continuing damages.

29. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 48 AD3d 545).

30. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that the Town of North Castle never extinguished the Easement pursuant to Highway Law § 205.

31. On or about June 12, 2006 title to the property, which is adjacent to the easterly boundary line of the Burke and Donohoe properties, referred to above, to the center line of Oregon Road, was transferred from Realis Associates to Seven Springs by deed dated June 12, 2006 and recorded in the Westchester County Clerk's office on March 17, 2008 in Control Number 480640315. The deed from Realis Associates to Seven Springs specifically provides, among other things, that "the premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in liber 10576 page 243, and as set forth in deed from Realis Associates to Noel B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 8, 1994 in liber 10929 page 35".

32. By reason of the foregoing, the Town of North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe have no valid basis,

in law or fact, to maintain the Gate or any other obstruction and/or barrier on or over Oregon Road, or prevent, or attempt to prevent, Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road.

33. Based upon the foregoing, Defendants Burke and Donohoe have no right, title or interest in, or to, Oregon Road and/or the Easement Area.

34. By reason of the foregoing, the Defendants have no fee interest in, or right of use over, that portion of the said allegedly closed portion of Oregon Road as described above, or the Easement Area, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road or the Easement Area.

35. As a result of the actions of Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

36. By virtue of the foregoing Plaintiff has been damaged in an amount to be determined at trial but not less than $30,000,000.00.

37. By virtue of Defendants' unlawful, improper and intentional acts, Plaintiff should be awarded punitive damages in an amount to be determined at trial but not less than $30,000,000.00.

WHEREFORE, Plaintiff demands judgment:

(a) That Plaintiff have Judgment for damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, individually and

severally, an amount to be determined at trial but not less than $30,000,000.00, with interest thereon and attorneys fees, for the injuries suffered as herein alleged.

(b) That Plaintiff have Judgment for punitive damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe in an amount to be determined at trial but not less than the amount of $30,000,000.00, with interest thereon.

(c) That the Plaintiff have such other, further and different relief as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action.

Dated: White Plains, New York
September 22, 2009

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

1290463
0143500-001

Exhibit "B"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 9130/06
Date Filed:

SUMMONS

FILED
MAY 15 2006
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial pursuant to CPLR § 507. The basis of venue is the location of real property which is the subject of this action.

Dated: White Plains, New York
May 12, 2006

DELBELLO DONNELLAN WEINGARTEN
TARTAGLIA WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

1170377

TO: THE NATURE CONSERVANCY
570 Seventh Avenue
New York, New York 10018

REALIS ASSOCIATES
356 Manville Road
Pleasantville, New York 10570

THE TOWN OF NORTH CASTLE
15 Bedford Road
Armonk, New York 10504

ROBERT BURKE
2 Oregon Hollow Road
Armonk, New York 10504

TERI BURKE
2 Oregon Hollow Road
Armonk, New York 10504

NOEL B. DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

JOANN DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No.
Date Filed:

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN TARTAGLIA WISE & WIEDERKEHR, LLP, for its complaint against defendants, The Nature Conservancy, Realis Associates, The Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and having a principal place of business at 570 Seventh Avenue, New York, New York, 10018.

3. Upon information and belief, Defendant, Realis Associates ("Realis"), is a New York Partnership having a principal place of business at 356 Manville Road, Pleasantville, New York.

4. Upon information and belief, Defendant, The Town of North Castle, is a governmental subdivision of The State of New York, which has been organized and exists under and pursuant to the laws of the State of New York, and is located in Westchester County.

5. Upon information and belief, Defendants Robert Burke and Teri Burke are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

6. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

7. This action is brought pursuant to Article 15 of the Real Property Action and Proceedings Law to compel the determination of claims to certain real property herein described and known as Oregon Road located in the County of Westchester.

8. Annexed hereto as **Exhibit "A"**, and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986. The portion of Oregon Road which is the subject of this action, as the same is shown on the said Maps, has been highlighted.

9. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

10. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

11. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

12. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

13. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

14. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

15. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

16. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of Defendant, The Nature Conservancy (the "Nature Conservancy Property").

17. The Nature Conservancy Property and the Seven Springs Parcel was part of certain lands acquired over time by Meyer.

18. By virtue of the various deeds pursuant to which Meyer acquired title to said real property Meyer had acquired the entire bed of Oregon Road as show on **Exhibit "A"**.

19. Upon information and belief, the Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

20. Upon information and belief, the Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

21. Upon information and belief, since at least 1917 and up until and including May, 1990 when the Town of North Castle allegedly "discontinued" the subject portion of Oregon Road said road was a public street.

22. Upon information and belief, the said portion of Oregon Road referred to herein, at paragraph 8 "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

23. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

24. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

25. By virtue of the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and

the facts herein set forth, Plaintiff has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access.

26. That none of the Defendants has any fee interest in or right of user over that portion of the said portion of Oregon Road as described in paragraph 8 hereof, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road.

27. The Defendants and each of them claim, and it appears from the public record that it or they will claim an interest in, and/or the fee title of, the bed of said Oregon Road abutting its or their respective premises as hereinafter set forth, and/or a right to prevent Plaintiff's right of ingress and egress to and from the Seven Springs Parcel to the legally opened portion of Oregon Road.

28. Any estate or interest claimed, or which may be claimed by any Defendant in the premises described in paragraph 8 hereof is invalid and ineffective as against the estate and interest of the Plaintiff therein to a right-of-way and/or easement for ingress and egress over Oregon Road.

29. Any estate, right or interest which Defendant The Nature Conservancy ever had, claims or may claim in the Nature Conservancy Property, or any part thereof, including the estates and interest claimed or which may be claimed by it by virtue of the instruments and facts hereinbefore set forth are ineffective and invalid as against the title and interest of Seven Springs, LLC, its successors in interest, grantees or transferees in and to an easement for ingress and egress over the Nature Conservancy Property.

30. By reason of the foregoing, and the above-referenced deeds and the rights set forth therein, Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and there is a valid and enforceable easement and/or right of way for ingress and egress for pedestrian and vehicular access over Oregon Road to the south, including over lands owned by The Nature Conservancy and others to the public portion of Oregon Road in favor of Plaintiff, its successors and assigns.

31. Upon information and belief there are no Defendants either known or unknown to Plaintiff not herein joined as a party and there is no Defendant who is or might be an infant, mentally retarded, mentally ill or an alcohol abuser.

32. Any judgment granted herein will not affect any person or persons not in being or ascertained at the commencement of this action, who by any contingency contained in a devise or grant or otherwise, could afterward become entitled to a beneficial estate or interest in the aforesaid premises, and every person in being who would have been entitled to such estate or interest, if such event had happened immediately before the commencement of the action is named as a party hereto.

33. No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim of the Plaintiff as set forth herein.

34. None of the Defendants or the parcels owned by them is or will be adversely affected by the relief herein sought.

35. The Defendant, Town of North Castle, is joined herein as a party Defendant by, reason of, among other things, Oregon Road is located in the Town of North Castle, and said municipality purported to close and/or discontinue the portion of Oregon Road which is the subject of this action.

36. The Defendant, Realis Associates, is joined herein as a party Defendant by virtue of having been the developer of the subdivision known as "Oregon Trails" under filed map number 22547, a portion of which abuts the westerly side of Oregon Road.

37. Defendants, Robert Burke and Teri Burke, acquired title to real property known as 2 Oregon Hollow Road, Armonk, New York pursuant to deed dated April 29, 1993 and recorded May 12, 1993 in liber 10576 page 243 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 2 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

38. Defendants, Noel B. Donohoe and Joann Donohoe, acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York pursuant to deed dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 1 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

39. Plaintiff has no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

40. Plaintiff repeats and reiterates each and every allegation contained in paragraphs 1 through 39 above as if the same were more fully set forth at length herein.

41. That upon information and belief and in or about May, 1990, defendant Town of North Castle allegedly discontinued and caused to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, the barrier consisting of a gate thereby making the aforesaid

section of Oregon Road, as a roadway, impassable to or from Oregon Road to the south by persons in vehicles and depriving plaintiff, plaintiff's visitors, trades people and vehicles and the like their lawful right to pass over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

42. That unless the relief be granted to Plaintiff, as hereinafter prayed for, the Plaintiff will suffer irreparable damages and injuries.

43. That plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment:

(1) That the Defendants and each of them and any and every person claiming through or under them and each of them be barred from any and all claim to an estate or interest in the property described in the complaint;

(2) Declaring that there is a valid and enforceable easement and/or right of way of no less than 50 feet in width for ingress and egress for pedestrian and vehicular traffic over Oregon Road to and from The Seven Springs Parcel to the south to the section of Oregon Road more particularly identified in **Exhibit "A"** annexed hereto, including over lands owned by the Nature Conservancy and others, in favor of Plaintiff, its successors and/or assigns.

(3) Declaring that Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts the Seven Springs Parcel on its westerly side.

(4) Declaring that Plaintiff, its successors and assigns also have the right to an easement and/or right of way of no less than 50 feet in width for ingress and egress, and for pedestrian and vehicular access over Oregon Road;

(5) Enjoining Defendants from interfering with and obstructing Plaintiff's right-of-way and Plaintiff's right of access to Plaintiffs' property as aforesaid.

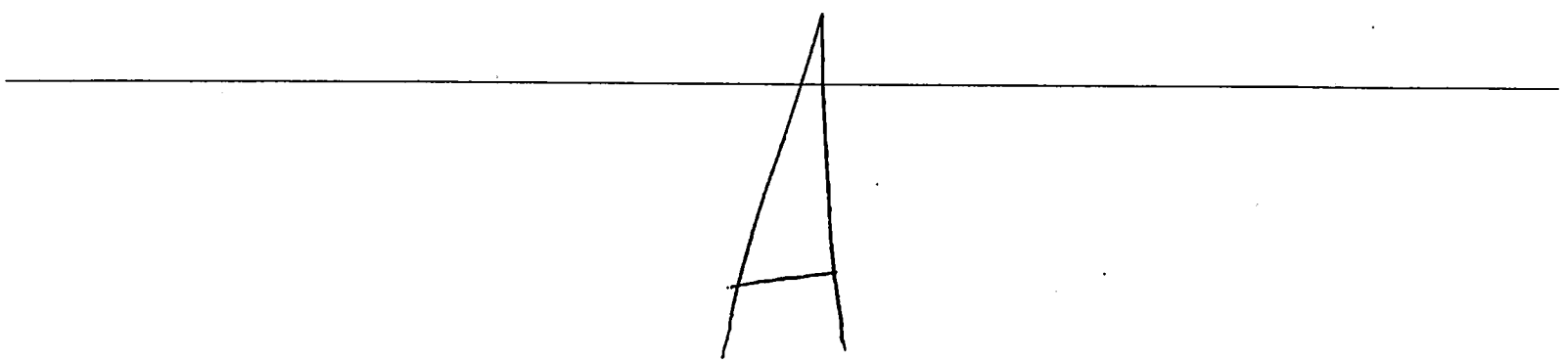
(6) That Defendant, Town of North Castle, be directed to remove all obstructions placed and/or maintained by it, on, or across Oregon Road which obstructs the use of Plaintiff, its invitees and utility and other vehicles from their lawful rights to pass over the land and to have ingress and egress over Oregon Road to the Seven Springs Parcel.

(7) That the Plaintiff have such other, further and different relief in the premises as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action, such costs to be against such Defendants as may defend this action.

Dated: White Plains, New York
May 12, 2006

DELBELLO DONNELLAN WEINGARTEN
TARTAGLIA WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

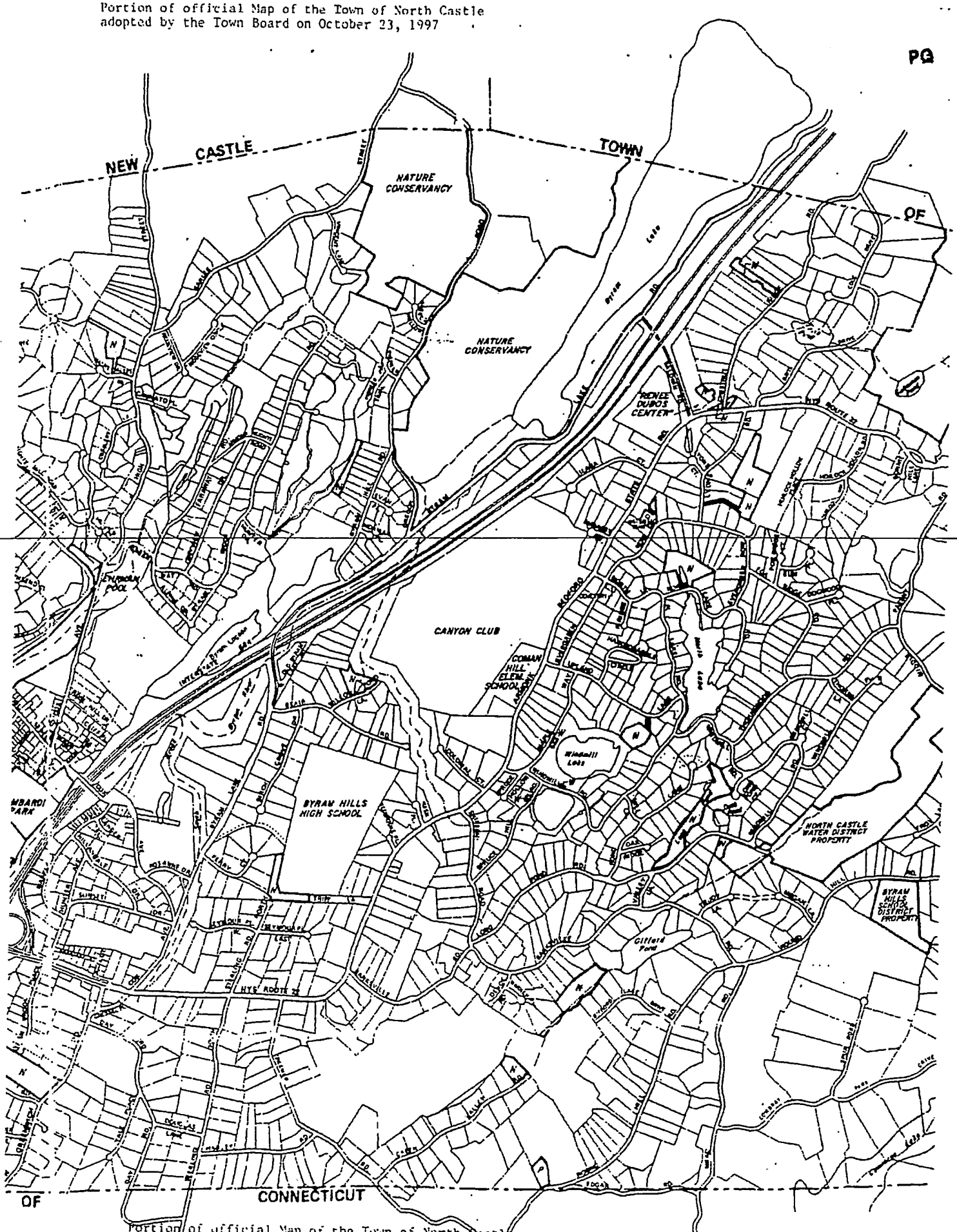


Portion of official Tax Map of the Town of North Castle
as of July 18, 1986

Portion of official Tax Map of the Town of North Castle
as of July 18, 1986

SEE SHEETS 5-6 To 5-12

Portion of official Map of the Town of North Castle
adopted by the Town Board on October 23, 1997



Portion of official Map of the Town of North Castle
adopted by the Town Board on October 23, 1997

ORIGINAL

DELBELLO DONNELLAN WEINGARTEN TARTAGLIA
WISE & WIEDERKEHR, LLP
COUNSELLORS AT LAW

Index No. *Year 20*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

SUMMONS AND COMPLAINT

DELBELLO DONNELLAN WEINGARTEN TARTAGLIA
WISE & WIEDERKEHR, LLP
COUNSELLORS AT LAW

Attorneys for **Plaintiff**

ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NEW YORK 10601

(914) 681-0200

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated:..... Signature.....

Print Signer's Name.....

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on 20 , at M.*

Dated:

DELBELLO DONNELLAN WEINGARTEN TARTAGLIA
WISE & WIEDERKEHR, LLP
COUNSELLORS AT LAW

Attorneys for

To:

ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NEW YORK 10601

Attorney(s) for

AFFIRMATION

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am .

Check Applicable Box

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 20

.....

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 20 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service by Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last-known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons at the address indicated below:

☐ Service by Electronic Means — by transmitting the same to the attorney by electronic means to the telephone number or other station or other limitation designated by the attorney for that purpose. In doing so I received a signal from the equipment of the attorney indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last-known address of the addressee(s) as indicated below:

☐ Overnight Delivery Service — by depositing the same with an overnight delivery service in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

Sworn to before me on , 20

.....

.....
(Print signer's name below signature)

Exhibit "C"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 9130/06

AMENDED COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its amended complaint against defendants, The Nature Conservancy, Realis Associates, The Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and having a principal place of business at 570 Seventh Avenue, New York, New York, 10018.

3. Upon information and belief, Defendant, Realis Associates ("Realis"), is a New York Partnership having a principal place of business at 356 Manville Road, Pleasantville, New York.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Index No. 9130/06

Plaintiff,

-against-

AMENDED COMPLAINT

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its amended complaint against defendants, The Nature Conservancy, Realis Associates, The Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and having a principal place of business at 570 Seventh Avenue, New York, New York, 10018.

3. Upon information and belief, Defendant, Realis Associates ("Realis"), is a New York Partnership having a principal place of business at 356 Manville Road, Pleasantville, New York.

4. Upon information and belief, Defendant, The Town of North Castle, is a governmental subdivision of The State of New York, which has been organized and exists under and pursuant to the laws of the State of New York, and is located in Westchester County.

5. Upon information and belief, Defendants Robert Burke and Teri Burke are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

6. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

7. This action is brought pursuant to Article 15 of the Real Property Action and Proceedings Law to compel the determination of claims to certain real property herein described and known as Oregon Road located in the County of Westchester.

8. Annexed hereto as **Exhibit "A"**, and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986. The portion of Oregon Road which is the subject of this action, as the same is shown on the said Maps, has been highlighted.

9. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

10. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

11. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

12. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

13. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

14. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

15. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

16. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of Defendant, The Nature Conservancy (the "Nature Conservancy Property").

17. The Nature Conservancy Property and the Seven Springs Parcel was part of certain lands acquired over time by Meyer.

18. By virtue of the various deeds pursuant to which Meyer acquired title to said real property Meyer had acquired the entire bed of Oregon Road as show on **Exhibit "A"**.

19. Upon information and belief, the Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

20. Upon information and belief, the Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

21. At some point in time prior to 1973 Oregon Road became a public road by virtue of its having been used as a public highway for a period of 10 years.

22. Up until and including May, 1990 when the Town of North Castle allegedly "discontinued" the subject portion of Oregon Road said road was a public street.

23. Upon information and belief, the said portion of Oregon Road referred to herein, at paragraph 8 "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

24. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

25. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

26. By virtue of the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and the facts herein set forth, Plaintiff has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access.

27. That none of the Defendants has any fee interest in or right of user over that portion of the said portion of Oregon Road as described in paragraph 8 hereof, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road.

28. The Defendants and each of them claim, and it appears from the public record that it or they will claim an interest in, and/or the fee title of, the bed of said Oregon Road abutting its or their respective premises as hereinafter set forth, and/or a right to prevent Plaintiff's right of ingress and egress to and from the Seven Springs Parcel to the legally opened portion of Oregon Road.

29. Any estate or interest claimed, or which may be claimed by any Defendant in the premises described in paragraph 8 hereof is invalid and ineffective as against the estate and interest of the Plaintiff therein to a right-of-way and/or easement for ingress and egress over Oregon Road.

30. Any estate, right or interest which Defendant The Nature Conservancy ever had, claims or may claim in the Nature Conservancy Property, or any part thereof, including the estates and interest claimed or which may be claimed by it by virtue of the instruments and facts hereinbefore set forth are ineffective and invalid as against the title and interest of Seven

Springs, LLC, its successors in interest, grantees or transferees in and to an easement for ingress and egress over the Nature Conservancy Property.

31. By reason of the foregoing, and the above-referenced deeds and the rights set forth therein, Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and there is a valid and enforceable easement and/or right of way for ingress and egress for pedestrian and vehicular access over Oregon Road to the south, including over lands which may be owned by The Nature Conservancy and others to the public portion of Oregon Road in favor of Plaintiff, its successors and assigns (the "Easement" or "Easement Area").

32. Upon information and belief there are no Defendants either known or unknown to Plaintiff not herein joined as a party and there is no Defendant who is or might be an infant, mentally retarded, mentally ill or an alcohol abuser.

33. Any judgment granted herein will not affect any person or persons not in being or ascertained at the commencement of this action, who by any contingency contained in a devise or grant or otherwise, could afterward become entitled to a beneficial estate or interest in the aforesaid premises, and every person in being who would have been entitled to such estate or interest, if such event had happened immediately before the commencement of the action is named as a party hereto.

34. No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim of the Plaintiff as set forth herein.

35. None of the Defendants or the parcels owned by them is or will be adversely affected by the relief herein sought.

36. The Defendant, Town of North Castle, is joined herein as a party Defendant by, reason of, among other things, Oregon Road is located in the Town of North Castle, and said municipality purported to close and/or discontinue the portion of Oregon Road which is the subject of this action.

37. The Defendant, Realis Associates, is joined herein as a party Defendant by virtue of having been the developer of the subdivision known as "Oregon Trails" under filed map number 22547, a portion of which abuts the westerly side of Oregon Road.

38. Defendants, Robert Burke and Teri Burke, acquired title to real property known as 2 Oregon Hollow Road, Armonk, New York pursuant to deed dated April 29, 1993 and recorded May 12, 1993 in liber 10576 page 243 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 2 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

39. Defendants, Noel B. Donohoe and Joann Donohoe, acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York pursuant to deed dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 1 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

40. Plaintiff has no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

41. Plaintiff repeats and reiterates each and every allegation contained in paragraphs 1 through 40 above as if the same were more fully set forth at length herein.

42. Defendant Town of North Castle caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate (the "Gate") thereby partially blocking and obstructing direct access to or from Oregon Road to the south by persons in vehicles and depriving Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

43. That the Gate is an unlawful encroachment and obstruction upon the Plaintiff's Easement as aforesaid and has caused and will continue to cause damage to the Plaintiff by reason of Plaintiff's inability to have direct access to the Seven Springs Parcel unimpeded from the south.

44. That by reason of the Gate as aforesaid, the Plaintiff has been and will in the future be deprived of the full use and enjoyment of the Seven Springs Parcel and Plaintiff has thereby suffered and will in the future suffer damages thereby.

45. That the Plaintiff has notified Defendant North Castle that the Gate obstructs direct access to the Seven Springs Parcel from the south, has demanded that Defendant North Castle remove the Gate, and the Defendant has failed to remove the same.

46. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendant and will suffer continuing damages.

47. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 2008 NY Slip Op. 01327).

48. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that Defendant North Castle never extinguished the Easement pursuant to Highway Law § 205.

49. It has been acknowledged in prior Court proceedings by the Town of North Castle that, upon the closing of Oregon Road for public purposes, title reverted to Rockefeller University (Plaintiff's predecessor in interest) upon the closure.

50. By reason of the foregoing, North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and no basis in law or fact to maintain the Gate on or over Oregon Road, or prevent or attempt to prevent Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road.

51. As a result of Defendant's actions Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven

Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

52. That unless the relief be granted to Plaintiff, as hereinafter prayed for, the Plaintiff will suffer irreparable damages and injuries.

53. That Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment:

(1) That the Defendants and each of them and any and every person claiming through or under them and each of them be barred from any and all claim to an estate or interest in the property described in the complaint;

(2) Declaring that there is a valid and enforceable easement and/or right of way of no less than 50 feet in width for ingress and egress for pedestrian and vehicular traffic over Oregon Road to and from The Seven Springs Parcel to the south to the section of Oregon Road more particularly identified in **Exhibit "A"** annexed hereto, including over lands which may be owned by the Nature Conservancy and others, in favor of Plaintiff, its successors and/or assigns.

(3) Declaring that Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts the Seven Springs Parcel on its westerly side.

(4) Declaring that Plaintiff, its successors and assigns also have the right to an easement and/or right of way of no less than 50 feet in width for ingress and egress, and for pedestrian and vehicular access over Oregon Road;

(5) Enjoining Defendants from interfering with and obstructing Plaintiff's right-of-way and Plaintiff's right of access to Plaintiffs' property as aforesaid.

(6) That the Defendants be restrained by injunction or otherwise from maintaining any obstructions, barriers, gates, or the like, on, or across Oregon Road which obstructs or blocks the use by Plaintiff, its invitees and utility and other vehicles from their lawful rights to pass over the land to have ingress and egress over Oregon Road to the Seven Springs Parcel.

(7) That Defendant, Town of North Castle, be directed to remove the Gate and all obstructions and/or barriers placed and/or maintained by it, on, or across Oregon Road which obstructs the use of Plaintiff, its invitees and utility and other vehicles from their lawful rights to pass over the land and to have ingress and egress over Oregon Road to the Seven Springs Parcel.

(8) That the Plaintiff have such other, further and different relief in the premises as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action, such costs to be against such Defendants as may defend this action.

Dated: White Plains, New York
April 3, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Exhibit "D"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 9130/06

ANSWER OF DEFENDANTS ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendants Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe (collectively, the "Individual Defendants"), by their attorneys, Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, as and for their answer to the Complaint, respectfully allege as follows:

As to the First Cause of Action

1. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint.

3. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.

4. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.

5. Admit the allegations contained in paragraph 5 of the Complaint.

6. Admit the allegations contained in paragraph 6 of the Complaint.

7. Deny each and every allegation contained in paragraph 7 of the Complaint, except admit that plaintiff purports to bring this action pursuant to Article 15 of the Real Property Actions and Proceedings Law.

8. Deny each an every allegation contained in paragraph 8 of the Complaint, and refer the Court to the document referred to therein for its contents.

9. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint.

10. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the Complaint, and refer the Court to the deed referred to therein for its contents.

11. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Complaint, and refer the Court to the deed referred to therein for its contents.

12. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Complaint.

13. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint, and refer the Court to the deed referred to therein for its contents.

14. Deny each and every allegation contained in paragraph 14 of the Complaint.

15. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the Complaint.

16. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint.

17. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Complaint.

18. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint.

19. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the Complaint.

20. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint, and refer the Court to the deed referred to therein for its contents.

21. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint.

22. Admit the allegations contained in paragraph 22 of the Complaint.

23. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint, and refer the Court to the deed referred to therein for its contents.

24. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Complaint.

25. Deny each and every allegation contained in paragraph 25 of the Complaint.

26. Deny each and every allegation contained in paragraph 26 of the Complaint.

27. Deny each and every allegation contained in paragraph 27 of the Complaint.

28. Deny each and every allegation contained in paragraph 28 of the Complaint.

29. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 of the Complaint.

30. Deny each and every allegation contained in paragraph 30 of the Complaint.

31. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Complaint.

32. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 of the Complaint.

33. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the Complaint.

34. Deny each and every allegation contained in paragraph 34 of the Complaint.

35. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 of the Complaint, except admit, upon information and belief, that the defendant Town of North Castle discontinued the portion of Oregon Road which is the subject of this action.

36. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 of the Complaint.

37. Deny each and every allegation contained in paragraph 37 of the Complaint, except admit that defendants Robert Burke and Teri Burke acquired title to real property known

as 2 Oregon Hollow Road, Armonk New York, pursuant to a deed dated April 29, 1993 and recorded May 12, 1993 in liber 10576 page 243, and further admit that their property abuts Oregon Road.

38. Deny each and every allegation contained in paragraph 38 of the Complaint, except admit that defendants Noel B. Donohoe and Joann Donohoe acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York, pursaunt to deed dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35, and further admit that their property abuts Oregon Road.

39. Deny each and every allegation contained in paragraph 39 of the Complaint.

As to the Second Cause of Action

40. The Individual Defendants repeat and reallege each and every allegation contained in paragraphs 1 through 39 hereof as if the same were fully set forth at length herein.

41. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the Complaint, except admit that the barrier gate erected by defendant Town of North Castle makes "the aforesaid section of Oregon Road, and roadway impassable to or from Oregon Road to the South by persons in vehicles" as alleged in paragraph 41 of the complaint, and affirmatively allege that in or about May 1990, defendant Town of North Castle duly acted, in accordance with New York Law, to close a portion of Oregon Road, at the point designated as "Pole 40".

42. Deny each and every allegation contained in paragraph 42 of the Complaint.

43. Deny each and every allegation contained in paragraph 43 of the Complaint.

First Affirmative Defense

44. The Complaint fails to state a cause of action.

Second Affirmative Defense

45. The Complaint is barred, in whole or in part, by the applicable statute of limitations.

Third Affirmative Defense

46. The Complaint is barred, in whole or in part, by the doctrines of waiver, laches and/or estoppel.

Fourth Affirmative Defense

47. The Complaint is barred, in whole or in part, by the applicable Statute of Frauds.

Fifth Affirmative Defense

48. The Complaint is barred, in whole or in part, because no easement or right-of-way was intended to be, nor was, conveyed to plaintiff or its predecessors-in-title, by any of the deeds referred to in the Complaint.

Sixth Affirmative Defense

49. The Complaint is barred, in whole or in part, because any easement or right-of-way claimed by plaintiff was extinguished, prior to the time plaintiff obtained title thereto, by plaintiff's predecessor-in-title's abandonment, consent to the closing or discontinuance of that part of Oregon Road which is the subject of this action, and/or consent or acquiescence in the Town of North Castle's installation of a locked barrier or gate at "Pole 40".

Seventh Affirmative Defense

50. The Complaint is barred, in whole or in part, because any easement or right-of-

way claimed by plaintiff was extinguished, prior to the time plaintiff obtained title thereto, by the merger of the dominant and servient estates into the ownership of "Meyer," as defined in paragraph 15 of the complaint.

Eighth Affirmative Defense

51. The Complaint is barred, in whole or in part, because any easement or right-of-way claimed by plaintiff was extinguished by adverse possession.

Ninth Affirmative Defense

52. The Complaint is barred, in whole or in part, because plaintiff knew or should have known, at the time it acquired the parcel defined in paragraph 9 of the complaint as the "Seven Springs Parcel" that Oregon Road was closed, that no public road, street or way existed at that place and time, and that no private easement then existed or was being conveyed.

Tenth Affirmative Defense

53. The Complaint is barred, in whole or in part, because the parcels of land that comprise the Seven Springs Parcel include one or more parcels of land that did not belong to, and were not acquired from, Meyer but which were acquired by plaintiff or its predecessor in title after any claimed easement was extinguished. No easement may be implied where, as here, its use will benefit additional, or after-acquired parcels.

Eleventh Affirmative Defense

54. The Complaint is barred, in whole or in part, because the parcels of land that comprise the Seven Springs Parcel have frontage on and access to a public highway to the northern portion of the Seven Springs Parcel.

WHEREFORE, the Individual Defendants respectfully request that the Complaint be dismissed with prejudice, and that this Court grant such other and further relief as it may deem just and proper.

Dated: White Plains, New York
March 10, 2008

Lois N. Rosen, Esq.
OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900
Attorneys for Defendants Robert Burke, Teri Burke, Noel Donohoe and Joann Donohoe

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

PAULA CHABLAL, being duly sworn, deposes and says: I am not a party to this action; I am over 18 years of age and I reside in Westchester, New York.

On Monday, March 10, 2008, I served the within **ANSWER OF DEFENDANTS ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,** upon:

DelBello, Donnellan, Weingarten, Tartaglia, Wise & Wiederkehr, LLP
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Roosevelt & Benowich, LLP
Attorneys for Defendant The Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

Stephens, Baroni, Reilly & Lewis, LLP
Attorneys for Defendant Town of North Castle
175 Main Street Suite 800
North Court Building
White Plains, New York 10601
(914) 761-0300

by depositing a true copy of the same enclosed in a first-class, postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Paula Chablal

Sworn to before me this
10th day of March, 2008

Notary Public

GREGORY J. SPAUN
NOTARY PUBLIC, State of New York
No. 02SP6054146
Qualified in Westchester County
Commission Expires 1/29/20 11

ORIGINAL

Index No. *Year 20*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC., **Index No. 9130/06**

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

ANSWER OF DEFENDANTS ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER LLP
Attorneys for

120 BLOOMINGDALE ROAD
WHITE PLAINS, NY 10605
(914) 422-3900

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: ..... Signature .....

Print Signer's Name.....

Service of a copy of the within *is hereby admitted.*

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. , one of the judges of the within-named Court, at on 20 , at M.*

Dated:

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER LLP
Attorneys for

To: 120 BLOOMINGDALE ROAD
WHITE PLAINS, NY 10605

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated: .....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 20

.....

.....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 20 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service by Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Personal Service — by delivering the same personally to the persons at the address indicated below:

☐ Service by Facsimile — by transmitting the same to the attorney by facsimile transmission to the facsimile telephone number designated by the attorney for that purpose. In doing so, I received a signal from the equipment of the attorney served indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) as indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Service by Electronic Means — by transmitting the same to the attorney by electronic means upon the party's written consent. In doing so, I indicated in the subject matter heading that the matter being transmitted electronically is related to a court proceeding:

☐ Overnight Delivery Service — by depositing the same with an overnight delivery service in a wrapper properly addressed, the address having been designated by the addressee(s) for that purpose or, if none is designated, to the last-known address of addressee(s). Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

Sworn to before me on , 20

.....

.....

(Print signer's name below signature)

Exhibit "E"

AT the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on April 14, 2008

PRESENT:

HON:

RORY J. BELLANTONI,

Acting Justice.

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

Index No. 9130/06

~~THE NATURE CONSERVANCY,~~
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

~~ORDER GRANTING~~
PRELIMINARY INJUNCTION

Defendant The Nature Conservancy ("TNC") having moved this Court, by order to show cause dated March 18, 2008, for a temporary restraining order and preliminary injunction ("Motion"), and this matter having come on to be heard before the Court on March 18, 2008 and on April 4, 2008, and the Court having considered the following papers in support of and in opposition to the Motion, all with due proof of service thereof: (1) the Order to Show Cause dated March 18, 2008, supported by the Affirmation of Leonard Benowich, Esq., dated March 13, 2008, the Affidavit of Amy Fenno, sworn to March 11, 2008, and the Affidavit of Jamie Norris, sworn to March 13, 2008, together with Exhibits 1-18 annexed thereto, and a

memorandum of law dated March 13, 2008, in support of the Motion; (2) the affidavit of Alfred Donnellan, Esq., sworn to March 17, 2008, and Exhibits A-E annexed thereto (on behalf of Plaintiff Seven Springs, LLC), and a memorandum of law dated March 17, 2008, in opposition to the Motion; (3) the Affidavit of Alfred Donnellan, Esq., sworn to March 26, 2008, and Exhibits A-G thereto (on behalf of Plaintiff Seven Springs, LLC) and a memorandum of law dated March 26, 2008, in opposition to the Motion; (4) the Reply Affirmation of Leonard Benowich, dated April 2, 2008, and Exhibits 19-22 annexed thereto, and a reply memorandum of law dated April 2, 2008, in support of the Motion; (5) the affirmation of John B. Kirkpatrick, Esq., sworn to April 2, 2008 (on behalf of defendants Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe), in support of the Motion; and (6) the affirmation of Gerald D. Reilly, Esq., dated April 2, 2008 (on behalf of defendant The Town of North Castle), in support of the Motion; and the parties, by their respective counsel, having been heard on March 18, 2008 in support of and in opposition to TNC's application for a temporary restraining order; and the Court having issued a temporary restraining order on March 18, 2008, and having directed that the parties appear on April 4, 2008 for oral argument of that portion of the Motion which sought a preliminary injunction; and the parties, by their respective counsel, having appeared before this Court for oral argument with respect thereto; and the Court, after hearing the arguments of counsel and upon due deliberation and consideration of the foregoing, having rendered its decision on the record of the proceedings held on April 4, 2008;

NOW, on Motion of BENOWICH LAW, LLP, counsel of record for defendant TNC, it is hereby

ORDERED, that TNC's Motion for a preliminary injunction is granted; and it is further

ORDERED, that during the pendency of this action, Plaintiff, its agents, employees and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing, be and they hereby are preliminarily enjoined from:

(a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and

(b) performing any work upon any land owned by TNC, including that portion of Oregon Road which ~~is~~ lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal); and it is further

ORDERED, that within ten (10) days of service of a copy of this order with notice of entry, TNC shall give and file an undertaking in the amount of One Hundred Thousand Dollars ($100,000).

ENTER:

Rory J. Bellantoni, A.J.S.C.

C:\Main Files\TNC\SEVEN SPRINGS\Litigation\TRO\PI ORDER.wpd

Certificate of Service by First Class Mail

LEONARD BENOWICH, an attorney duly admitted to practice in this Court, hereby affirms, under the penalty of perjury, that on April 15, 2008, I served the foregoing **Notice of Filing Undertaking - CPLR 6312** and **Notice of Entry** upon the following counsel:

DelBello Donnellan Weingarten, Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

Stephens Baroni Reilly & Lewis, LLP
75 Main Street
White Plains, New York 10601
Attorneys for Defendant Town of North Castle

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
120 Bloomingdale Road
White Plains, New York 10605
Attorneys for Defendants Burke and Donohoe

by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the party and/or parties listed above.

Dated: White Plains, New York
April 15, 2008

Leonard Benowich

Exhibit "F"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE TOWN OF NORTH CASTLE,

Defendant.

Index No. 05484-08
Date Filed: 3/14/08

SUMMONS

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial. The basis of venue is the Defendant is situated in the County of Westchester.

Dated: White Plains, New York
March 14, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: THE TOWN OF NORTH CASTLE
15 Bedford Road
Armonk, New York 10504

126560
0143139-001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE TOWN OP NORTH CASTLE,

Defendant.

Index No. 05484-08
Date Filed: 3/14/08

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its complaint against defendant, The Town of North Castle, alleges, upon information and belief, as follows:

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2 The Town of North Castle is a governmental subdivision of The State of New York, which has been organized and exists under and pursuant to the laws of the State of New York, and is located in Westchester County.

3. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94 17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94 18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

4. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester

County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel

5. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

6. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

7. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

8. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

9. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

10 Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of The Nature Conservancy (the "Nature Conservancy Property").

11. The Nature Conservancy Property and the Seven Springs Parcel was part of certain lands acquired over time by Meyer.

12. The Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

13. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

14. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

15 The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

16. By reason of the foregoing and the December 22, 1995 Deed recorded in liber 11525 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and the facts herein set forth, Plaintiff has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified and highlighted (the "Easement" or "Easement Area") on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access. Annexed hereto as Exhibit "A", and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986.

17 At some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used as a public highway for a period of 10 years.

18. In or about 1990 the Town Board of the Town of North Castle purportedly closed a portion of Oregon Road pursuant to Highway Law § 205 as it was no longer used for public travel.

19. The said portion of Oregon Road referred to herein that was purportedly closed and that is referred to on Exhibit "A" "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

20. That Defendant Town of North Castle has no fee interest in or right of user over that portion of the said allegedly closed portion of Oregon Road as described above, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road.

21. Defendant caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles and depriving Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

22. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of Defendant and to the Planning Board of the Town of Bedford.

23. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel.

24. That Defendant has taken, and continues to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road.

25. That the Gate is an unlawful encroachment and obstruction upon the Plaintiff's Easement as aforesaid and has caused and will continue to cause damage to the Plaintiff by reason of Plaintiff's inability to have direct access to the Seven Springs Parcel unimpeded from the south.

26. That by reason of the Gate as aforesaid, the Plaintiff has been and will in the future be deprived of the full use and enjoyment of the Seven Springs Parcel and Plaintiff has thereby suffered and will in the future suffer damages thereby.

27. That the Plaintiff has notified the Defendant that the Gate obstructs direct access to the Seven Springs Parcel from the south, has demanded that Defendant remove the Gate, and the Defendant has failed to remove the same. when?

28. That Defendant, through its elected officials, has in the past unlawfully, wrongfully and improperly collaborated with, and continues to unlawfully, wrongfully and improperly collaborate with, private parties in a joint effort to deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel.

29. Upon information and belief, said Defendant's acts are willful, without reasonable or probable cause and are without basis in law or fact.

30. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendant and will suffer continuing damages.

31. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 2008 NY Slip Op. 01327).

32. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that Defendant never extinguished the Easement pursuant to Highway Law § 205.

33. It has been acknowledged in prior Court proceedings by the Town of North Castle that, upon the closing of Oregon Road for public purposes, title reverted to Rockefeller University (Plaintiff's predecessor in interest) upon the closure.

34. By reason of the foregoing, North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and no basis in law or fact to maintain the Gate on or over Oregon Road, or prevent or attempt to prevent Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road

35. As a result of Defendant's actions Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven

Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

36. By virtue of the foregoing Plaintiff has been damaged in an amount to be determined at trial but not less than $300,000,000.00.

37. By virtue of Defendant's unlawful, improper and intentional acts, Plaintiff should be awarded punitive damages in an amount to be determined at trial but not less than $300,000,000.00.

WHEREFORE, Plaintiff demands judgment:

(a) That Plaintiff have Judgment for damages against Defendant an amount to be determined at trial but not less than $300,000,000.00, with interest thereon and attorneys fees, for the injuries suffered as herein alleged

(b) That Plaintiff have Judgment for punitive damages against Defendant in an amount to be determined at trial but not less than the amount of $300,000,000.00, with interest thereon.

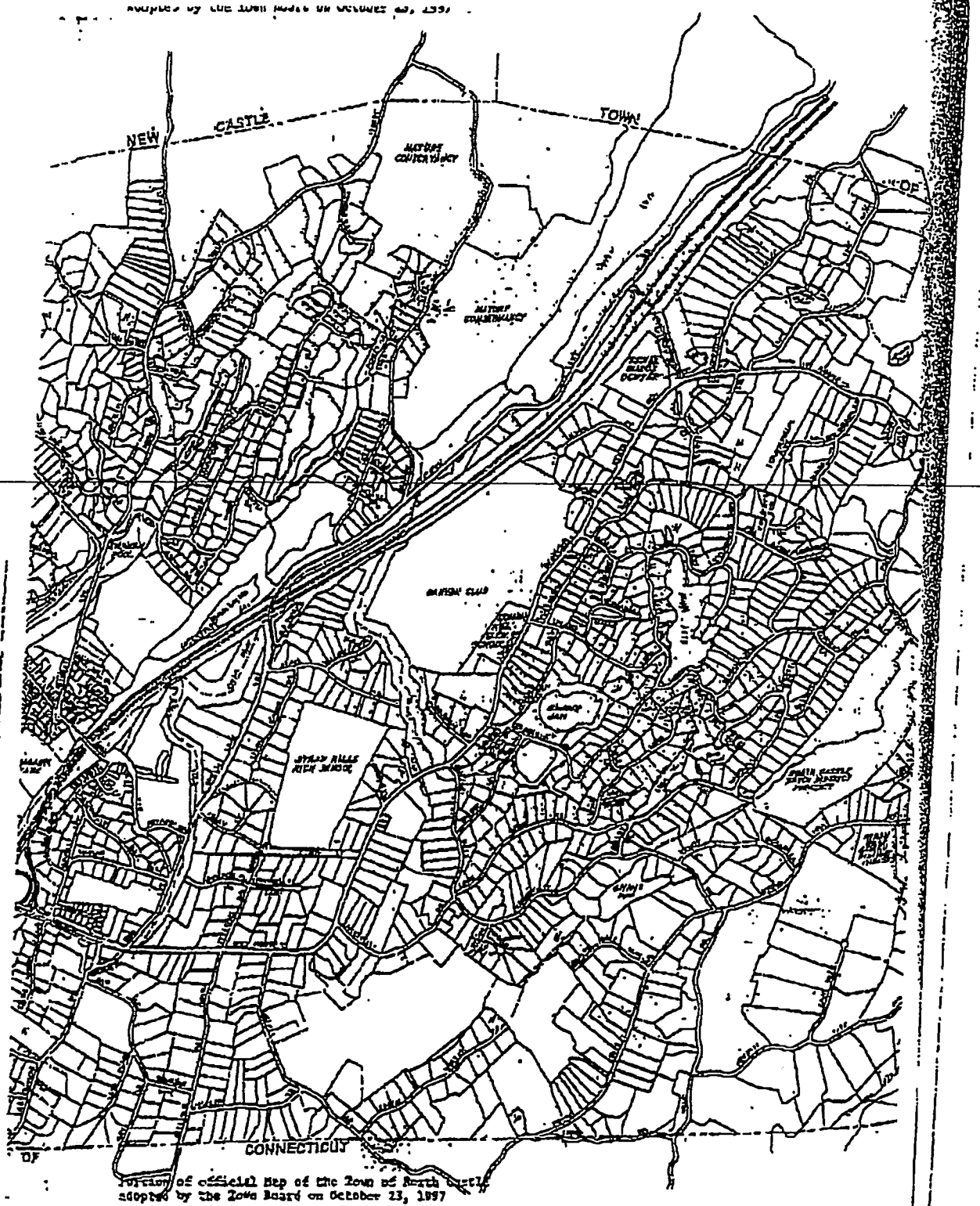
(c) That the Plaintiff have such other, further and different relief as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action.

Dated: White Plains, New York
March 14, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

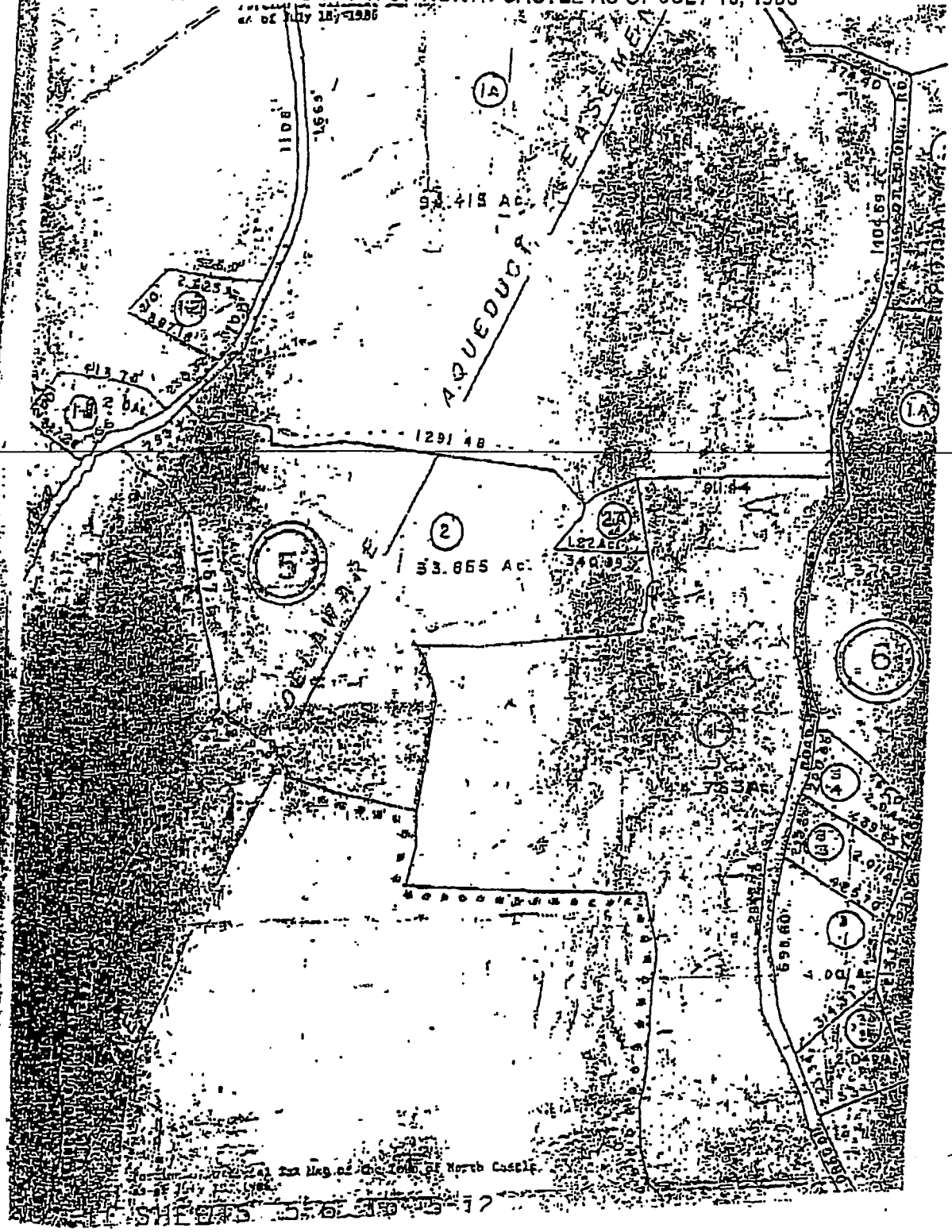
EXHIBIT A



Portion of official Map of the Town of North Castle adopted by the Town Board on October 23, 1997

Poor Quality

EXHIBIT A TO COMPLAINT -
PORTION OF THE OFFICIAL MAP OF THE TOWN OF NORTH CASTLE ADOPTED BY THE TOWN BOARD ON OCTOBER 23, 1997 AND PORTION OF THE OFFICIAL TAX MAP OF THE TOWN OF NORTH CASTLE AS OF JULY 16, 1986



Poor Quality

Exhibit "G"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

STIPULATION OF SETTLEMENT

Index No.: 9130/2006

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE TOWN OF NORTH CASTLE,

Defendant.

----------X

STIPULATION OF SETTLEMENT

~~Index No.: 5484/2008~~

WHEREAS, Plaintiff Seven Springs, LLC ("Plaintiff") has commenced the above-captioned actions against the Town of North Castle ("North Castle") and others (collectively with North Castle, "Defendants"), in relation to a dispute over ownership and easement rights to Oregon Road, which spans between the Towns of North Castle and New Castle ("Oregon Road");

WHEREAS, in and by the first action, Index No. 9130/06 (the "Declaratory Judgment Action"). Plaintiff sought quiet title to Oregon Road and claimed a right to utilize this road, and the Town of North Castle claimed that it had properly closed this road, effectively precluding any intended use of the road by the Plaintiff or any others;

WHEREAS, the other Defendants similarly contested Plaintiff's rights to Oregon Road;

WHEREAS, in and by the second action against Defendant North Castle, Index No. 5484/2008 (the "Damages Action") Plaintiff sought compensatory and punitive damages associated with an allegedly illegal interference with alleged property rights;

WHEREAS, during the past three years, the parties hereto have been engaged in lengthy, protracted and costly litigation over the issues raised in the Complaints herein; and

WHEREAS, in an effort to resolve the disputes and claims between Plaintiff and Defendant North Castle, the parties hereto have reached an agreement which compromises and settles both actions as they relate to Defendant North Castle.

IT IS NOW THEREFORE, STIPULATED AND AGREED, by and between Plaintiff and Defendant North Castle as follows:

I. DECLARATION AND FINDINGS:

That after lengthy negotiations and deliberation, the parties hereto declare and find that:

A. It is in their best interests and in the best interests of the people of the Town of North Castle that the within actions be settled and discontinued on the terms and conditions hereinafter set forth.

B. Each of the parties hereto has the power and authority to enter into this Stipulation and upon the full and final execution thereof by the Supervisor of the Town of North Castle, on behalf of Defendant North Castle and the Town Board, and the respective attorneys for each said person, entity and party, this Stipulation shall be submitted to the Honorable Rory J. Bellantoni, Justice of the Supreme Court of the State of New York, for approval, and shall thereafter constitute an Order in the Declaratory Judgment Action (Index No. 9130/2006).

II. PLAINTIFF'S ACTIONS IN FURTHERANCE OF THIS STIPULATION:

A. Plaintiff hereby withdraws in its entirety, discontinues, and dismisses with prejudice the Damages Action bearing Index No. 5484/2008.

B. Plaintiff further discontinues and dismisses with prejudice, as against Defendant North Castle only, the Declaratory Judgment Action bearing Index No. 9130/2006.

C. Plaintiff further releases Defendant North Castle of any and all actions, claims, causes of action, whether known or unknown, suspected or unsuspected, contingent or non-contingent, in law or in equity, based on state, local, federal, statutory or common law or any other law, rule or regulation, seeking compensatory, punitive or equitable relief, multiple damages or attorneys fees, based on Defendant North Castle's closing of Oregon Road as a public highway, the erection of a gate at Pole 40, or any other factual allegation as alleged in the Complaints in the Damages and Declaratory Judgment Actions.

D. Plaintiff will prepare and submit a revised proposal for the Seven Springs development project in the North Castle area, which will incorporate elements agreeable to, and in the mutual interests of, both the Plaintiff and Defendant North Castle and which application is expected to reasonably conform to the Code of the Town of North Castle.

E. During the course of review of said application, Plaintiff will undertake reasonable efforts in cooperation with Defendant North Castle to sustain a dialog with the Town of Bedford toward the goal of unifying Plaintiff's property by connecting the Bedford private road with the North Castle private road.

III. DEFENDANT NORTH CASTLE'S ACTIONS IN FURTHERANCE OF THIS STIPULATION:

A. Defendant North Castle agrees that it will not contest Plaintiff's position that it has easement rights over Oregon Road as shown in its title report.

B. Defendant North Castle will support the use of Oregon Road as a gated private road providing sole access to Plaintiff's North Castle property in connection with a revised subdivision application to be filed by Plaintiff with the North Castle Planning Board.

C. Defendant North Castle will provide reasonable cooperation to Plaintiff in connection with the on-going litigation against the remaining Defendants, including during the discovery process currently in progress.

D. Defendant North Castle, by and through Supervisor Reese Berman, will participate with Plaintiff in the preparation of, and will jointly with Plaintiff issue, a mutually acceptable press release announcing this settlement.

E. Defendant North Castle releases Plaintiff of any and all actions, claims, causes of action, whether known or unknown, suspected or unsuspected, contingent or non-contingent, in law or in equity, based on state, local, federal, statutory or common law or any other law, rule or regulation, seeking compensatory, punitive or equitable relief, multiple damages or attorneys fees, in connection with the Plaintiff's Damages Action bearing Index No. 5484/2008 and Plaintiff's Declaratory Judgment Action bearing Index No. 9130/2006.

F. Once a Lead Agency has been designated for the purposes of SEQR review, Defendant North Castle will recommend to such Lead Agency that in accordance with SEQRA §617(8)(a), public scoping is not required for the revised subdivision application and that the public scoping document from the prior proposal for subdivision be utilized insofar as applicable to the property in North Castle.

G. Defendant North Castle will also recommend to the Lead Agency that all of Plaintiff's work product done in pursuit of earlier applications of Plaintiff's North Castle property shall be incorporated therein, as appropriate, so as to avoid duplication of work or repetition of work in the new Draft Environmental Impact Statement.

IV. BOTH PARTIES UNDERSTANDINGS WITH RESPECT TO THIS STIPULATION:

A. If the North Castle Planning Board is designated Lead Agency as required by SEQRA, North Castle will thoroughly and carefully, and in accordance with its statutory obligations, review Plaintiff's submission of a revised subdivision application and any additional approvals required in connection with the proposed development of the site in order to determine whether the proposed development of the site as therein provided for will have a significant impact upon the environment. It is specifically understood and agreed by and between the parties to this Stipulation that the subdivision application as herein contemplated is subject to and conditioned upon completion of all of the requirements of SEQRA, none of the issues of which have been predetermined by North Castle.

B. It is understood that North Castle shall carry out the SEQRA review process in the spirit of §617.3(h) of SEQRA, which calls for "minimum procedural and administrative delay" and further specifies that agencies must expedite all SEQR proceedings in the interest of prompt review."

C. In an effort to speed the completion of the review process, avoid confusion and resolve issues in the shortest period of time, North Castle will allow and encourage the Plaintiff, as Project Sponsor, to meet directly with the Town Planner, the Town Engineers and such other experts and/or consultants utilized by North Castle, as often as the need therefore may appear.

V. MISCELLANEOUS:

A. The Plaintiff and Defendant North Castle agree that they are entering into this Stipulation in a spirit of cooperation, candor and for the achievement of common beneficial interests, and will process the forthcoming application in that spirit.

B. The Supreme Court of the State of New York, County of Westchester by the Honorable Rory J. Bellantoni or such other Justices as may from time to time be designated, shall continue to exercise jurisdiction over this action for the purposes of periodic review to determine the progress of the within settlement and to specifically enforce those provisions of this Stipulation which are capable of specific enforcement to the extent permitted by law and of making such other or further orders or judgments as it finds appropriate under the circumstances existing at the time of such application.

C. Both parties shall bear their own attorneys' fees, costs and expenses.

D. This Stipulation may be executed in counterparts and photocopied signatures shall be treated as originals.

DELBELLO, DONNELLAN, WEINGARTEN, WISE & WIEDERKEHR, LLP

By: Alfred E. Donnellan., Esq.

Attorneys for Plaintiff

1 North Lexington Avenue
White Plains, New York 10601
(914) 682-0200

February 26, 2009

THE TRUMP ORGANIZATION AND SEVEN SPRINGS, LLC

By: Hal Goldman

Vice President for Development
February 25, 2009

STEPHENS, BARONI, REILLY & LEWIS, LLP

By: Roland A. Baroni, Jr., Esq.

Attorneys for Defendant North Castle

175 Main Street, Suite 800
White Plains, New York 10601
(914) 761-0300

February 25, 2009

TOWN OF NORTH CASTLE

By: Reese Berman

Town Supervisor,
Town of North Castle
February 25, 2009

This Stipulation of Settlement is **SO ORDERED** at White Plains, New York this _____ day of _____, 2009.

Hon. Rory J. Bellantoni, J.S.C.

Exhibit "H"

SEQ 1

At an IAS Part of the Supreme Court of the State of New York, held in and for the County of Westchester, at the Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York 10601 on the 13 day of November, 2009.

RECEIVED
NOV 13 2009
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

PRESENT:

X Hon. Francis A. Nicolai

JUSTICE OF THE SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC, Plaintiff, - against - THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE, Defendants.	**Index No.: 21162/09** **ORDER TO SHOW CAUSE**

RECEIVED
NOV 13 2009
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

SIRS:

Upon the reading and filing of the annexed Affirmation of Charles M. Feuer, dated November 12, 2009, the exhibits annexed thereto, the prior pleadings and proceedings, let the Plaintiff show cause before this Court before the Hon. Francis Nicolai at the Supreme Court Building, located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York 10601, on the 4 day of ~~November~~ December, 2009, at 9:30 a.m., or as soon thereafter as counsel can be heard why an Order should not be entered pursuant to CPLR § 2004, extending defendants', ROBERT BURKE and TERI BURKE's time within which to appear, answer, or otherwise move in the within action until December 7, 2009 and for such other and further relief as this Court may deem just and proper.

ORDERED, that sufficient reason being alleged, that defendants' ROBERT BURKE and TERI BURKE's time within which to appear, answer or otherwise move is hereby extended pending the hearing and determination of the within application;

ORDERED, that sufficient cause appearing therefore, let service of a copy of this Order, together with the papers upon which it is based, by ☒ personal service ☐ ~~overnight mail~~ ☐ ~~regular mail~~, upon the Plaintiff's counsel, Alfred E. Donnellan, Esq., of DelBello Donnellan and Weingarten Wise & Wiederkehr, LLP, on or before November 16, 2009 be deemed good and sufficient service.

ORDERED, that all papers in opposition to the motion, shall be filed and served by the 27 day of November, 2009. All reply papers by the 30th day of November, 2009.

~~No previous application for the relief sought herein has been made to this~~ or any other Court or Justice.

NO ORAL ARGUMENT. NO Appearances Required.

JSC

Dated: White Plains, New York
November 13, 2009

ENTER:

J.S.C.

Hon. Francis A. Nicolai

Proof of Service to be filed on or before December 4, 2009

11/13/09
Received

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Krissie Taylor, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Westchester County;

That on the 2nd day of December, 2009, deponent served the within document(s) entitled Notice of Motion and Affirmation in Support of Motion to Dismiss Complaint upon:

DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Krissie Taylor

Sworn to before me this
2nd day of December 2009

Notary Public

JANINE A. MASTELLONE
NOTARY PUBLIC, State of New York
No. 02MA6160620
Qualified in Putnam County
Commission Expires Feb. 12, 2011

08139.00589

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff(s),

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendant(s).

NOTICE OF MOTION AND AFFIRMATION IN SUPPORT OF MOTION TO DISMISS COMPLAINT

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Attorneys For Defendants, Robert and Teri Burke

3 Gannett Drive
White Plains, NY 10604-3407
914.323.7000

C

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,	:	**Index No.: 21162/09**
Plaintiff,	:	
- against -	:	
THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,	:	
Defendants.	:	

MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE BURKE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorneys for Defendants ROBERT BURKE and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of the Defendants, Robert Burke and Teri Burke (hereinafter, the "BURKE Defendants") in further support of their motion to dismiss the plaintiff's Complaint and in opposition to the plaintiff's motion for leave to amend the Complaint.

Plaintiff's Complaint, as amended, is nothing more than an unsuccessful attempt to allegedly cure glaring defects in the purported claims asserted in the original complaint against the defendants. Moreover, as amended, plaintiff's allegations against the defendants amount to nothing more than a request for relief relative to the issuance of a preliminary injunction in the prior pending action, for which the plaintiff should be barred from pursuing. As a matter of law, there is no cause of action for damages relative to the issuance of a preliminary injunction. Rather, plaintiff's sole remedy is to pursue the funds posted in the undertaking in accordance with the Preliminary Injunction Order.

If and when it is determined that the Preliminary Injunction Order was improperly issued, plaintiff's damages are limited to the funds posted in the undertaking, or $100,000, as previously determined by the Court. Plaintiff failed to pursue his appellate remedy relative to the issuance of the preliminary injunction, and now seeks to amend his complaint in this action to circumvent his failure to pursue that appellate remedy. Accordingly, the plaintiff's complaint as amended should be dismissed in its entirety, as it is barred as a matter of law.

Even if this Court finds that plaintiff is not barred from asserting a claim for relief relative to the issuance of the preliminary injunction at the outset, plaintiff's purported claim is time barred and fails to state any legally cognizable claim against the BURKE

Defendants, or any defendant in this action. The applicable statute of limitations for plaintiff's claim is one year.

Plaintiff cannot establish the necessary elements of *prima facie* tort. Plaintiff's amended complaint essentially alleges that the BURKE and other defendants have taken the "position" that the plaintiff is not entitled to a private easement. In sum, the BURKE Defendants have simply defended themselves in a prior lawsuit commenced by the plaintiff. The BURKE Defendants are undeniably entitled to defend themselves in the prior suit and have a vested interest in protecting their property from the potential 25' road widening easement, depicted in the plaintiff's survey. The plaintiff cannot establish that any purported "position" taken by the BURKE Defendants was motivated solely by "disinterested malevolence." Moreover, any purported statement made in the context of the 2006 action, including the alleged "joinder" of an application for injunctive relief, is absolutely privileged and thus, not actionable as alleged by the plaintiff. Plaintiff's amended complaint fails to allege with particularity special damages and/or any basis for an award of punitive damages as required.

Finally, the plaintiff has failed to overcome the requisite burden of establishing by clear and convincing evidence that the plaintiff's claim has a substantial basis in law or fact. As such, this Court must dismiss the plaintiff's complaint. The plaintiff's complaint, even as amended, constitutes and impermissible SLAPP (Strategic Lawsuit Against Public Participation) suit, for which the plaintiff has failed to demonstrate has any basis in law or fact. Contrary to the plaintiff's allegations, this suit, even as amended, falls directly within the parameters of Civil Rights Law § 76-A(1)(a), commonly referred to as SLAPP suit. Indeed, plaintiff's claim is a baseless lawsuit attempting to intimidate, bully and silence the BURKE Defendants from defending

themselves in a prior action relative to the plaintiff's claim of a purported easement over a portion of Oregon Road. Plaintiff's amended complaint alleges that the BURKE Defendants obtained a preliminary injunction and then informed unnamed, unknown third-parties about the injunction at a time and place that is not specified in the amended complaint. For this, plaintiff seeks, without the requisite specificity, no less than $60 million in damages against each defendant. Plaintiff has miserably failed to allege with any particularity any wrongful or purportedly illegal actions taken by the BURKE Defendants, even utilizing *prima facie* tort, as the proverbial dumping ground for the plaintiff's baseless claim.

This Court should deny the plaintiff's cross-motion for leave to amend and grant the BURKE Defendants' motion in its entirety.

ARGUMENT

POINT I

PLAINTIFF'S CROSS-MOTION TO AMEND THE COMPLAINT MUST BE DENIED

Leave to amend a pleading should not be freely given where the proposed amendment is palpably insufficient or patently devoid of merit. Sheila Properties, Inc., v. A Real Good Plumber, Inc., 59 A.D.3d 424, 874 N.Y.S.2d 145 (2009); Gitlin v. Chirinkin, 60 A.D.3d 901, 875 N.Y.S.2d 585 (2009). Here, plaintiff's application for leave to amend should be denied. Plaintiff's proposed Amended Complaint, asserting one cause of action for *prima facie* tort, is nothing more than an unsuccessful attempt to cure glaring defects in the plaintiff's original complaint. Plaintiff's complaint, as amended, is intended as a retaliatory lawsuit, seeking to silence, bully and intimidate the BURKE Defendants. As amended, plaintiff's "claim" for "damages" relative to the

issuance of a preliminary injunction is improper as a matter of law, time barred and does not constitute a legally cognizable claim against any defendant.

A. Plaintiff is Barred from Asserting a "Claim" for Damages Relative to the Issuance of the Preliminary Injunction in the 2006 Action

The gravamen of the plaintiff's complaint, as amended, is an action which seeks damages for what the plaintiff alleges was the erroneous issuance of a preliminary injunction in a prior pending action.[1] More specifically, plaintiff's proposed amended complaint alleges "that the defendants have sought and obtained preliminary injunctive relief prohibiting the plaintiff from exercising its full rights. . .and that the plaintiff would have been able to develop" the property but for the defendants' actions. (See, Donnellan, Aff., Exh. "A", ¶36). For this, plaintiff seeks $60,000,000 in damages against each defendant.

Plaintiff is barred from seeking recovery for a purported "claim" relative to the issuance of the preliminary injunction in the 2006 action. There is no right to recover for damages resulting from the issuance of a preliminary injunction. Reingold v. Bowins, 34 A.D.3d 667, 826 N.Y.S.2d 316 (2d Dep't 2006). Rather, CPLR § 6312(b) provides in pertinent part the following:

> "(b) Undertaking. Except as provided in section 2512, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the [defendant], if it is finally determined that he or she was not entitled to an injunction, will pay to the

[1] The procedural history of this matter is more fully outlined in the BURKE Defendants' motion to dismiss. For ease of reference, however, on or about May 15, 2006, the plaintiff commenced an action pursuant to Article 15 of Real Property Action and Proceedings Law, entitled, Seven Springs, LLC, and v. The Nature Conservancy, Realis Associates, the Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, bearing Index no.: 9130/06 ("the 2006 action"). Moreover, a copy of the Preliminary Injunction Order is attached to the Mastellone Affirmation as Exh. "E", in support of the BURKE Defendants' motion to dismiss.

[plaintiff] all damages and costs which may be sustained by reason of the injunction."

Indeed, "'the undertaking is the source of liability and, therefore, absent an undertaking there is no right'" to recover for damage resulting from the erroneous issuance of a preliminary injunction. Id at 668. Thus, plaintiff's sole remedy is to pursue the undertaking, not to assert a claim for damages against the defendants.

Plaintiff's amended complaint, seeks monetary damages and alleges that the defendants have done nothing more than obtain a preliminary injunction in the 2006 action.[2] Plaintiff's complaint, as amended, should be summarily dismissed since plaintiff's sole remedy is to pursue damages that have been posted in the undertaking in accordance with the Preliminary Injunction Order. Id; *See also*, CPLR § 6315. Moreover, even if it is determined that the preliminary injunction was not proper, plaintiff's right of recovery will be limited to the amount of the undertaking as fixed by the Court, or as here, $100,000. *See*, CPLR § 6315.

Notably, plaintiff filed a Notice of Appeal relative to the issuance of the preliminary injunction but failed to perfect the appeal. Mastellone, Aff. Exh. "1". Moreover, plaintiff's time to perfect the appeal has long since expired. Mastellone, Aff. Exh. "1". Plaintiff's amended complaint is a transparent attempt to circumvent the expiration of plaintiff's right to appeal and to craft a remedy where none is legally recognized. In sum, plaintiff's claim is barred as a matter of law.

Accordingly, this Court should deny plaintiff's application for leave to amend and dismiss this action in its entirety.

---

[2] As is discussed more fully herein, the BURKE Defendants contend that they did not "join" in the application for injunctive relief, rather, the Preliminary Injunction was issued upon the motion of co-defendant, The Nature Conservancy. Moreover, even if this Court finds that the BURKE Defendants "joined" in the application for injunctive relief, said statements are privileged and not actionable.

B. Plaintiff's Claim is Time Barred

Even if this Court finds that the plaintiff's claim for damages relative to the issuance of injunctive Order is not barred as a matter of law, the plaintiff's cause of action for *prima facie* tort is barred by the applicable statute of limitations of one year. CPLR § 215(3); Russek v. Dag Media Inc., 47 A.D.3d 457, 851 N.Y.S.2d 399 (1st Dep't 2008); Havell v. Islam, 292 A.D.210, 739 N.Y.S.2d 371 (2002).

Plaintiff's amended complaint does not cite with specificity any alleged act, which was committed by the BURKE Defendants within one year of the date the action was filed.[3] To the extent the plaintiff alleges to have a "claim" relative to the issuance of the Preliminary Injunction, this Order was issued on April 14, 2008, more than one year prior to the filing of the plaintiff's summons and complaint. Plaintiff's complaint, even as amended, is purposefully vague as to any specific acts committed by the defendants, or more importantly, when these acts were allegedly committed.

Contrary to the plaintiff's assertion, plaintiff has failed to allege any actions taken by the defendants which have resulted in any economic loss to the plaintiff. As noted above, plaintiff's "damages" are limited in this matter to the amount posted in the undertaking. Further, far from true is plaintiff's repeated assertion that he has been precluded from developing the Seven Spring parcel by any action taken by the BURKE Defendants. Indeed, the Findings Statement from the Town of Bedford indicates that the plaintiff has been approved to develop a residential subdivision of the Seven Springs lot into nine lots: seven of which are for new single-family residences ranging in size from

[3] Plaintiff's initial Summons and Complaint was filed on September 22, 2009.

6.65 to 11.26 acres.[4] (See, Mastellone, Aff. Exh. "2"). Plaintiff's amended complaint fails to identify any special damages or that the plaintiff has lost a single contract for the sale or development of any portion of its property.

Finally, plaintiff's assertion that the amended complaint in the 2009 action relates back to the 2006 action is meritless. Review of the plaintiff's amended complaint reveals that the acts, which allegedly give rise to the plaintiff's baseless claim for *prima facie* tort, did not occur until several years after the 2006 action was commenced. Thus, the allegations in the plaintiff's 2006 complaint cannot be said to have given the defendants notice of transactions or occurrences, which are alleged to have occurred years later.

Plaintiff's claims sound similar to an action for slander of title, or reputation.[5] Indeed, plaintiff contends that the defendants have taken the "position" does not have title to an easement in the lower portion of Oregon Road. A cause of action for slander of title is also governed by a one year statute of limitations period. Hanbidge v. Hunt, 183 A.D.2d 700, 583 N.Y.S.2d 288 (2d Dep't 1992).

Accordingly, Plaintiff's amended complaint asserting a claim for *prima facie* tort is time barred by the applicable statute of limitations of one year.

C. Plaintiff Fails to Establish the Elements of Prime Facie Tort

In order to establish a claim of *prima facie* tort, the plaintiff must establish (a) intentional infliction of harm; (b) resulting in special damages; (c) without any excuse or justification; (d) by an act or series of acts which would otherwise be lawful. See

[4] Further, as will be discussed more fully herein, plaintiff repeatedly claims that he is denied access to the Seven Springs parcel. The Findings Statement from the Town of Bedford, however, notes that Seven Springs parcel is accessible from alternate roadways including Sarles Street and Byram Lake Road. This is contrary to plaintiff's assertion that access can only be gained from the lower portion of Oregon Road.

[5] The elements of slander of title are (1) communication falsely casting doubt on the validity of a complainant's title; (2) reasonably calculated to cause harm, and (3) resulting in special damages. See, 39 College Point Corp. v. Transpac Capital Corp., 27 A.D.3d 454, 810 N.Y.S.2d 530 (2d Dep't 2006).

generally, Burns Jackson v. Local 100, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (1983). This cause of action was not intended to be utilized as a "catch all" dumping ground for "every cause of action which cannot stand on its legs." Curiano v. Suozzi, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 470(1984). Moreover, plaintiff must allege establish that disinterested malevolence is the sole motivation for the conduct for which the plaintiff complains. R.I. Island House, LLC v. North Town Phase II Houses, Inc., 51 A.D.3d 890, 858 N.Y.S.2d 372 (2d Dep't 2008)(emphasis added).

Similar to the initial complaint, plaintiff's amended complaint does not state with particularity any wrongful conduct allegedly perpetrated by the BURKE Defendants. Rather, the amended complaint categorically alleges that the defendants have taken, and continue to take the "position" that the plaintiff has no right to access the subject parcel. The amended complaint's added feature is simply an allegation that the defendants procured a preliminary injunction and communicated the existence of the preliminary injunction (again, without specificity as to who, when or where) to third parties. In sum, the amended complaint (similar to its predecessor) alleges that the BURKE Defendants have done nothing more than defend themselves in the 2006 action.

Noticeably absent from the plaintiff's amended complaint, among other things, is any allegation of specific acts, which one may infer, that the BURKE Defendants acted solely out of disinterested malevolence, as required. Indeed, plaintiff's own submissions establish that the BURKE Defendants have a vested interest, as abutting landowners of the Seven Springs parcel, in opposing the easement. In conjunction with its application to this Court, plaintiff submits a survey of the subject parcel, upon which the Burke's property is depicted. (See, Donnellan Aff. Exh. "J"). Plaintiff has highlighted in orange highlighter a 25' road widening easement, which falls directly in the BURKE

Defendants' backyard, should the Town choose to open and/or widen the lower portion of Oregon Road. (See, Donnellan Aff. Exh. "J"). As such, the BURKE Defendants could be adversely effected if the road widening easement is effectuated. Accordingly, the BURKE defendants cannot be said to be solely motivated by "disinterested malevolence" where their property interest might be adversely effected. In this regard, the plaintiff's amended complaint simply must fail.

The plaintiff's amended complaint does not specify any particular act by any one defendant, but rather categorically states that the defendants "have sought and obtained" a preliminary injunction. Notably, the Preliminary Injunction Order specifically states that it was granted upon the motion of co-defendant, The Nature Conservancy, and not upon the application of the BURKE Defendants in the 2006 action. (See, Mastellone Aff. Exh. "E", in support of motion to dismiss complaint). The two paragraph Affirmation of John B. Kirkpatrick cannot be said to constitute the BURKE Defendants' "joining" in the application. (See, Donellan Aff. Exh. "F"). Indeed, the BURKE Defendants did not cross-move for similar relief and simply submitted a two paragraph affirmation in support of the Nature Conservancy's application.

Notwithstanding this, even if this Court finds that the submission of an Affirmation by John B. Kirkpatrick in the 2006 action amounted to "joining" in the Nature Conservancy's application, such statements made in the course of litigation in the 2006 action are absolutely privileged. Park Knoll Associates v. Schmidt, 59 N.Y.2d 205, 464 N.Y.S.2d 424 (1983). *See also*, Weiner v. Weintraub, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968); Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); Alan and Allan Arts, Ltd., v. Rosenblum, 201 A.D.2d 136, 615 N.Y.S.2d 410 (2d Dep't 1994). It has long been held that statements made during the course of litigation are afforded

absolute privilege. Park Knoll Associates, at 139. Accordingly, Mr. Kirkpatrick's Affirmation, a statement made during the course of the 2006 action, is absolutely privileged and is thus, not actionable in any craftily drafted complaint.

Accordingly, the plaintiff's amended complaint fails.

D. The Plaintiff has Been Approved to Pursue Development in the Town of Bedford

Plaintiff's cross-motion repeatedly states that Plaintiff's has been denied access to the Seven Springs parcel and has been precluded from exercising its property rights through the development of said property. Accordingly, the plaintiff erroneously contends that he has a cause of action in *prima facie* tort for money damages.

Contrary to the plaintiff's statements, the plaintiff has been approved to pursue development of the Seven Springs parcel in the Town of Bedford. The Findings Statement from the Town of Bedford indicates that the plaintiff has been approved to develop nine lots: seven of which will be single-family residences ranging in size, one lot of the existing "Nonesuch" home and one lot of a private equestrian facility with staff housing. (Mastellone, Aff. Exh. "2").

How can the BURKE Defendants (or any other defendant in this action) be said to have precluded the plaintiff from developing his property where plaintiff's application for development has in fact been granted. (Mastellone, Aff. Exh. "2"). Moreover, how can the BURKE Defendants (or any other defendant in this action) be said to have denied the plaintiff access to the subject premises where plaintiff's prior application for the development of the site in the Town of Bedford and Town of New Castle specifically identified and contemplated access to the residential development utilizing a new subdivision road intersection with Sarles Street (and not the lower portion of Oregon

Road) in the Town of New Castle. (See, Mastellone, Aff. Exh. "2", p. 4). Plaintiff's development proposal with the Town of Bedford does not require access over the disputed portion of Lower Oregon Road and thus, the BURKE Defendants cannot be said to have interfered with any right of the plaintiff.

E. Plaintiff has Failed to Plead Special Damages

Plaintiff's proposed Amended Complaint wholly fails to allege special damages as required for the cause of action of prima facie tort. A critical element of the cause of action of *prima facie* tort is the requirement that the plaintiff allege special damages. ATI, Inc. v Ruder & Finn, 42 NY2d 454, 458 (1977)(Court of Appeals affirmed the dismissal of plaintiff's prima facie tort cause of action as the defendants' alleged conduct simply did not constitute prima facie tort); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 143 (1985); Epifani v. Johnson, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234, 241 (2d Dep't 2009). Such special damages must be "specific and measurable." Freihofer, *supra*, at 143. Furthermore, special damages "must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts." Ginsberg v Ginsberg, 84 AD2d 573, 574, 443 N.Y.S.2d 439, *quoting* Luciano v Handcock, 78 AD2d 943, 944, 433 N.Y.S.2d 257. Special damages must not be "speculative in nature," but "clearly definable..." Beck v. General Tire & Rubber Co., 98 A.D.2d 756, 758, 469 N.Y.S.2d 783, 787 (2d Dep't 1983)(despite finding that some of the damages sought were clearly definable, dismissal of plaintiff's cause of action for prima facie tort affirmed on the basis that the plaintiff failed to plead intentional and harmful acts such as to prove prima facie tort).

Plaintiff's proposed pleadings devote just one paragraph to the issue of special damages. These alleged damages of "not less than $60,000,000.00" consist of round sums lacking any specificity or itemization, and are alleged as follows:

(a) $5,000,000.00 for Plaintiff's inability to use its purported easement;

(b) $50,000,000.00 for alleged diminution in value of the Seven Springs Parcel; and

(c) $5,000,000.00 for Plaintiff's inability to access the Seven Springs Parcel from the south at Oregon Road.

(Proposed Amd. Cplt., ¶ 50.)

By any account, these vaguely stated alleged damages are general damages and are not special damages as required to plead *prima facie* tort. "Damages pleaded in such round sums, without any attempt at itemization, must be deemed allegations of general damages." Leather Dev. Corp. v. Dun & Bradstreet, Inc., 15 A.D.2d 761, 761, 224 N.Y.S.2d 513, 513 (1st Dep't 1962), *aff'd* 12 N.Y.2d 909 (1963), *citing* Drug Research Corp. v. Curtis Pub. Co., 7 N.Y.2d 435, 441, 199 N.Y.S.2d 33, 37 (1960).

Absent from Plaintiff's allegation of purported damages is any indication of the basis of the calculation of such damages. Furthermore, Plaintiff's first and third alleged damages of $5 million each for its inability to use its purported easement and its inability to access the Seven Springs Parcel over Oregon Road (Proposed Amd. Cplt., ¶ 50), appear to be for the same alleged harm. Glaringly absent from Plaintiff's alleged damages are "specific and measurable" losses as required by New York law.

Plaintiff does not allege with the requisite specificity how any alleged action by the BURKE Defendants was the cause of such alleged damages. A *prima facie* tort cause of action has been defined as "[The] infliction of intentional harm, resulting in damage,

without excuse or justification, by an act or series of acts which would otherwise be lawful." ATI, Inc. v Ruder & Finn, *supra*, 24 N.Y.2d 458. Plaintiff simply fails to link any wrongdoing by the BURKE Defendants to its alleged $60 million damages. As stated in the BURKE Defendants' memorandum of law in support of their motion to dismiss the Complaint, the Complaint, and indeed the proposed Amended Complaint, alleges no specific tortious acts by the BURKE Defendants. Plaintiff's proposed amended pleading refers to "statements" made "upon information and belief," by "the Defendants" at large, (Proposed Amd. Cplt., ¶¶ 28 through 34) without stating (a) what the alleged "statements" entailed; (b) to whom the alleged "statements" were made; (c) when or by what mode of communication the alleged "statements" were made; nor (d) by which of the various named defendants the alleged "statements" were made. Any allegation with regard to the BURKE Defendants simply involves such defendants' efforts to defend the 2006 action against them.

Plaintiff wholly fails to state with any specificity an action by the BURKE Defendants which caused the alleged damages in excess of $60,000,000.00. Moreover, the damages amount to nothing more than general damages, at best, and not special damages as an essential element of a cause of action for prima facie tort.

For all of the reasons stated, Plaintiff failed to allege special damages and its prima facie tort cause of action should be dismissed.

F. Plaintiff is Not Entitled to Recover Punitive Damages

Plaintiff is not entitled to recover punitive damages based on its vaguely stated attempt to plead a cause of action in *prima facie* tort. Plaintiff's proposed pleadings simply do not meet the strict standard for the award of punitive damages under New York law. Plaintiff's proposed pleading alleges no less than $30,000,000.00 of punitive

damages, purportedly based on "Defendants' unlawful, improper, and intentional acts." (See, Donnellan Aff. Exh. "A", ¶ 51). Like its purported special damages, Plaintiff devotes little attention to its allegation that it should recover no less than $30 million in punitive damages. Such purported punitive damages are not alleged with specifically as to actions by any particular defendant. As pointed out by defendant The Nature Conservancy, "[t]he proposed amended complaint offers no greater basis for punitive damages than does the original Complaint." TNC Mem. of Law, page 17. Plaintiff makes no attempt to plead with specificity how any alleged wrongdoing of the BURKE Defendants, or other defendants, are so egregious so as to merit the award of punitive damages.

The standard for an award of punitive damages is "where the wrong complained of is morally culpable, or is actuated by evil or reprehensible motives..." Walker v. Sheldon, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 490 (1961). Other cases historically giving rise to an award of punitive damages involve cases in which "the defendant's conduct evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations." Id., at 10 N.Y.2d 405, 223, N.Y.S.2d at 491 (*emphasis added*).

Moreover, the standard for an award of punitive damages is to be strictly applied. Rocanova v. Equitable Life Assur. Soc. Of U.S., 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339, 343 (1994). There, the New York Court of Appeals dismissed all claims for punitive damages, upholding the strict standard set forth in Walker. The Court of Appeals further asserted that:

> ...a party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.

Rocanova, at 83 N.Y.2d 613, 612 N.Y.S.2d 342 (*emphasis added*).

The purported wrongdoing by the BURKE Defendants as alleged by Plaintiff consists solely of their actions in an effort to defend themselves in the 2006 action commenced against them. Plaintiff's proposed pleadings refer vaguely to "willful," and "unlawful, improper, intentional acts," by "Defendants" (Proposed Amd. Cplt., ¶¶ 41 and 51, respectively). The pleadings fail to state what exactly these "acts" are, and when they allegedly occurred. Such alleged "acts" by the BURKE Defendants certainly do not give rise to standards of punitive damage awards under New York law.

As noted in the BURKE Defendants' memorandum of law in support of their motion to dismiss, and is still the case under Plaintiff's proposed Amended Complaint, Plaintiff fails to allege any tortious conduct by the BURKE Defendants directed against the public generally. The BURKE Defendants have simply sought to defend another action against them, a right they undeniably possess. Moreover, the proposed pleadings fail to allege conduct by the BURKE Defendants rising to the level of a high degree of moral turpitude, evil motives, or wanton dishonesty as to imply a criminal indifference to civil obligations. Plaintiff simply does not, and cannot, allege conduct by the BURKE Defendants, or any of the defendants, which reaches the strict standard required of an award for punitive damages. For the foregoing reasons, punitive damages should not be awarded to the Plaintiff.

POINT II

PLAINTIFF HAS FAILED TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE A SUBSTANTIAL BASIS IN FACT OR LAW FOR ITS CLAIM

Plaintiff's primary motivation in this matter has been and continues to be to intimidate, bully, and silence the BURKE Defendants in the 2006 action. Plaintiff's complaint, even as amended, constitutes an impermissible Strategic Lawsuit Against Public Participation (SLAPP suit), based upon the provisions of Civil Rights Law § 76-a, subject to dismissal pursuant to CPLR § 3211(g), relative to the plaintiff's then pending site approval application before the Town of Bedford. Plaintiff's motivation has been and continues to be that a baseless claim for $60,000,000 in damages, where the plaintiff has already been approved to develop residential homes, will force the BURKE Defendants to succumb to the plaintiff's claimed right of easement as alleged in the 2006 action.

As has been addressed more fully infra, the BURKE Defendants contend that they did not "join" in any application for a preliminary injunction and alternatively, that their purported "joinder" is a communication that is absolutely privileged. Plaintiff's amended pleading asserts that the BURKE Defendants communicated the existence of a preliminary injunction to unknown, unnamed third-parties at a time and place that has not been identified in the plaintiff's amended pleading. Even if such a communication occurred, it is respectfully submitted that that is precisely the type of communication, which the provisions of Civil Rights Law § 76-a, were intended to protect, relative to the plaintiffs' then pending application for site approval. The BURKE Defendants should not be subject to a lawsuit, egregiously claiming $60,000,000 in damages as a means of silencing what the plaintiff's own survey establishes is a vested property interest in their own backyard.

Moreover, plaintiff's opposition to the Burke defendant's motion to dismiss, simply ignores the provisions of CPLR § 3211(g), requiring the plaintiff to demonstrate

by clear and convincing evidence that the plaintiff's claim, even as amended, has a substantial basis in law or fact. Indeed, where a moving party demonstrates that an action is a SLAPP suit, the Court must dismiss the action unless the responding party demonstrates that the claim has substantial basis in law or fact. *See*, CPLR § 3211(g); Matter of Related Properties, Inc., v. Town Board of Town/Village of Harrison, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dep't 2005). Indeed, the Legislature viewed "'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply." *See*, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B. In this regard, the plaintiff's pleading requirements are more stringent.

Here, the plaintiff has failed to demonstrate by clear and convincing evidence that the plaintiff's claim is substantially based in law or fact. Rather, the plaintiff's complaint, as amended, is purposefully drafted as a *prima facie* tort, which plaintiff has attempted to utilize the proverbial dumping ground for his baseless claim and this retaliatory litigation. Since the plaintiff has failed to establish by clear and convincing evidence that the complaint, even as amended, has any substantial basis in law or fact, this Court must dismiss the complaint and/or deny the plaintiff leave to amend its complaint.

CONCLUSION

For the foregoing reasons, the plaintiff's cross-motion for leave to amend should be denied and the BURKE Defendants' motion should be granted in its entirety. The plaintiff's complaint should be dismissed in its entirety.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: _____

JANINE A. MASTELLONE
Attorneys for Defendants ROBERT BURKE and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

TO: DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Krissie Taylor, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Westchester County;

That on the 19th day of February, 2010, deponent served the within document(s) entitled Memorandum of Law in Further Support of the Burke Defendants' Motion to Dismiss the Complaint and In Opposition to Plaintiff's Motion for Leave to Amend Its Complaint upon:

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE Attention: John Kirkpatrick, Esq. 120 Bloomingdale Road White Plains, New York 10605 (914) 422-3900	Benowich Law, LLP Attorneys for Defendant THE NATURE CONSERVANCY Attention: Leonard Benowich, Esq. 1025 Westchester Avenue White Plains, New York 10604 (914) 946-2400

at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a properly addressed Federal Express wrapper, in an official depository under the exclusive care and custody of Federal Express within the State of New York.

Krissie Taylor

Sworn to before me this
22nd day of February 2010

JANINE A. MASTELLONE
Notary Public, State of New York
No. 02MA616020
Qualified in Putnam County
Commission Expires Feb. 12, 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC, Plaintiff, - against - THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE, Defendants.	**Index No.: 21162/09** **AFFIRMATION IN FURTHER SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND**

JANINE A. MASTELLONE, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under the penalty of perjury:

1. I am associated with the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, attorneys for the defendants, ROBERT BURKE and TERI BURKE ("the BURKE defendants"). I am familiar with the facts and circumstances of this matter, based upon a review of the file maintained by this office.

2. This Affirmation is respectfully submitted in further support of the BURKE defendants' application, for an Order pursuant to CPLR § § 3211(a)1, 7 and 3211(g), seeking dismissal of the plaintiff's complaint and in opposition to the plaintiff's cross-motion seeking leave to amend the complaint. As will be set forth more fully in the accompanying memorandum of law, the plaintiff's amended complaint is nothing more than an unsuccessful attempt to allegedly cure glaring defects in the purported claims asserted in the original complaint.

3. In sum, plaintiff's *prima facie* tort appears to be a request for relief relative to the issuance of a Preliminary Injunction in the 2006 action. As a matter of law, there is no cause of action for damages relative to the issuance of a preliminary injunction. Rather, plaintiff's remedy was to either to perfect his appeal or to pursue the undertaking posted in conjunction

with the Preliminary Injunctive Order. Attached hereto as Exhibit "1" is a copy of the plaintiff's Notice of Appeal relative to the issuance of the Preliminary Injunction Order.

4. Plaintiff's time to appeal has long since expired and as such, the plaintiff is attempting to circumvent the expiration of his appeal time by filing the instant baseless amended complaint.

5. Even if this Court finds that the plaintiff is not barred from asserting a claim for relief relative to the issuance of the preliminary injunction at the outset, plaintiff's purported claim is time barred and fails to state any legally cognizable claim against the BURKE defendants. Plaintiff simply cannot establish the necessary elements of a *prima facie* tort.

6. The BURKE defendants have not interfered or prevented the plaintiff from developing the subject parcel in any manner. A copy of the Findings Statement from the Town of Bedford is attached hereto as Exhibit "2".

WHEREFORE, it is respectfully requested that the plaintiff's cross-motion seeking leave to amend be denied and that the plaintiff's complaint be dismissed in its entirety and for such other, further and different relief as this Court deems just and proper.

Dated: White Plains, New York
February 19, 2010

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

JANINE A. MASTELLONE
Attorneys for Defendants ROBERT BURKE
and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

TO: DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Index No. 9130/06

Plaintiff,

NOTICE OF APPEAL

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

PLEASE TAKE NOTICE that Plaintiff, SEVEN SPRINGS, LLC, by its attorneys DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, from each and every part of the Order of the Honorable Rory J. Bellantoni dated April 14, 2008 and entered in the office of the County Clerk of Westchester County on April 14, 2008.

Dated: White Plains, New York
May 9, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: Roosevelt & Benowich, LLP
Attorneys for Defendant
The Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

1244370
0143500-001

Stephens Baroni Reilly & Lewis, LLP
Attorneys for Defendant
Town of North Castle
175 Main Street
White Plains, New York 10601
(914) 761-0300

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants Burke and Donohoe
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

AT the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on April 14, 2008

PRESENT: HON:

RORY J. BELLANTONI,

Acting Justice.

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No. 9130/06

ORDER GRANTING PRELIMINARY INJUNCTION

Defendant The Nature Conservancy ("TNC") having moved this Court, by order to show cause dated March 18, 2008, for a temporary restraining order and preliminary injunction ("Motion"), and this matter having come on to be heard before the Court on March 18, 2008 and on April 4, 2008, and the Court having considered the following papers in support of and in opposition to the Motion, all with due proof of service thereof: (1) the Order to Show Cause dated March 18, 2008, supported by the Affirmation of Leonard Benowich, Esq., dated March 13, 2008, the Affidavit of Amy Fenno, sworn to March 11, 2008, and the Affidavit of Jamie Norris, sworn to March 13, 2008, together with Exhibits 1-18 annexed thereto, and a

memorandum of law dated March 13, 2008, in support of the Motion; (2) the affidavit of Alfred Donnellan, Esq., sworn to March 17, 2008, and Exhibits A-E annexed thereto (on behalf of Plaintiff Seven Springs, LLC), and a memorandum of law dated March 17, 2008, in opposition to the Motion; (3) the Affidavit of Alfred Donnellan, Esq., sworn to March 26, 2008, and Exhibits A-G thereto (on behalf of Plaintiff Seven Springs, LLC) and a memorandum of law dated March 26, 2008, in opposition to the Motion; (4) the Reply Affirmation of Leonard Benowich, dated April 2, 2008, and Exhibits 19-22 annexed thereto, and a reply memorandum of law dated April 2, 2008, in support of the Motion; (5) the affirmation of John B. Kirkpatrick, Esq., sworn to April 2, 2008 (on behalf of defendants Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe), in support of the Motion; and (6) the affirmation of Gerald D. Reilly, Esq., dated April 2, 2008 (on behalf of defendant The Town of North Castle), in support of the Motion; and the parties, by their respective counsel, having been heard on March 18, 2008 in support of and in opposition to TNC's application for a temporary restraining order; and the Court having issued a temporary restraining order on March 18, 2008, and having directed that the parties appear on April 4, 2008 for oral argument of that portion of the Motion which sought a preliminary injunction; and the parties, by their respective counsel, having appeared before this Court for oral argument with respect thereto; and the Court, after hearing the arguments of counsel and upon due deliberation and consideration of the foregoing, having rendered its decision on the record of the proceedings held on April 4, 2008;

NOW, on Motion of BENOWICH LAW, LLP, counsel of record for defendant TNC, it is hereby

ORDERED, that TNC's Motion for a preliminary injunction is granted; and it is further

ORDERED, that during the pendency of this action, Plaintiff, its agents, employees and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing, be and they hereby are preliminarily enjoined from:

(a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and

(b) performing any work upon any land owned by TNC, including that portion of Oregon Road which ~~is~~ lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal); and it is further

ORDERED, that within ten (10) days of service of a copy of this order with notice of entry, TNC shall give and file an undertaking in the amount of One Hundred Thousand Dollars ($100,000).

ENTER:

Rory J. Bellantoni, A.J.S.C.

C:\Main Files\TNC\SEVEN SPRINGS\Litigation\TROUPI ORDER.wpd

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

Index No.: 9130/06

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- [X] Civil Action
- [ ] CPLR article 75 Arbitration
- [ ] CPLR article 78 Proceeding
- [ ] Special Proceeding Other
- [ ] Habeas Corpus Proceeding

Filing Type

- [✓] Appeal
- [ ] Original Proceeding
- [ ] Transferred Proceeding
- [ ] CPLR 5704 Review

Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.

A. Administrative Review

- [ ] 1 Freedom of Information Law
- [ ] 2 Human Rights
- [ ] 3 Licenses
- [ ] 4 Public Employment
- [ ] 5 Social Services
- [ ] 6 Other

B. Business & Other Relationships

- [ ] 1 Partnership/Joint Venture
- [ ] 2 Business
- [ ] 3 Religious
- [ ] 4 Not-for-Profit
- [ ] 5 Other

C. Contracts

- [ ] 1 Brokerage
- [ ] 2 Commercial Paper
- [ ] 3 Construction
- [ ] 4 Employment
- [ ] 5 Insurance
- [ ] 6 Real Property
- [ ] 7 Sales
- [ ] 8 Secured
- [ ] 9 Other

D. Domestic Relations

- [ ] 1 Adoption
- [ ] 2 Attorney's Fees
- [ ] 3 Children - Support
- [ ] 4 Children - Custody/Visitation
- [ ] 5 Children - Terminate Parental Rights
- [ ] 6 Children - Abuse/Neglect
- [ ] 7 Children - JD/PINS
- [ ] 8 Equitable Distribution
- [ ] 9 Exclusive Occupancy of Residence
- [ ] 10 Expert's Fees
- [ ] 11 Maintenance/Alimony
- [ ] 12 Marital Status
- [ ] 13 Paternity
- [ ] 14 Spousal Support
- [ ] 15 Other

E. Miscellaneous

- [ ] 1 Constructive Trust
- [ ] 2 Debtor & Creditor
- [ ] 3 Declaratory Judgment
- [ ] 4 Election Law
- [ ] 5 Notice of Claim
- [ ] 6 Other

F. Prisoners

- [ ] 1 Discipline
- [ ] 2 Jail Time Calculation
- [ ] 3 Parole
- [ ] 4 Other

G. Real Property

- [ ] 1 Condemnation
- [X] 2 Determine Title
- [X] 3 Easements
- [ ] 4 Environmental
- [ ] 5 Liens
- [ ] 6 Mortgages
- [ ] 7 Partition
- [ ] 8 Rent
- [ ] 9 Taxation
- [ ] 10 Zoning
- [ ] 11 Other

H. Statutory

- [ ] 1 City of Mount Vernon Charter §§ 120, 127-f, or 129
- [ ] 2 Eminent Domain Procedure Law § 207
- [ ] 3 General Municipal Law § 712
- [ ] 4 Labor Law § 220
- [ ] 5 Public Service Law §§ 128 or 170
- [ ] 6 Other

I. Torts

- [ ] 1 Assault, Battery, False Imprisonment
- [ ] 2 Conversion
- [ ] 3 Defamation
- [ ] 4 Fraud
- [ ] 5 Intentional Infliction of Emotional Distress
- [ ] 6 Interference with Contract
- [ ] 7 Malicious Prosecution/ Abuse of Process
- [ ] 8 Malpractice
- [ ] 9 Negligence
- [ ] 10 Nuisance
- [ ] 11 Products Liability
- [ ] 12 Strict Liability
- [ ] 13 Trespass and/or Waste
- [ ] 14 Other

J. Wills & Estate

- [ ] 1 Accounting
- [ ] 2 Discovery
- [ ] 3 Probate/Administration
- [ ] 4 Trusts
- [ ] 5 Other

V2.0.060203

Appeal

Paper Appealed From (check one only):

☐ Amended Decree	☐ Determination	☑ Order	☐ Resettled Order
☐ Amended Judgment	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme	County: Westchester
Dated: April 14, 2008	Entered: April 14, 2008
Judge (name in full): Rory J. Bellantoni	Index No.: 9130/06
Stage: ☒ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ☐ Yes ☒ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ☐ Yes ☐ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed. Defendant The Nature Conservancy ("TNC") moved for a temporary restraining order and preliminary injunction pursuant to CPLR §6301 restraining and enjoining Plaintiff, its agents, employees, and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing from:(a) entering upon the lands owned by [TNC] and maintained by [TNC] as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon the same, and (b) performing any work upon any land owned by [TNC] including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action. The Order of the lower Court granted TNC's motion, and directed TNC to file an undertaking in the amount of $100,000.00.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

Whether the Court below erred in granting TNC's motion?

Whether TNC demonstrated its right to injunctive relief by establishing a likelihood of success on the merits, irreparable harm and a balancing of the equities in its favor?

Whether the lower court erred in limiting the amount of the undertaking required to be filed by TNC to $100,000.00.

Issues Continued:

Use Form Before Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	Seven Springs, LLC	Plaintiff	Appellant
2	The Nature Conservancy	Defendant	Respondent
3	Realis Associates	Defendant	Non-Party
4	The Town of North Castle	Defendant	Respondent
5	Robert Burke and Teri Burke	Defendant	Respondent
6	Noel B. Donohoe and Joann Donohoe	Defendant	Respondent
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: DelBello Donnellan Weingarten Wise & Wiederkehr, LLP

Address: One North Lexington Avenue

City: White Plains State: NY Zip: 10601 Telephone No.: 914-681-0200

Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

Attorney/Firm Name: Benowich Law, LLP

Address: 1025 Westchester Avenue

City: White Plains State: NY Zip: 10604 Telephone No.: 914-946-2400

Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 2

Attorney/Firm Name: Stephens Baroni Reilly & Lewis, LLP

Address: 75 Main Street

City: White Plains State: NY Zip: 10601 Telephone No.: (914) 761-0300

Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 4

Attorney/Firm Name: Oxman Tulis KirkPatrick Whyatt & Geiger, LLP

Address: 120 Bloomingdale Road

City: White Plains State: NY Zip: 10605 Telephone No.: (914) 422-3900

Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 5 6

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in §670.3 of the Rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed in an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention (Form A) with this document, (2) any required Additional Appeal Information Forms, Form B, (3) any required Additional Party and Attorney Information Forms, Form C, (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance. If any of the

Poor Quality

Exhibit 2

Final 6/3/09

FINDINGS STATEMENT
SEVEN SPRINGS SUBDIVISION AND EQUESTRIAN FACILITY
TOWN OF BEDFORD, NEW YORK

I. INTRODUCTION

This document is a Findings Statement prepared pursuant to and as required by Part 617.11 of NYCRR Part 617, Title 6 (the Statewide regulations implementing the New York State Environmental Quality Review Act). This Findings Statement pertains to the environmental review of the proposed Seven Springs Subdivision. This Findings Statement draws upon the facts and conclusions in the Draft Environmental Impact Statement (DEIS) accepted by the Lead Agency on June 10, 2008 and the Final Environmental Impact Statement (FEIS) accepted by the Lead Agency on March 27, 2009.

This Findings Statement attests to the fact that the Town of Bedford Planning Board, acting as Lead Agency in the environmental review of this matter, has complied with all of the applicable procedural requirements of Part 617 in reviewing this matter, including but not limited to the following:

- Circulation of Notice of Intent to be Co-Lead Agency for the two-town subdivision plan by the Planning Boards of the Towns of Bedford and North Castle on May 14, 2004;

- Designation of the Town of Bedford Planning Board and the Town of North Castle Planning Board as the Co-Lead Agency on June 14, 2004;

- Issuance of a Positive Declaration on June 14, 2004 by the Co-Lead Agency and direction to prepare a Draft Environmental Impact Statement ("DEIS");

- Holding of a public Scoping Session for the DEIS by the Co-Lead Agency on June 29, 2004;

- Preparation of a DEIS by the Applicant;

- Review by the Co-Lead Agency of multiple drafts of the proposed DEIS with respect to completeness;

- Withdrawal by the applicant of all applications to the Town of North Castle on August 10, 2007;

- Circulation of Notice of Intent to be sole Lead Agency for the proposed Bedford only subdivision plan by the Town of Bedford Planning Board on October 30, 2007;

- Acceptance of the DEIS for the Bedford only plan by the Lead Agency and the filing of the DEIS and Notice of Completion on June 10, 2008;

- Holding of a Public Hearing on the DEIS by the Lead Agency on July 29, 2008;

- Closing of the Public Hearing on the DEIS on July 29, 2008 and the establishment of a public comment period on the DEIS for submission of additional written comments ending on August 29, 2008:

  Preparation of a FEIS by the applicant;

- Review by the Lead Agency of two drafts of the proposed FEIS with respect to completeness;

- Acceptance of the Final Environmental Impact Statement ("FEIS") by the Lead Agency and the filing of the FEIS and Notice of Completion on March 27, 2009 and the establishment of a public comment period on the FEIS for the submission written comments ending on April 30, 2009;

- Review and consideration of comments submitted by Involved Agencies, Interested Agencies and members of the public in writing and at public meetings throughout the course of the environmental review process; and

- Preparation and adoption of this Findings Statement by the Lead Agency.

This Findings Statement also attests to the fact that the Lead Agency has given due consideration to the Environmental Impact Statement (EIS) prepared in conjunction with this action and the public comments submitted on the same. Furthermore, this Findings Statement contains the facts and conclusions in the EIS that were relied upon by the Lead Agency to support its decisions and indicates the social, economic and other factors and standards that form the basis for its decisions.

A. Site Description

The site of the proposed Seven Springs Residential Subdivision and Equestrian Facility is the 80.5-acre Bedford portion of the 213-acre former Eugene and Agnes Meyer estate located in northern Westchester County at the intersection of the Towns of Bedford, North Castle and New Castle. This part of the estate is generally bordered on the north by approximately 920 feet of frontage on Oregon Road (in the Town of Bedford); on the east by approximately 1400 feet of Byram Lake watershed lands owned by the Village of Mount Kisco; on the south by the town boundary between the Towns of Bedford and North Castle; on the west by a single-family residence on a 10 acre parcel.

The area surrounding the site to the north, west and south is composed principally of nature preserves, parkland and low-density residential development. In addition to the 247-acre Eugene and Agnes Meyer Nature Preserve located to the south and southwest of the site, other major open space parcels in the vicinity include the 358-acre Arthur W. Butler Memorial Sanctuary, the 100-acre Marsh Sanctuary and the 100-acre Merestead estate that is now Westchester County parkland. The closest residential areas to the west include a 10-acre parcel that is surrounded by the site on three sides and is developed with a single-family residence and several accessory buildings as well as four other single-family residences located along or near Oregon Road in the Town of Bedford. To the west, existing single-family residential development exists along Sarles Street and Bretton Ridge Road in the Town of New Castle. Since the Eugene and Agnes Meyer Nature Preserve abuts the site to the south and southwest, the nearest residential development in the Town of North Castle is located further to the southwest along Sarles Street and approximately 800 feet to the south of the site on Oregon Hollow and Oregon Road.

The 80.5 acre Bedford portion of the site is located in the R-4A District, a zoning designation permitting single-family residential development on a minimum lot size of four acres. The 97.8-acre North Castle portion of the site is located within an R-4A District. The 31.5 acre New Castle portion of the site are located within an R-2A District, permitting single-family residential development on a minimum lot size of two acres.

The Bedford portion of the site is predominantly open fields and moderate terrain. The site contains areas of landscaped estate grounds, open meadows, an open wetland, an old orchard and many stonewalls. The high point of the site is at elevation 758 (feet above sea level) and is located on a knoll near the North Castle border at an existing stone water tower. The low point of the site is at approximately elevation 525 and is located at the southeasterly corner of the property adjacent to Byram Lake. Approximately 82 percent of the site contains slopes of 0-15 percent; another 10 percent of the site contains slopes of 15-25 percent; and the remaining 8 percent of the site contains slopes of 25 percent or steeper.

Two separate Town-regulated wetland areas on the site total approximately 0.43 acres. Approximately 37 percent of the greater, three-town site drains to the Kisco River and is therefore within the New York City Croton Watershed. Another 56 percent of the site drains to Byram Lake and is therefore within the watershed of the Village of Mount Kisco's water supply reservoir (which has been designated as a Critical Environmental Area (CEA) by the Town of Bedford and Westchester County). The remaining 7 percent of the site drains to the Wampus River and eventually to Long Island Sound.

The existing structures on the Bedford portion of the site include a farmhouse constructed prior to 1851, a caretaker's house, a large barn complex, carriage barn, greenhouse and garden buildings, a stone water tower, root cellar, and Nonesuch, a Tudor style stone residence with a courtyard and a tennis court.

B. Project History

The Applicant first submitted applications for approval to the Towns of Bedford, North Castle and New Castle in June 1996 for the development of the site as a private membership club which was to include an 18-hole golf course with pro shop, putting green, practice range, short game practice area and maintenance building; a clubhouse in the former Seven Springs estate house with dining facilities, lounge areas, locker rooms and overnight suites accommodating up to 12 club members; a separate guest house in the existing Nonesuch estate house with overnight suites accommodating up to 12 club members, a swimming pool and a tennis court; parking areas and appurtenant facilities; and the construction of nine single-family residences.

The Applicant proposed to sponsor professional golf tournaments at the site, which would have been open to the public. Part of the golf club, including the clubhouse and the maintenance area, and two single-family residences were to be located in the Town of North Castle. Part of the golf club, all of the Nonesuch facilities and one single-family residence were to be located in the Town of Bedford. Six single-family residences were to be located in the Town of New Castle. Primary access to the golf club was to be provided from the existing site driveway on Oregon Road. Access to the residential development in New Castle and North Castle was to be provided from a new subdivision road intersecting with Sarles Street in the Town of New Castle. Although that proposal also involved a connection of the proposed subdivision road to Oregon Road in the Town of Bedford, through traffic between Sarles Street in New Castle and Oregon Road in Bedford would not have been possible since the installation of gates and gatehouses at either end of the new subdivision road was proposed. The Draft Environmental Impact Statement prepared for this golf course project and accepted by the then Co-Lead Agency, consisting of the Bedford Zoning Board of Appeals, New Castle Planning Board and North Castle Town Board, in August 1998 was based upon the original development concept proposed by the Applicant ("the DEIS Site Plan").

Following the close of the public hearing on the DEIS and the expiration of the public comment period in November 1998, the Applicant was directed to prepare a Final Environmental Impact Statement (FEIS) for consideration by the Co-Lead Agency. Prior to submission of the first draft of the FEIS, the Applicant notified the Co-Lead Agency that it had modified the proposed development concept for the project in response to comments by the reviewing agencies and the public, and in order to avoid or further mitigate potential impacts of the proposal on the site and the community. The Applicant further advised the Co-Lead Agency that it would describe those project modifications in the FEIS.

The principal modification to the original golf course plan proposed by the Applicant was the elimination of the eight single-family residences in the Towns of New Castle and North Castle and the elimination of the new subdivision road intersecting with Sarles Street. The Applicant also stated that it planned to convey all of the New Castle land to The Nature Conservancy or another similar conservation organization, subject to a restrictive declaration intended to protect that land in its natural state in perpetuity. Other significant modifications proposed by the Applicant included elimination of all professional tournaments and events involving paid admission, spectator gallery; separate short game area; revision of Golf Holes #10, #11, #12 and #15, redesign of the Nonesuch area in the Town of Bedford, including provision of a separate driveway access to Oregon Road in the Town of Bedford; addition of restrictions on the use of the driveway from Oregon Road in the Town of Bedford to the maintenance area; and the provision of an additional emergency access connection to the site from the existing driveway behind Nonesuch. The Final Environmental Impact Statement prepared for this project and accepted by the Co-Lead Agency in November 2000 was based upon the modified plan proposed by the Applicant ("the FEIS Site Plan").

Based upon the modified golf course plan, the Applicant formally withdrew its applications for a subdivision plat, wetlands permit, steep slope permit and tree removal permit in the Town of New Castle. Subsequently, the Town of New Castle also withdrew as a member of the Co-Lead Agency subject to the stipulation, among other conditions, that gave the Town of New Castle the right to rejoin the Co-Lead Agency as a fully participating member in the event that the Applicant further modified the proposed development concept during the course of the SEQRA review by the Co-Lead Agency so as to require a regulatory permit or approval from the Town of New Castle.

A Findings Statement prepared in accordance with SEQR regulations was adopted by the Co-Lead Agency for the modified plan on April 25, 2002. The Bedford Planning Board was not part of the Co-Lead Agency and did not approve a Findings Statement for the golf course.

In March 2004 a different development plan for the property was submitted to the Towns

of Bedford and North Castle. This plan consisted of a single-family residential subdivision containing 8 single-family lots in Bedford and 9 single-family lots in North Castle. The North Castle portion of this plan was withdrawn in August 2007.

II. PROPOSED ACTION

A. Project Description

The Proposed Action is a residential subdivision of the Bedford portion of the Seven Springs site into nine lots: seven lots for new single-family residences ranging in size from 6.65 to 11.26 acres, one lot for the existing "Nonesuch" home (8.31 acres) and one lot for a private equestrian facility with staff housing (9.03 acres). The existing large barn complex will be renovated and re-used as the equestrian facility. The white farmhouse will also be preserved and renovated for use as a homeowner's association common facility. The carriage barn will be replaced with a staff housing facility incorporating four studio apartments with a central kitchen designed to occupy the same general footprint as the existing building and to be in character with the existing farm structures.

Access to Lots B1 and B2, the existing Nonesuch lot, will be over Oregon Road, an existing public road. Access to all other lots is proposed over a new private road intersecting Oregon Road (north), an existing public road in the Town of Bedford. The Meyer estate house will remain on the existing 103.8-acre lot in the Town of North Castle with access over its existing driveway from the proposed new private road in Bedford.

The proposed new private road is designed to conform to all Bedford town road standards except pavement width and length. Waivers for both pavement width and road length will be requested from the Planning Board. Under the Town of Bedford Subdivision Regulations, a dead-end road cannot serve more than fifteen homes, however the Planning Board may waive this requirement. Nine existing homes on Oregon Road, two existing homes on the property (Nonesuch and the Meyer estate) and seven new homes would be served by the new private road. No access to the North Castle portion of the site is proposed.

The 28.7-acre portion of the site in the Town of New Castle is not currently proposed to be developed. However, to ensure that potential future cumulative impacts are addressed, a hypothetical 5-lot subdivision of that portion was analyzed in the DEIS. Similarly, although no new development is currently proposed in North Castle, potential future cumulative impacts of a hypothetical subdivision are analyzed in the DEIS.

A homeowner's association (HOA) will be formed, subject to the approval of the New York Attorney General's office. All lots including the Meyer estate lot will be members

of the HOA, be subject to its rules and regulations and will own fee title to their individual lot plus an interest in common with all other lot owners in all HOA property. The private road will be maintained by a company owned by Donald Trump or its assignees. This company will have the obligation to maintain the on-site detention basin located on lot #B4 and will also be responsible to implement and enforce the Residential Lawn Management Plan (RLMP).

The equestrian facility will be owned and operated by a company owned by Donald Trump. The company will enter into a continuing contract with the homeowners, through the homeowner's association, which will set forth the obligations and benefits of all parties. The company will perform all functions necessary to board the horses and to maintain the facility.

The applicant has agreed that there will be no further subdivision of the Bedford portion of the site into additional building lots. This restriction will be indicated on the subdivision plat and by separate recorded agreement.

Water supply to the proposed lots will be provided by private, individual wells. Sewage from all lots will be treated in conventional subsurface sewage disposal systems. Both water supply and sewage disposal systems will be approved by the Westchester County Department of Health.

B. Required Approvals

The Proposed Action requires the following approvals:

1. **Town of Bedford Zoning Board of Appeals**
   Variance approvals for lot coverage for Lot B2 and for equestrian facility and staff housing on Lot B4 pursuant to Chapter 125 (Zoning).

2. **Town of Bedford Planning Board**
   Special Permit approval for equestrian facility and staff housing pursuant to Chapter 125 (Zoning) of the Bedford Town Code.
   Subdivision approval pursuant to Chapter 107 (Subdivision of Land) of the Bedford Town Code, including waiver for road pavement width and road length.
   Steep Slope Permit approval pursuant to Chapter 102 (Steep Slopes) of the Bedford Town Code.
   Tree Removal Permit approval pursuant to Chapter 112 (Tree Preservation) of the Bedford Town Code.
   Review and approval of Stormwater Pollution Prevention Plan pursuant to Chapter 103 (Stormwater Management) of the Bedford Town Code.

3. **Town of Bedford Historic Building Preservation Commission**
   Demolition permit for carriage barn.

4. **Town of Bedford Wetlands Control Commission**
Wetlands Permit approval pursuant to Chapter 122 (Wetlands) of the Bedford Town Code if a regulated act is proposed.

5. **New York City Department of Environmental Protection (NYCDEP)**
Approval of Stormwater Pollution Prevention Plan (SWPPP) for stormwater discharges within New York City Croton Watershed areas of the site.

6. **Westchester County Department of Health (WCDOH)**
Subsurface sewage treatment system (SSTS) approvals for maintenance area and the one single-family residence.
Water supply (well) approvals.
Approval of Realty Subdivision.

7. **Westchester County Planning Department**
Advisory review.

8. **Westchester County Soil/Water Conservation District**
Advisory review.

9. **New York State Department of Environmental Conservation (NYSDEC)**
Approval of General State Pollution Discharge Elimination System (SPDES) Permit and Stormwater Pollution Prevention Plan (SWPPP) for stormwater discharges.

10. **NYS Office of Parks, Recreation and Historic Preservation (NYSSOPRHP)**
Cultural resources review.

III. ENVIRONMENTAL IMPACTS OF PROPOSED ACTION

A. Geology and Soils

1. Impacts and Proposed Mitigation

The 80.5-acre Bedford portion of the site contains nine different soils types, including Charlton-Chatfield, Chatfield-Hollis Paxton and Woodbridge soils. The site's surface features are predominantly flatter terrain previously used for farming or residential lawn. Soil limitations on the development of this property pertain mostly to slopes and a few areas of shallow depth to bedrock.

According to the test boring reports, the subsurface soils encountered on the site are suitable for the proposed development. Rock may be encountered at some of the cut locations may need to be removed. In areas where fill is required, it can be placed after stripping the topsoil and rolling the subgrade. The silty sand, gravelly

silty sand, decomposed rock and the excavated rock can be used as new fill for both building areas and the general site work.

With excavation for ponds and utility lines and the construction of access drives and foundations, some blasting was originally anticipated to occur on the site. Based on comments received from the public on the DEIS, the Planning Board discussed this topic at several public Planning Board meetings. As a result of this discussion, the applicant has engaged the services of an additional civil engineer to evaluate this subject. Based on this review, the applicant has stated that no blasting is anticipated to construct the proposed project (FEIS, p. 43). With respect to blasting near the easterly side of the property near Byram Lake, the applicant has stated conclusively that no blasting will occur "at the crest of the slope overlooking Byram Lake" (FEIS, p. 34). The Planning Board has determined that no blasting will be permitted on this property under this approval process. Any blasting proposed by the applicant at a later time will require a new application to the Planning Board with required review under the Town of Bedford Blasting Law, the New York State Environmental Quality Review Act and all other applicable regulations.

Portions of virtually all of the identified soil types on the site, with the exception of Sun Loam (Sm), Hollis Rock outcrop complex (Hrf) and Chatfield-Hollis rock out outcrop complex (Ctc), will be affected to some degree by the construction of the proposed residential subdivision. Existing soils will be graded and shaped to achieve the proposed road, house sites, septic fields and stormwater detention areas.

Based upon the Subdivision Plan, it is estimated that approximately 33.6 acres of the 80.5-acre site would be temporarily disturbed, approximately 42 percent of the site. Of this area, the construction of the proposed infrastructure would impact 1.23 acres of slopes greater than 25%. The proposed home design plan would impact 2.03 acres of slopes 25% or greater. A Steep Slopes Permit from the Planning Board will be required for these areas. Based on the preliminary grading plan submitted by the applicant, the necessary earthwork will be balanced (FEIS, p. 8).

Where slopes are proposed to be disturbed, proactive stabilization methods, both temporary and permanent, will be used as a part of a comprehensive soil erosion and sedimentation control plan. Unless prior written approval is obtained from the Town, the amount of soil disturbance at any one time will be limited to no more than five acres in accordance with SPDES General Permit GP-0-08-001.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will not require blasting for its construction.

- Disturbance of existing soils will be required for construction of the subdivision road and buildings. The amount of disturbance proposed for the proposed subdivision is typical for this type of project.

- Prior to the signing of the Final Plat the applicant will be required to submit final plans for soil erosion and sediment control for review and approval.

- The Proposed Action will adequately avoid or mitigate potential impacts on geology and soils.

B. Topography and Slopes

1. Impacts and Proposed Mitigation

Potential impacts to slopes and topography, such as sedimentation and soil erosion, could occur during construction of the proposed development as soils are cut and filled to install the private road, drainage facilities and home sites.

Based upon the Subdivision Plan, it was estimated that approximately 33.6 acres of the 80.5-acre site would be temporarily disturbed, approximately 42 percent of the site. Of this area, the construction of the proposed infrastructure would impact 1.23 acres of slopes greater than 25%. The proposed home design plan would impact 2.03 acres of slopes 25% or greater. A Steep Slopes Permit from the Planning Board will be required for these areas. Based on the preliminary grading plan submitted by the applicant, the necessary earthwork will be balanced (FEIS, p. 8).

A comprehensive Soil Erosion and Sedimentation Control Plan will be implemented prior to the commencement of any grubbing, grading or construction on the site. This plan will remain in place and will be monitored and maintained for the duration of the construction process.

Much of the concern expressed at the numerous meetings held by the Planning Board on this proposal have been over potential impacts to the slope above Byram Lake, most of which is not located on the applicant's property.

The proposed Subdivision Plan indicates no construction on the steep slopes adjacent to Byram Lake. There will no blasting anywhere on the property. The nearest construction of any type would be the creation of a raised berm to intercept surface drainage which, at all points, is located at least 550 feet from the edge of

Byram Lake and is at least 150 feet from any slopes over 25% leading to Byram Lake, both distances measured horizontally.

The proposed residential subdivision and equestrian facility will change the nature of vegetative cover on various areas of the site. The runoff coefficients for the different areas have been carefully studied to determine that the proposed development will result in no significant change in the peak rate of runoff to Byram Lake. The runoff coefficient for the drainage area above the slope will not be significantly different from that which currently exists at that part of the site, thereby resulting in no significant change in the peak rate of runoff in those areas. Therefore, the modification of cover type will not influence the conditions of the slope.

As part of the overall Stormwater Management Plan for the proposed development, water will be diverted away from the eastern slope of the site so that the total volume of runoff that reaches Byram Lake via that slope will be less under post-development conditions than under pre-development conditions. However, the total volume of water reaching Byram Lake from all sources will remain unchanged. Where runoff is collected to a central point or discharged to a concentrated point, a level spreader or other device will be used to distribute the water from the detention pond across portions of the slope. This will reduce potential impacts to the slope.

2. Discussion and Findings

The Lead Agency finds that:

- Prior to the approval of the Preliminary Subdivision Plat, the Applicant will be required to submit for review and approval by the Planning Board of final plans concerning soil erosion and sediment control as well as a final stormwater drainage plan for the site.
- The Proposed Action will adequately avoid or mitigate potential impacts on topography and slopes.

C. Ground Water Resources

1. Impacts and Proposed Mitigation

Extensive hydrogeologic investigations have been conducted to evaluate the potential impacts to ground water quality and quantity, and to determine the extent of hydraulic connection between the site and Byram Lake. The hydrogeologic investigations included:

- Field geologic mapping;
- Fracture trace analyses;

- Well drilling and geologic logging;
- Geophysical surveying;
- Aquifer testing of four individual wells.
- Aquifer testing of four wells simultaneously;
- Ground water level monitoring on-site and off-site;
- Safe yield analyses; and
- Pesticide fate modeling.

The results of the hydrogeologic investigations, as presented in the DEIS, show conclusively that the bedrock aquifer underlying the Seven Springs property is hydraulically isolated from Byram Lake.

Analyses of fracture traces, geologic reconnaissance and geophysical surveying indicate that bedrock structure and fractures at the site run northeast to southwest. Groundwater elevations in monitoring wells adjacent to Byram Lake are over 200 feet above the lake level. Because the lake lies to the east of the site and because of the large difference between on-site groundwater elevations and lake levels, there is little evidence of a hydraulic connection between the fractured bedrock aquifer on the site and Byram Lake to the east.

A series of hydrogeologic investigations was conducted for the previously proposed golf course project to assess existing groundwater resources, to determine their ability to meet irrigation demands and to assess the potential effects of the project on neighboring wells. These investigations included drilling eight on-site test wells, individual and system pumping tests in four of the wells, geophysical surveying of the property to assess subsurface fracturing and evaluating the natural groundwater recharge that occurs on the site.

At the pumping rate of 160 gallons per minute (gpm) for the previously proposed golf course, no drawdown was observed in any of the neighboring wells monitored and there were no observed drawdown effects on Byram Lake. The irrigation, domestic and horse facility demands for the proposed subdivision and equestrian facility during the month of July, the worst case usage month, is approximately 19 gpm. Therefore, the combined pumping rate for the proposed residential subdivision and equestrian facility is substantially less than the originally proposed golf course.

The anticipated demand of the residential and equestrian proposal would utilize only 11 percent of the available annual recharge on the site. The peak water demand usage will occur in July when irrigation water demand is at its highest. Additionally, approximately 80 percent of the groundwater withdrawn for potable use will be recharged back to the aquifer through the use of on-site septic systems.

A Residential Lawn Management Plan (RLMP) was prepared for the project that outlines a site-specific program for the management of lawns through the controlled use of nutrient and pesticide applications (DEIS Appendix E). Further, 7.61 acres of the Bedford portion of the site will be permanently protected by conservation areas restricted by negative covenants and will remain undisturbed. Along with prescribed application schedules and procedures outlined in the RMLP, this open space will significantly reduce the potential for groundwater contamination. The final form of the RLMP is subject to the approval of the Planning Board.

A company owned by Donald Trump or its assignees will administer and enforce the RLMP, however, the declaration of covenants and restrictions will also grant the Town of Bedford the right to enforce the RLMP regulations. An annual report of the work performed in accordance with the RLMP will be filed each year with the Town. The Planning Board will require periodic testing of surface waters leaving the site as a part of the subdivision approval process. Violations of the approved RLMP may be cited by the Town enforcement officer and corrective action required.

2. Discussion and Findings

The Lead Agency finds that:

- The Applicant performed extensive water resources analyses of this site and the neighboring properties. These investigations, in conjunction with the Residential Lawn Maintenance Program (RLMP) developed for the project, were completed to determine the impacts of all facets of the proposed project on the Seven Springs site and surrounding areas and their suitability for the site. Results from the various analyses and predictive models used by the Applicant indicate that the proposed project will not adversely affect the ground water resource features on and around the Seven Springs property. The maintenance program specified in the RLMP will be continued indefinitely. Annual reports as specified in the RLMP will be submitted to the Town.

- The results of the groundwater risk assessment concluded that there are no predicted risks to the groundwater resources on or off the site. Therefore, there are no expected impacts due to groundwater discharges from the site to surface waters entering Byram Lake or the New Croton Reservoir. The Applicant's plan will not adversely impact ground water quality and/or quantity.

- As a condition of any subdivision approval, the Applicant will be required to permanently implement the proposed Residential Lawn Maintenance Program for the site.

- The Proposed Action will adequately avoid or mitigate potential impacts on ground water resources.

D. Surface Water Resources/Stormwater Drainage

1. Impacts and Proposed Mitigation

Surface water resources on the Bedford portion of the Seven Springs site consist mainly of surface and overland runoff in association with seasonal seeps and watercourses. One perennial watercourse, located in the southwesterly corner of the site, crosses a small portion of the site. An intermittent swale runs north to the property's border with Oregon Road through a small wetland. The property serves as the headwaters for three different drainage basins: the Byram Lake Reservoir watershed, the Kisco River watershed and the Wampus River watershed.

Byram Lake located just east of the site and is classified as a Class AA water body by NYSDEC. It serves as the drinking water supply for the Village of Mount Kisco and small areas in the Towns of Bedford and New Castle. Byram Lake is the headwaters for the Byram River, which ultimately discharges into the Long Island Sound. Approximately 118 acres of the total three-town site drain to Byram Lake. Approximately 80 acres of the site lie within the Kisco River Basin, which is part of the New York City Watershed. Approximately 15 acres of the site drains to the Wampus River and eventually to Long Island Sound.

The groundwater quality risk assessment conducted for the proposed development concluded that there are no predicted risks to the groundwater resources on or off the site. Therefore, it is concluded that there are no expected impacts due to groundwater discharges from the site to downstream surface waters.

Based on the proposed Subdivision Plan, impervious surface on the site will increase by approximately 4.5 acres. This figure includes potential tennis courts and swimming pools on each lot and is therefore conservative. Wooded areas will decrease by approximately 7 acres with most of these areas to be redesigned as landscaped and meadow areas as well as stormwater management facilities. The increases in the rate of stormwater runoff and associated potential adverse impacts will be managed and reclaimed (or eliminated entirely) through the implementation of a stormwater management plan. The stormwater plan includes a proposed stormwater basin on Lot B4.

The storm water plan has been designed to control post-development runoff through the entire range of storm events (1 year- through 100 year storms) based on Soil Conservation Service (SCS) methodology to avoid increased stream channel erosion, maintain the adequate of the existing drainage system, manage the increased runoff volume, minimize sedimentation into receiving waters and

not increase flooding of downstream properties. This plan will be approved by the Town of Bedford and the NYSDEP and will meet the requirements of the Town Stormwater Regulations and NYSDEC SPDES General Permit GP-0-08-001. Based on this plan, there will be no impact on receiving waters such as Byram Lake, the New Croton Reservoir and its tributary watercourses, wetlands streams and ponds.

Storm water runoff from the site flows to several environmentally sensitive water resource features that are on or adjacent to the site. These features include Byram Lake, surface watercourses, and on and off-site wetlands. Because of the existence of these water resource features, special attention has been devoted to managing the use of pesticides on the site through the development of a detailed Residential Lawn Maintenance Program (RLMP).

A surface water risk assessment was completed to provide a quantitative pesticide fate risk screening for the pesticides identified in the RLMP for use in the residential and equestrian development. Based on the results of that analysis, both management and engineering controls can be optimized and incorporated into the plan to effectively minimize or eliminate potential impacts to the water resource features on or adjacent to the property. The Planning Board will require periodic testing of surface waters leaving the site as a part of the subdivision approval process. In this manner, any measurable increase in pesticide loading from the site will be avoided.

During the construction period, a Soil Erosion and Sediment Control Plan specifically designed for the project will use temporary devices to control erosion and sedimentation.

2. Discussion and Findings

The Lead Agency finds that:

- The RLMP prepared for the proposed development outlines the anticipated dates and application rates of pesticide active ingredients to be used.
- Although surface water will be slightly redirected on the site, the basic drainage patterns of the site will be preserved. No surface water will be diverted from Byram Lake.
- Results from the various analyses and predictive models used by the Applicant indicate that the proposed project would not adversely affect the surface water resource features on and around the site.

- Steeply sloped portions of the site will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance.

  The erosion and sedimentation control plan and stormwater pollution prevention plan for the site will meet NYSDEC requirements and will be approved by the Town Engineer.

- The Applicant's plan will not adversely impact surface water quality or quantity. In addition, the Residential Lawn Management Plan established for the site will be sufficient to identify any surface water contamination.

- The Proposed Action will adequately avoid or mitigate potential impacts on surface water resources and stormwater conditions.

E. Wetlands

1. Impacts and Proposed Mitigation

The Bedford portion of the Seven Springs site currently contains approximately 0.43 acres of wetlands in two separate areas. These wetland areas are regulated by the Town of Bedford Freshwater Wetlands Law (Town Code Section 122) and also regulated by the United States Army Corps of Engineers (ACOE) in accordance with Section 404 of the Federal Clean Water Act (NYSDEC) in accordance with Article 24 of the New York State Environmental Conservation Law. The Bedford Wetlands Control Commission confirmed the wetlands delineations (DEIS IIID-2).

In addition, the site currently contains approximately 3.48 acres of 100-foot wetland/watercourse buffers regulated by the Bedford Wetlands Law. No areas of wetland buffer from wetlands in the Towns of New Castle or North Castle are present on the Bedford portion of the site.

Under the proposed Subdivision Plan, no disturbance to any wetland or wetland/watercourse buffer is proposed. To eliminate any potential disturbance, a defined limit of disturbance outside any regulated wetland or wetland/watercourse buffer will be established for each lot. The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board.

Strormwater runoff from the proposed development will not be discharged directly into wetlands and watercourses but will be retained, renovated and slowly released into the drainage system, thereby maintaining high water quality discharges from the property.

In response to the concerns regarding the adverse impacts from stormwater pollutants to the wetlands and watercourses during and after construction, the Applicant has prepared an Erosion and Sediment Control Plan, a Stormwater Pollution Management Plan, and a Residential Lawn Maintenance Plan (RLMP) that minimize stormwater impacts to wetlands and watercourses to the greatest extent possible. The RLMP will be administered and enforced by a company owned by Donald Trump or its assignee. Enhanced water quality protection measures will include reduced pesticide and fertilizer use under the RLMP and Best Management Practices (BMPs) to control nutrient run-off.

2. Discussion and Findings

The Co-Lead Agency finds that:

- The plan for the subdivision and equestrian facility proposes no disturbance to the existing wetlands, watercourses or wetland/watercourse buffers.
- Stormwater runoff from the proposed development will not be discharged directly into wetlands and wetland buffers.
- A 1.97-acre area around Wetland H will be permanently protected as a conservation area restricted by negative covenants controlling its use and maintenance.
- The Proposed Action will adequately avoid or mitigate potential impacts on wetlands.

F. Vegetation

1. Impacts and Proposed Mitigation

The vegetation communities on the site are divided into three broad categories: terrestrial cultural, forested uplands and wetlands. The terrestrial cultural communities encompass the highly developed and modified areas of the property. The forested uplands communities consist of common forest types and include a mix of second growth native, planted, and ornamental plant species. Vegetation associations indicative of wetland and watercourses make up a small portion of the site. Plant material on the property was identified and no rare, threatened or endangered plant species were observed or identified by regulatory authorities.

The proposed plan will require the clearing and grading of approximately 33.6 acres containing woods, orchards, open fields, scrub-shrub growth and estate landscape. The limits of clearing are based on preliminary grading plans prepared

for the subdivision shown in the DEIS (Plan BD-1) and assume a typical house size and location anticipated for this site. It is estimated that 875 trees with diameters over 8 inches will be removed during construction; of these, 105 trees are greater than 24 inches in diameter.

The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board. Within the areas of disturbance, the applicant will save as many trees, especially specimen trees, as can be feasibly incorporated into the landscape for the homes, but final landscape design will be each homeowner's decision, and so tree removal is an unavoidable impact of the proposed action. Tree removal permits are required as a part of Town of Bedford approval. The proposed plan will leave 58 percent of the site in a natural habitat condition and much of the disturbed portion of the site will be ultimately re-established. Therefore, a significant portion of the long-term impacts that would otherwise occur from the removal of existing vegetation will be mitigated.

Long-term impacts to vegetation will be minimal or non-existent in portions of the site that will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance. In addition, the use and disturbance of the area east of the berm on Lots B3, B4 and B5 will be regulated. Areas proposed to be converted from natural vegetation to lawn areas have the potential for adverse impacts, but these will be minimized through the implementation of the RLMP.

2. Discussion and Findings

The Lead Agency finds that:

- The removal of existing vegetation, including mature trees, is an unfortunate but unavoidable impact associated with development.

- Long-term impacts to vegetation will be minimal or non-existent in portions of the site that will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance. In addition, the use and disturbance of the area east of the berm on Lots B3, B4 and B5 will be regulated. Areas proposed to be converted from natural vegetation to lawn areas have the potential for adverse impacts, but these will be minimized through the implementation of the RLMP. The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board. The Planning Board will review specific tree removal and

replacement as a part of the subdivision approval process. The Proposed Action will adequately avoid or mitigate potential impacts on vegetation.

G. Wildlife

1. Impacts and Proposed Mitigation

The site consists of a 80.5 acre parcel that contains a mixture of man-modified and natural ecosystems. Ecological communities currently on the site that provide wildlife habitat include wetlands (forested, scrub-shrub, emergent and meadow/old field), water bodies (streams and ponds), upland mixed hardwood forest, meadow/successional old fields and maintained lawn. Wildlife associated with the site is typical of those present on larger land parcels in Westchester County that display similar habitat characteristics. The NYSDEC Natural Heritage Program did not have any records of endangered or threatened species or critical habitats on the site.

Site investigations were conducted to identify the wildlife species present on, or with potential to utilize the property. The DEIS includes a list of natural and man-made habitats on the site as well as a matrix that documents each habitat type and its potential value to wildlife species that are potential inhabitants of the site. A specific study was conducted to determine if bog turtles were present on the site. No bog turtles, or other rare, threatened of endangered wildlife species were identified on the property. One Species of Concern, the Eastern Bluebird, was observed during the wildlife survey.

The proposed plan will result in temporary impacts to wildlife on the site. On a permanent basis, no significant habitat fragmentation or adverse impacts to rare, threatened or endangered species are anticipated. The plan does not include any permanent, impassable barriers to wildlife such as fencing in the conservation area, so a continuum of habitats will remain, allowing wildlife to pass through the site.

The proposed action includes the introduction of nesting boxes within and at the edge of open growth areas to provide additional habitat features for the Eastern Bluebird, as well as provide nesting sites for tree swallows.

Since the Indiana bat is assumed to occupy or use the site for foraging or roosting, the applicant proposes to limit forest-clearing activities to between October 1 and March 30, the bat's hibernation period, when they will not be present on the site. Consultation with the United States Fish and Wildlife Service concurred that this restriction would avoid direct impacts on the bat and also did not anticipate impacts on the bog turtle (DEIS, p. I-16)

Concerns were expressed during the SEQRA process regarding impacts that development of the site would have on wildlife species and wildlife habitats, impacts to the adjacent nature preserve and wildlife corridors, disturbance to wetland buffers, increasing Canada geese populations, and impacts to wildlife on neighboring residential properties.

In response to the concerns regarding wildlife and wildlife habitats, a limit of disturbance line has been designed to minimize impacts to vegetation and wildlife habitats to the greatest extent practicable. This limit is shown on the plan entitled "BD-1 Development Plan – Bedford," dated 3/31/05, prepared by TRC Engineers, Inc.

In response to the concerns regarding possible impacts to the nearby nature preserve and wildlife corridors, the plan will preserve 5.24 acres of wooded land adjacent to the Byram Lake in perpetuity. Larger animals, such as deer, will continue to utilize the preserved wooded areas as well as other parts of the site as travel corridors during dusk and dawn hours. No fences that could block the movement of small animals and amphibians across the landscape will be used.

In response to concerns regarding potential impacts of wildlife on neighboring residential properties, a measurable increase in wildlife use of neighboring properties is not anticipated to occur as a result of the implementation of the revised site plan. The majority of the animals that are displaced by activities associated with the proposed development will relocate to the undisturbed wooded portions of the site and the adjacent nature preserves. The larger animals, such as deer, will continue to frequent the property.

2. Discussion and Findings

The Lead Agency finds that:

- A limit of disturbance line has been designed to minimize impacts of vegetation and wildlife habitats on the site to the greatest extent practicable, and the proposed site plan has been designed so that no measurable impacts will occur to wildlife populations on adjacent properties.

- The proposed development will not impact Federal or State rare, endangered or threatened wildlife species or communities.

- The Proposed Action will adequately avoid or mitigate potential impacts on wildlife.

H. Traffic and Transportation

1. Impacts and Proposed Mitigation

Access to the proposed residential subdivision and equestrian facility will be from Oregon Road, a public street in the Town of Bedford. New Lot B1 and the Nonesuch lot (B2) will each have a new private driveway entering Oregon Road.

A proposed new private road intersecting with Oregon Road and following the route of the existing driveway, will serve the remaining six lots, the equestrian facility and the existing estate house in North Castle. This road will end within 75 feet of the southerly property line. The design of the turnaround will be determined by the Planning Board in consultation with the emergency service providers serving the site during the subdivision review process. A separate parcel of land approximately 0.17 acres in area will be dedicated to the Town of Bedford at the end of the private road. This layout is shown on the subdivision plan, included in the FEIS, entitled "Seven Springs – Preliminary Subdivision Plat (Bedford)," dated 7/3/08, prepared by Donnelly Land Surveying.

Chapter 107 of the Bedford Land Subdivision Regulations limits the length of a dead end road to that serving not more than 15 houses unless waived by the Planning Board. Oregon Road currently serves nine existing homes in addition to two existing homes on the Seven Springs site (Nonesuch and the Meyer estate house). With the proposed seven new homes, a total of 18 homes would use Oregon Road. Because the subdivision application in North Castle was withdrawn, no alternative entrance exists for the Proposed Action.

The applicant has agreed that the new road will not be extended or used for access to the North Castle portion of the site except for access to the existing estate home. If, in the future, the North Castle portion of the site is developed with a primary access from North Castle, the Bedford Planning Board may grant amended subdivision approval specifically permitting a connection to create a through road. Any other scenario would violate the Town of Bedford regulations for dead-end roads. This agreement will be a covenant in the recorded declaration of the homeowner's association that will be formed by the applicant.

A Traffic Impact Analysis was prepared for the prior proposed 17 lot subdivision by John Collins Engineers presented in the DEIS and updated in the FEIS and included 27 intersections. The analysis identified base traffic volumes, expanded base volumes to reflect background traffic conditions for a design year and combined traffic volumes, which included other developments, typical growth factors and estimates for site-generated traffic for the proposed use.

The proposed subdivision will generate up to 7 entering vehicles and 231 exiting vehicles during the weekday AM peak hour and 18 entering and 10 exiting vehicle during the weekday PM peak hour. The additional traffic generated by the

proposed project is not expected to significantly change traffic operations in the vicinity of the site and will not result in significant increase in levels of service, traffic conditions or deterioration in operating conditions. Accordingly, no traffic mitigation is proposed.

Proposed road pavement with for the new private road is 20 feet, within a 50 foot wide right-of-way. This road width is narrower than the standard width of 24 feet cited in the Town Subdivision Regulations. The narrower width will reduce environmental impacts including less tree removal, less impervious surface, less cut and fill and preservation of more of the existing stone wells on the site. No sidewalks or street lights are proposed on the new private road.

A detailed analysis was prepared by the Applicant to evaluate construction traffic and impacts on area roadways. It has been determined by the Applicant that all construction traffic will follow one specific access route. All trucks will access the area from N.Y. Route 117 and follow Byram Lake Road to access Oregon Road and the site driveway. Construction traffic will be directed not to use Sarles Street or Byram Lake Road around Byram Lake. The major stream crossing under Byram Lake Road was reinforced previously to accommodate construction traffic to the Village of Mount Kisco water treatment plant and, therefore, this road should be able to safely handle the construction traffic anticipated from this project.

The Applicant has agreed to prohibit heavy construction vehicles from using Byram Lake Road during its use by school buses. Flagmen will be posted at critical areas for safety of the public during any movement of trucks other than isolated single trucks.

The impact of construction traffic to trees along the construction route was discussed in the DEIS (IIIE-9,10) and trees over 24" dbh were mapped in Figure #E-5. The DEIS concludes that construction vehicles will not damage these trees (DEIS IIIE-26). The Applicant will be responsible for any damage to area roadways or trees caused by construction traffic. To protect the Towns affected, appropriate insurance, bonding or escrow funds will be established to cover these costs.

Discussion and Findings

The Lead Agency finds that:

- Site access is proposed via Oregon Road in the Town of Bedford. All vehicles will generally access Oregon Road and the site access drive via N.Y. Routes 22 and 172, Sarles Street, Byram Lake Road and other local roadways.

- Results of the traffic capacity analysis show that each intersection studied would continue to operate at the same Level of Service with or without site traffic.

- Construction traffic will be required to access the site from N.Y. Route 117 and travel south on Byram Lake Road to Oregon Road and enter the site via the main access drive. The Applicant will repair any damage that occurs to roads or trees due to construction vehicles as required by each municipality. Construction traffic will be limited and delivery times will be specifically directed to prohibit use of local roads during their use by school buses. Flagmen will be used to control truck traffic.

- There will be no use or landing of helicopters on the site as part of the proposed development, or at any time in the future, except for emergency medical purposes.

- The Proposed Action will adequately avoid or mitigate potential impacts on traffic.

I. Land Use and Zoning

1. Impacts and Proposed Mitigation

Land uses surrounding the site include mostly low-density single-family residential development and open space. Open space areas include the Eugene and Agnes Meyer Nature Preserve, Merestead County Park and Byram Lake.

The zoning of the site and surrounding lands in the towns of Bedford and North Castle is R-4A, permitting single-family development on lots of four acres or more. Zoning in the Town of New Castle is R-2A, permitting lots of two acres in size.

The primary land use impact resulting from the proposed development of the site will be a change from the present vacant residential estate to a residential development with an equestrian facility, staff housing facility and reused historic farm buildings. The proposed use is consistent with the recommendations of the Bedford Comprehensive Plan of 2003 and the Westchester County Plan – Patterns for Westchester.

The proposed density of the project is well below that permitted by existing zoning. All new homes will be built in accordance with all dimensional requirements of the Zoning Law, except for Lots B2 and B5 that will need variances from the maximum building coverage requirement. A variance will also be required for the staff housing use. The Bedford Zoning Law currently permits

the equestrian facilities as a Special Permit Use. The proposed facility must receive this permit from the Planning Board.

The proposed private road will require a waiver for the reduction in road pavement width from 24 feet to 20 feet and for the maximum permitted length of a dead end road. Chapter 107 of the Bedford Land Subdivision Regulations limits the length of a dead end road to that serving not more than 15 houses unless waived by the Planning Board. Oregon Road currently serves nine existing homes, in addition to two existing homes located on the Seven Springs property (Nonesuch and the Meyer estate home). With the proposed seven new homes, a total of 18 homes would use Oregon Road.

Overall, the impacts to zoning and land use will not be significant. The proposed density within the Town of Bedford will be one house per ten acres. The development is therefore compatible with the low-density residential and open space land use and zoning of the surrounding area, as well as local land use plans. Therefore, no mitigation measures are proposed with respect to land use and zoning. The proposed plan includes 7.61 acres of conservation area, almost ten percent of the site area.

2. Discussion and Findings

The Lead Agency finds that:

- The proposed residential subdivision and equestrian facility is consistent with applicable zoning and land use regulations of the Town of Bedford.
- The Proposed Action is compatible with the recommendation of the Comprehensive Plans for the Town of Bedford and Westchester County.
- The Proposed Action will adequately avoid or mitigate potential impacts relating to land use and zoning.

J. Community Facilities and Services

1. Impacts and Proposed Mitigation

The property is served by the Mount Kisco Fire District and Mount Kisco Lions Volunteer Ambulance Corps for fire and emergency medical services, respectively. Police services are provided by the Town of Bedford. In general, the Proposed Action will require an increase in community services compared to

the current demand by the existing site use. Throughout the environmental review of the proposed residential development and previous golf course development, the Lead Agency has received comments from representatives of the emergency service providers indicating that police, fire and ambulance services currently serving the site would have some difficulty providing adequate levels of service for the Proposed Action (DEIS Appendix P). However, all of these comments pre-date the elimination of the nine lots proposed in the Town of North Castle that reduced the scale of the project.

The Bedford Police Department expressed concern for the ability to serve the area due to increasing development in the area, rising department costs and the desirability of an alternate entrance to the site.

The Mount Kisco Fire Department expressed concern with the lack of water supply for firefighting and also would prefer a secondary access route to the site. The applicant has proposed to equip each home with an indoor sprinkler system fed by a storage tank. In addition, the proposed detention pond will have 310,000 gallons of water in its permanent pool that can be accessed from a dry hydrant.

No comments were received from the Mount Kisco Lions Volunteer Ambulance Corps.

A secondary access to the site is not available at this time. The HOA will own and operate standard snow removal equipment as well as chain saws and other tools necessary to clear blocked roadways. The equipment will be stored on site and will be available to the HOA staff for use in emergencies and serious weather conditions.

The new development is estimated to generate a minimum of $500,000 in tax revenue to all non-school taxing jurisdictions (DEIS III-I-9), and therefore provide revenue substantially in excess of any additionally needed service costs.

The Proposed Action includes no community-wide water or sewerage facilities. Sewage disposal will be provided by individual on-site septic systems for each residence. Water supply will be provided by an individual well for each residence. No future public water or sewer services are expected due to the great distances and costs involved in extending existing service lines.

Because the new road would be privately owned, no municipal snow plowing or road maintenance will be provided. Solid waste will be hauled away by private contractors.

The proposed homes and equestrian facility will incrementally increase demand for electricity, telephone and cable services at the site, although no significant impacts to these utilities are anticipated.

The Bedford portion of the site is currently located in the Bedford Central School District. Using standard analyses for determining population from residential development, the Proposed Action is estimated to increase enrollment in the Bedford Central School District by 12 students. This increase is minor and is expected to be accommodated by existing service levels and resources. The new tax revenues anticipated from the project are expected to provide $2,195,082 in tax revenue to the school district. This figure is significantly higher than the costs to educate the number of students generated by the development.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will not have a significant adverse impact on the police, fire or ambulance services. Tax revenues generated by the new development are expected to offset the incremental increase over time in the cost of providing these services.
- Subject to receiving necessary approval from other permitting authorities, the requirements for potable water and irrigation water for the proposed development will be met by wells. Therefore, existing public water supply systems will not be impacted by the Proposed Action.
- Subject to receiving necessary approvals from other permitting authorities, the Applicant will use on-site sewage disposal systems for the proposed development. Therefore, municipal sewerage facilities will not be impacted by the proposed development.
- The Proposed Action will adequately avoid or mitigate potential impacts on community facilities and services.

K. Historic, Archaeological and Cultural Resources

1. Impacts and Proposed Mitigation

Compared to the impacts associated with the originally proposed golf course plan, the cultural resources that are proposed to be disturbed under the residential subdivision and equestrian facility have been substantially decreased.

Representatives from the New York State Office of Parks, Recreation and Historic Preservation (NYSOPRHP) visited the site in May 2000 during the previous golf course application and determined that the former Seven Springs property meets the eligibility criteria for inclusion in the National Register of Historic Places. NYSOPRHP identified a number of structures and features throughout the site that contributed to this conclusion. In addition, NYSOHPRHP determined that the Nonesuch complex is also eligible for inclusion in the National Register of Historic Places.

Stage 1 archaeological testing was conducted over the entire site and revealed Native American and historic era sensitivity in eight loci. Stage 1A assessments were completed in 1998 (DEIS Appendix R). Stage 2 archaeological field investigations were completed in two areas in Bedford and the technical reports accepted by NYSOPRHP. These reports concluded that no further excavations were warranted in the side yard of Nonesuch (Area 6 Locus 1). However, Area 14 Locus 1, along the easterly side of the main driveway west of the secondary barn complex, was determined to have the potential to yield important prehistoric information. This area is eligible for listing in the New York State and National Registers of Historic Places (10/13/04 Correspondence from NYSOPRHP, DEIS Appendix S). Under applicable state and federal regulations, the applicant must either avoid or mitigate impacts to this area. The Proposed Action avoids these impacts by placing the area within a conservation area restricted by negative covenants.

The Proposed Action calls for the re-use of all but two of the existing structures on the site. Nonesuch and the Meyer estate house will continue to be used as single-family homes. Renovations to these historic structures will involve only minimal interior alteration. The exterior of the buildings will not be altered and the original exterior details will be refurbished to protect the architectural integrity of the structures.

The carriage barn and the modern tool shed will be removed. Demolition of the carriage house is under the jurisdiction of the Bedford Historic Building Preservation Commission and will require their approval.

Other buildings and features to be preserved include the Nonesuch gardens, stone garage, large caretaker's house, secondary barn complex and small caretakers house, the stone water tower, greenhouse and two root cellars. On the equestrian facility lot, the white farmhouse, caretaker's cottage and main barn complex will remain. The carriage barn is proposed for demolition and a new staff housing facility built in its place. The proposed new private road follows the route of the original estate driveway and will minimize disturbance to trees and stone walls. In addition, almost all of the stone walls on the site will relocated, repaired or rebuilt.

2. Discussion and Findings

- Most of the historically significant buildings on the site will be restored and preserved as a result of this project.
- Only one historic building, the carriage house, will be removed under the Proposed Action. The demolition of this building will require the approval of the Bedford Historic Building Preservation Commission.
- One area determined to have potential archeological significance, Area 14 Locus 1, will be permanently preserved within a easement.
- The Proposed Action will adequately avoid or mitigate potential impacts on historic, archaeological or cultural resources.

L. Visual Resources

1. Impacts and Proposed Mitigation

The Proposed Action will alter the visual character of the site from one characterized by an estate landscape of open fields, farm buildings and forested areas to one predominantly characterized by large, single-family residences on large lots. The farm structures around the white farmhouse will be retained and maintain the visual character of the majority of the property seen to the east of the main driveway.

The only structures that can be presently seen from outside of the site are Nonesuch house, visible from Oregon Road, and the Meyer estate mansion, the roof of which can be seen during winter months from I-684. Views of these structures are not anticipated to change significantly.

Views of the site from most of the surrounding area will not be impacted due to the topography and vegetation of the site. The conservation area on most of the perimeter of the site will assist in maintaining the densely wooded character seen from the east. Views of the eastern portion of the site from Route I-684 and nearby residences surrounding Byram Lake will be minimally changed by the Proposed Action, although the tops of homes on Lots 3, B4 and B5 may be seen. The portion of the site most visible from these locations is currently maintained as mowed lawn area surrounded by a wooded buffer that is proposed to remain. Similarly, the southern and southwestern portions of the site will maintain their existing views with wooded buffers proposed along the perimeter of the property.

Site frontage on Oregon Road will remain the same, except that the new residences on Lots B1 and B8 and the new driveway to Nonesuch will be seen. The nearest residential neighbors on Oregon Road will have views of new homes on Lots B1, B3, B7 and B8. However, these views will be screened by the

existing dense wooded buffers existing on the property. These buffers will be protected by the limits of disturbance shown on the proposed subdivision plan and discussed in Section E of this Findings Statement.

The addition of seven new homes on the site is not anticipated to significantly contribute to light pollution. No street lighting is proposed and all lots will comply with the lighting requirements of the Bedford Code. This regulation does not permit the exterior illumination of buildings and limits off-site light spillage to low levels.

2. Discussion and Findings

The Lead Agency finds that:

- When subdivision approval is sought, the Applicant will be required to specifically identify the trees to be protected during construction and to remain on site. Additionally, the establishment of clearing and grading limit lines will be required when determined necessary by the Town to preserve the visual and environmental resources of the site. When the plan is refined for approval purposes, emphasis should be placed on screening the site from the view of adjacent properties and streets and re-vegetating those areas disturbed during construction.

- The proposed single-family residences to be located on Lots B1, B3, B7 and B8 will be visible from adjacent residences and Oregon Road. This development is consistent with the current neighborhood character and existing zoning, and will not have an adverse environmental impact.

- The Proposed Action will adequately avoid or mitigate potential impacts on visual resources.

M. Noise

1. Impacts and Proposed Mitigation

The Applicant has conducted a detailed noise analysis and has modeled the anticipated noise levels associated with the proposed use (DEIS IIIL-1). The noise assessment included background noise monitoring at six selected noise sensitive receptors in order to characterize the existing noise environment.

No mitigation measures will be required for noise from the completed project since no noise impacts as expected.
Temporary noise impacts from construction activity are anticipated. Noise associated with construction activities will include, but not be limited to, noise from worker vehicles, construction equipment, delivery vehicles, construction activity such as clearing vegetation, grading, loading and unloading of trucks, and

building of structures. The short-tern nature and small, expected magnitude of the construction noise do not warrant any mitigation measures.

The applicant has stated that construction activities that will create noise in excess of the permitted decibel levels will be conducted during midday hours and will not take place during weekends or holidays. As a good construction practice to reduce construction noise to the greatest extent possible, and practical, functional mufflers will be maintained on all construction equipment. Construction activities on the site will comply with the noise requirements of Chapter 83 of the Bedford Code.

2. Discussion and Findings

The Lead Agency finds that:

- No negative noise impacts from the completed project are expected.
- Noise during construction will consist of noise from vehicular traffic, construction equipment, delivery vehicles, power tools, and construction activity. Noise levels associated with the construction activity will comply with all requirements of the Town noise ordinance. Construction activities that will create noise in excess of the permitted decibel levels will be conducted during midday hours and will not take place during weekends or holidays.
- There is no further practical mitigation that could eliminate or significantly reduce the noise associated with the Proposed Action. The Proposed Action will adequately avoid or mitigate potential impacts relating to noise.

N. Air Quality

1. Impacts and Proposed Mitigation

The air quality analysis conducted for the Proposed Action evaluated the potential ambient air quality impacts of the project against the applicable standards for those pollutants for which a National Ambient Air Quality Standard (NAAQS) exists. Currently, the United States Environmental Protection Agency USEPA) and the NYSDEC enforce ambient air quality standards for seven pollutants.

A review of existing air quality showed that of the seven pollutants, USEPA classified them all at attainment levels or better, except for particulate matter with a diameter less than 2.5 microns which has not been determined, lead which is not designated and ozone which has severe non-attainment.

With the Proposed Action, a minor increase in emissions is anticipated for the increase in vehicular traffic associated with the action, and for an increase in the

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER)

SEVEN SPRINGS LLC

Plaintiff(s)

-against

THE NATURE CONSERVANCY, ROBERT BURKE,TERI BURKE, NOEL B. DONOHOE, and JOANN DONOHOE

Defendant(s)

Index Number 21162/2009

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:

I, Richard Schaab, being sworn, say: I am not a party to the action, am over the age of 18 years of age and reside in Sleepy Hollow, New York.

On February 19th, 2010 at 3:15pm I served the **Affirmation in Further Support of Motion to Dismiss Complaint, and Memorandum of Law in Further Support of Motion to Dismiss Complaint** papers upon DelBello, Donellan, Weingarten, Tartaglia, Wise & Wiederkehr, LLP, located at One North Lexington Avenue, White Plains, New York, 10601.

The documents were accepted by " Carolyn" a receptionist at the firm who was authorized to accept service on behalf of the firm. The person served can best be described as

Sex:	Female	Hair:	Brown
Skin:	White	Eyes:	Brown
Age:	45-50 approx. years of age	Height:	Approximately 5' 5"
Weight:	Approximately 130 pounds		

Sworn to before me this
22nd day of February 2010

RICHARD SCHAAB

Notary Public

LAURIE PAYER
Notary Public, State of New York
No. 4945402
Qualified in Dutchess County
Commission Expires Dec 19, 2010

340058.1

AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Krissie Taylor, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Westchester County;

That on the 19th day of February, 2010, deponent served the within document(s) entitled Affirmation in Further Support of Motion to Dismiss the Complaint and in Opposition to Plaintiff's Cross-Motion for Leave to Amend upon:

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE Attention: John Kirkpatrick, Esq. 120 Bloomingdale Road White Plains, New York 10605 (914) 422-3900	Benowich Law, LLP Attorneys for Defendant THE NATURE CONSERVANCY Attention: Leonard Benowich, Esq. 1025 Westchester Avenue White Plains, New York 10604 (914) 946-2400

at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a properly addressed Federal Express wrapper, in an official depository under the exclusive care and custody of Federal Express within the State of New York.

Krissie Taylor

Krissie Taylor

Sworn to before me this
22nd day of February 2010

JANINE A. MASTELLONE
Notary Public, State of New York
No. 02MA616020
Qualified in Putnam County
Commission Expires Feb. 12, 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff(s),

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendant(s).

AFFIRMATION IN FURTHER SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Attorneys For Defendants, Robert and Teri Burke

3 Gannett Drive
White Plains, NY 10604-3407
914.323.7000

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

Laurie Payer being duly sworn, deposes and says:

That I am not a party to this action, am over eighteen years of age and reside in the State of New York.

That on the 3rd day of August, 2010 deponent served the within NOTICE OF CROSS-MOTION FOR REARGUMENT and AFFIRMATION IN SUPPORT OF CROSS-MOTION FOR REARGUMENT on the parties at their respective offices for that purpose by depositing the same with an overnight delivery service (**Federal Express**) in a wrapper properly addressed to the attorneys to the address designated by the attorneys for that purpose or, if none were designated, to the attorneys' last known address. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address is indicated below:

TO: SEE ANNEXED

Laurie Payer

Sworn to before me this
3rd day of August, 2010

Notary Public

JANINE A. MASTELLONE
Notary Public, State of New York
No. 02MA616020
Qualified in Putnam County
Commission Expires Feb. 12, 2011

TO: COHN & SPECTOR
Attorneys for the Plaintiff
Attention: Julius W. Cohn, Esq.
200 East Post Road
White Plains, NY 10601
(914) 428-0505

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
Attorneys for Defendants
NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

BENOWICH LAW, LLP
Attorneys for Defendant
THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

Index No. 21162/09

Janine A. Mastellone
08139.00589

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

NOTICE OF CROSS-MOTION FOR REARGUMENT and AFFIRMATION IN SUPPORT OF CROSS-MOTION FOR REARGUMENT

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Attorneys For Defendants – ROBERT BURKE and TERI BURKE

Office & Post Office Address, Telephone
3 GANNETT DRIVE
WHITE PLAINS, NEW YORK 10604
(914) 323-7000

Motion #45

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No. 21162/09

Assigned Justice
(Francis A. Nicolai)

TNC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR REARGUMENT AND RENEWAL

Benowich
BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

Assigned Justice
(Francis A. Nicolai)

TNC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR REARGUMENT AND RENEWAL

Benowich
BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

Preliminary Statement

Defendant The Nature Conservancy ("TNC") respectfully submits this memorandum in support of its motion for, *inter alia*, leave to reargue this Court's Order which (a) granted Plaintiff leave to serve an Amended Complaint, and (b) denied TNC's motion (and the other defendants' motions) to dismiss the Amended Complaint.

TNC's motion for reargument should be granted and the Amended Complaint should be dismissed as futile for several reasons, including Plaintiff's acknowledgment that its seeks damages which may arise from the issuance in April 2008 in *Seven Springs I* of a preliminary injunction. Any claim for damages by reason of the Preliminary Injunction must be brought in *Seven Springs I*, and even then, there is a presumption that TNC sought and procured the preliminary injunction in good faith and for a proper purpose - thus eviscerating any claim for *prima facie* tort.

In addition, this Court improperly concluded that Plaintiff stated a cause of action for slander of title, precisely because Plaintiff disavowed any such cause of action. Indeed, TNC had argued that the Amended Complaint sought to assert a claim for slander of title, which claim would be barred by the applicable one-year statute of limitations. Plaintiff, however, took the position in this Court that the Amended Complaint does not assert a slander of title cause of action. Plaintiff charted its own course, and this Court should not find a cause of action that is not asserted.

Background Summary

As this Court recognized in its Order, Plaintiff seeks damages for positions it claims TNC took or actions it claims TNC did - if at all - solely within *Seven Springs I*, which resulted in the issuance by that Court of a Preliminary Injunction Order enjoining Plaintiff from using at least a portion of Oregon Road, the so-called "Easement Area", including land owned by TNC pending conclusion of that action.

Plaintiff does not allege that TNC did anything other than defend itself and obtain a preliminary injunction in *Seven Springs I.* The sole basis for any claim is Plaintiff's unsubstantiated and conclusory assertion that it has sustained (or may yet sustain) tens of millions of dollars in damages (all of which are, in fact, general damages) as a result of the issuance of the Preliminary Injunction Order in *Seven Springs I.*

Plaintiff's sole member, Donald J. Trump ("Trump"), stated in his affidavit that all TNC and the other defendants have done is to "have taken, and continue to take the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road, and have sought and obtained preliminary injunctive relief prohibiting Plaintiff from exercising its rights over Oregon Road." (Trump Aff., ¶19)

Plaintiff admittedly seeks damages which it claims result from the issuance of the Preliminary Injunction Order in *Seven Springs I.* As this Court noted on page 5 of the Order, even Plaintiff:

> acknowledges that its instant action simply seeks to assert plaintiffs rights to damages against defendants should it be determined that the defendant[s] have wrongfully prevented plaintiff from using and exercising its rights with respect to the easement. The Court

> notes the preliminary injunction issued in favor of defendants and that the prior action in which the preliminary injunction issued is effectively dormant, supra.

This concession by Plaintiff, and the absence of any allegation that TNC has done any act outside of *Seven Springs I*, or even since the issuance of that injunction, precludes Plaintiff from maintaining this action as a matter of law.

Plaintiff and this Court recognize, as they must, that the Preliminary Injunction Order was issued in *Seven Springs I*; consequently, the law imposes a presumption of good cause - a presumption which negates any conclusory averment of "malice" or "disinterested malevolence" - which presumption Plaintiff must, but has not overcome with its bare and conclusory Amended Complaint.

Accordingly, notwithstanding Plaintiff's allegation - upon information and belief - that "[d]efendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence is the sole motivation for Defendant's actions" (Amd. Cplt., ¶41), TNC is entitled to, and enjoys a presumption of good faith - a presumption which can only be overcome with substantial allegations of facts establishing that TNC sought the Preliminary Injunction Order by means of fraud or misrepresentation.

Even if Plaintiff could state a cause of action for *prima facie* tort - and it cannot - any such claim would first have to be brought in *Seven Springs I*. The Court in that case is the only court that can determine whether the Preliminary Injunction Order was wrongfully issued, whether Plaintiff sustained any damages as a result and, if so, the nature and extent of those damages. Of course, any such damages are limited to the $100,000 bond given by TNC as required by the Preliminary Injunction Order.

ARGUMENT

Point I

THIS COURT MISAPPREHENDED AND MISAPPLIED THE PROPER STANDARD ON TNC'S MOTION TO DISMISS

This Court misapprehended - or at the very least misapplied - the standard applicable to the determination of TNC's motion to dismiss.

This Court stated that the standard as follows:

> On a motion to dismiss pursuant to CPLR 3211, a court must accept as true the facts alleged within the four corners of the complaint and afford the plaintiff the benefit of every possible inference to determine whether the allegations fit within any cognizable legal theory. [Citations omitted] "*When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleadings has a cause of action, not whether she has stated one.*" *Meyer v. Guinta*, 262 A.D.2d 436. (Emphasis added.)

Order at 5.

This Court then went on to conclude that it could not "determine as a matter of law that plaintiff has failed to state a cause of action for *prima facie* tort and/or slander of title. Plaintiff has alleged that disinterested malevolence was the sole motivation for defendants' conduct and has alleged specific and measurable loss to the value of its property and its development." Order at 6.

But the standard on this motion is not whether Plaintiff has stated a cause of action; rather, the proper standard is whether Plaintiff has a cause of action. *Meyer v. Guinta*, 262 A.D.2d 463 (2nd Dep't 1999).

We respectfully submit that this Court misapprehended and/or misapplied the standard applicable to this case and applied a standard that is far-too deferential to Plaintiff under the circumstances - especially given that Plaintiff submitted evidentiary material including the affidavit of Donald J. Trump ("Trump"). In these circumstances, this Court is required to determine whether Plaintiff has a cause of action, not simply whether it has "stated" a cause of action, and that determination must be based on allegations of specific facts, allegations which are not conclusory, incredible or contradicted by documentary evidence. *Scoyni v. Chabowski*, 72 A.D.3d 792 (2nd Dep't 2010); *Steve Elliot, LLC v. Teplitsky*, 59 A.D.3d 523 (2nd Dep't 2009).

Although it is true that on a motion pursuant to CPLR 3211(a)(7), a court will accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," it is also true, as the Court of Appeals has held, that:

> . . . allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration," nor to that *arguendo* advantage (*Gertler v. Goodgold*, 107 A.D.2d 481, 485, 487 N.Y.S.2d 565, *affd. for reasons stated below* 66 N.Y.2d 946, 498 N.Y.S.2d 779, 489 N.E.2d 748).

Maas v. Cornell University, 94 N.Y.2d 87, 91 (1999).

This standard has been recognized and applied by the Second Department as well. *See e.g. Sweeney v. Sweeney*, 71 A.D.3d 989 (2nd Dep't 2010) ("bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material,

the court is required to determine whether the proponent of the pleading has a cause of action, not whether she has stated one"); *Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372 (2nd Dep't 2002); *Tarzia v. Brookhaven Nat. Laboratory*, 247 A.D.2d 605 (2nd Dep't 1998) ("plaintiffs' bare assertion that the defendants 'negligently misrepresented to the plaintiffs the risk created by the use, discharge and deposit of the hazardous materials' is legally insufficient to state a cause of action for negligent misrepresentation"); *Rand Int'l Leisure Products, Inc. v. Bruno*, 22 Misc. 3d 1111(A), 875 N.Y.S.2d 823 (Sup. Ct. Nassau Co. Jan. 14, 2009) (Austin, JSC).[1]

Plaintiff itself is all-too familiar with this standard, as numerous complaints filed by Trump have been dismissed for their failure to contain sufficiently particularized factual allegations. Recently, for example, in *Trump v. The Carlyle Group*, Index No. 603097/08 (Sup. Ct. N.Y. Co., March 29, 2010), Supreme Court dismissed Trump's amended complaint in that case using language which, we submit, is equally descriptive of the Amended Complaint:

---

[1] *See also JFK Holding Company, LLC v. City of New York*, 68 A.D.3d 477 (1st Dep't 2009); *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep't 2006); *Goldfarb v. Schwartz*, 26 A.D.3d 462 (2nd Dep't 2006) (bare allegations are insufficient); *Jordan v. UBS AG*, 11 A.D.3d 283, 285 (1st Dep't 2004); *Ozdemir v. Caithness Corp.*, 285 A.D.2d 961 (3rd Dep't 2001) ("a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence"); *Franklin v. Winard*, 199 A.D.2d 220 (1st Dep't 1993); *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993); *ABN Amro Bank N.V. v. MBIA Inc.*, 26 Misc. 3d 1223(A), 2010 WL 549074 (Sup. Ct. N.Y. Co. Feb. 17, 2010) ("[a]llegations consisting of bare legal conclusions, however, are not entitled to consideration"); *Charney v. Sullivan & Cromwell LLP*, 15 Misc. 3d 1128(A), 841 N.Y.S.2d 217 (Sup. Ct. N.Y. Co. Apr. 30, 2007) ("The court is not, however, required to accept factual allegations that are negated beyond substantial question by documentary evidence or allegations consisting of bare legal conclusions [citations omitted]").

> The Amended Complaint's fact section *does not allege any specific actions or statements by the C/E Defendants. Plaintiff instead appears to rely upon the barest of allegations. . . .*"

Id., at 7 (emphasis added) (annexed as *Exhibit 1*). The Court in *Trump v. The Carlyle Group* recognized that a "court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts." *Id.*, at 8.

The decision in *Trump v. The Carlyle Group* is not an isolated one, and in numerous cases, the courts have rejected Trump's attempt to assert *in-terrorem* causes of action using only the slightest and barest conclusory allegations, which are unsupported by any actual facts. *See Trump v. Cheng*, 63 A.D.3d 623 (1st Dep't 2009), which affirmed dismissal of Trump's complaint and amended complaint on the grounds, *inter alia*, that it lacked specificity and failed to allege facts and made only conclusory statements (the "claims do not allege 'with particularity' the reasons why a presuit demand on the general partners was not "likely to succeed"; "plaintiff's allegations are insufficient 'to create a reasonable doubt either as to whether the directors are disinterested and independent or whether the transaction at issue resulted from a valid exercise of business judgment'").

Indeed, it appears that Trump's *modus operandi* is to use the barest of allegations - employing conclusory, boilerplate allegations - to commence and prosecute *in terrorem* litigation, such as this case.

But, as the Second Department has held: "bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion." *Palazzolo, supra*, 298 A.D.2d at 372. Indeed, even in the case relied on by this Court - *Meyer v. Guinta* -

the Second Department held that a motion to dismiss should have been granted because there, as here, "the evidentiary record flatly contradicts the conclusory allegations of the plaintiff's amended complaint."

> It is well settled that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether she has stated one (citation omitted).

262 A.D.2d at 464.

This is especially the case where, as here, Plaintiff has relied on evidentiary material beyond the pleadings. In this instance, the Court is required not merely to assume the truth of the allegations in the Complaint but rather to determine whether Plaintiff has a cause of action. Order, at 5; *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 46 A.D.3d 530 (2nd Dep't 2007).

Plaintiff's motion for leave to amend should have been denied because there is no well-pleaded allegation containing any factual basis to support any proposed theory of recovery. *See Rand Int'l Leisure Products, Inc.* Because there is no dispute that TNC sought and was granted a preliminary injunction by the Court in *Seven Springs I*, TNC is, as a matter of law, entitled to the presumption that it sought and obtained that injunction properly and in good faith, for good cause. *See e.g. I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 207 (1st Dep't 2005); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.*, 168 A.D.2d 238 (1st Dep't 1990); *Tray Wrap, Inc. v. Pacific Tomato Growers Ltd.*, 18 Misc. 3d 1122(A), 856 N.Y.S.2d 503, *14

(Table) (Sup. Ct. Bronx Co. 2008).

This Court concluded that the Amended Complaint states a cause of action for *prima facie tort* and slander of title. Order at 6. For the reasons set forth below, we believe that this Court misapprehended the applicable law, and gave far-too much deference to the conclusory and plainly incredible assertions in the Amended Complaint.

Point II

PLAINTIFF "HAS" NO CLAIM FOR *PRIMA FACIE* TORT, AND THE AMENDED COMPLAINT FAILS TO STATE ONE

This Court concluded that Plaintiff stated a cause of action for *prima facie* tort because "Plaintiff has alleged that disinterested malevolence was the sole motivation for defendant's conduct and has alleged specific and measurable loss to the value of its property and its development." Order at 6.

As the Second Department stated in *Epifani v. Johnson*, 65 A.D.3d 224 (2nd Dep't 2009), "[p]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action which is not independently viable ."

We respectfully submit that the Amended Complaint in this action fails to satisfy this requirement.

A. The Amended Complaint Fails to Overcome the Presumption that Arose by Virtue of the Preliminary Injunction order in *Seven Springs I*

The Amended Complaint fails to allege any facts which even identify the purportedly offensive or unlawful conduct committed by any of the defendants. Moreover, the bare allegation that this unidentified conduct was motivated solely by "disinterested malevolence" is not only conclusory, it is incredible and contradicted by undisputed record evidence, and it is precluded by the presumption that arises by virtue of the fact that the Preliminary Injunction Order was entered by the Court in *Seven Springs I.*

This presumption eviscerates Plaintiff's bare contention that TNC was motivated by "malice" or disinterested malevolence." *I.G. Second Generation Partners, L.P., supra*, 17 A.D.3d at 207 ("Where, as here, [an order] has been entered against the malicious prosecution plaintiff in the prior action of which it complains, that circumstance is at least prima facie evidence that the prior action was based on probable cause, and this presumption is not overcome by . . . [where] Plaintiffs have failed to allege any facts from which it might be inferred that the prior decision in [TNC's] favor in the underlying action was obtained by fraud or misrepresentation and have thus failed to overcome the presumption of probable cause"); *Crown Wisteria, Inc., supra*, 168 A.D.2d 238 (same; Plaintiff needs to overcome the presumption on a motion to dismiss); *Tray Wrap, Inc., supra*, *14.

B. The Amended Complaint Fails to Allege Facts Sufficient to Demonstrate that Plaintiff "Has" a Cause of action for *Prima Facie* Tort

As TNC demonstrated in its Reply Memorandum in support of its motion to dismiss, a claim of *prima facie* tort requires evidence of: "(1) the intentional infliction of harm, (2) which

results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985); *Curiano v. Suozzi*, 63 N.Y.2d 113, 117 (1984); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 332 (1983). "This means that 'the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another'." *Id.*, 59 N.Y.2d at 333; *DeNaro v. Rosalia*, 59 A.D.3d 584 (2nd Dep't 2009).

But where, as here, TNC's conduct was motivated or committed at least partly in furtherance of legitimate motives - as Supreme Court found when it issued the Preliminary Injunction Order in *Seven Springs I* - there is no claim for *prima facie* tort. *Kleinerman v. 245 East 87 Tenants Corp.*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2010 WL 2195742 (1st Dep't 2010); *Empire One Telecommunications, Inc. v. Verizon New York, Inc.*, 26 Misc. 3d 541, 888 N.Y.S.2d 714 (Sup. Ct. Kings Co. 2009) (allegation by plaintiff competitor that Verizon intentionally manipulated call records so that long distance calls appear as local calls fails to state a claim for prim a facie tort because plaintiff's accusations are logically explained by Verizon's self-interest in depriving plaintiff of a business opportunity in the hope that competition may be diminished). It is not enough simply to assert in bare conclusory fashion the bare, naked elements of a cause of action. The amended complaint must allege facts - not simply conclusory statements - which support such a claim. The Amended Complaint in this case contains no such allegations.

This Court focused on the allegation in the Amended Complaint, made on information and belief, that "Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence is the sole motivation for Defendant's actions." (Amd. Cplt., ¶41)

But the Second Department has routinely dismissed such conclusory allegations as legally insufficient because, as here, they do not allege any specific acts committed by any of the Defendants, and they do not contain facts which allege, or from which an inference may be drawn, that TNC acted solely out of disinterested malevolence. The Second Department requires that this allegation be pleaded with facts, not just conclusory statements. *Simaee v. Levi*, 22 A.D.3d 559 (2nd Dep't 2005) (pleading must "allege facts indicating that the defendants' actions were motivated by disinterested malevolence"); *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc.*, 5 A.D.3d 352 (2nd Dep't 2004); *EECP Centers of America, Inc. v. Vasomedical, Inc.*, 265 A.D.2d 372 (2nd Dep't 1999) (complaint dismissed for failing to allege any facts to indicate that the sole motivation for the appellant's actions was disinterested malevolence).

Moreover, the bare the assertion that TNC acted solely out of disinterested malevolence is not only precluded by the presumption arising from the Preliminary Injunction Order, *see I.G. Second Generation Partners, L.P., supra*, but settled law establishes that where TNC had at least another, partial, reason for having done whatever it is alleged to have done wrong, Plaintiff cannot state and does not have a cause of action for *prima facie* tort. *Meridian Capital Partners, Inc. v. Fifth Ave. 58/59 Acquisition Co. LP*, 60 A.D.3d 434 (1st Dep't 2009) (existence of other interest or motive precludes *prima facie* tort claim); *WFB Telecom-munications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257 (1st Dep't 1992) (affirming dismissal of claim for *prima facie* tort where there were no well-pleaded allegations to support the conclusory allegation that disinterested

malevolence was the sole motivation for defendant's actions)[2]; *Fallon v. McKeon*, 230 A.D.2d 629 (1st Dep't 1996) (claim for *prima facie* tort dismissed in absence of allegations of facts tending to show that disinterested malevolence was the sole motivation for defendant's actions); *Empire One Telecommunications, Inc., supra.*

The New York Court of Appeals long ago recognized that an altruistic motive provides protection against a suit for *prima facie* tort, and held that where, as here, one of defendant's purposes is to perform an act or establish a business that will be of benefit to others - such as the maintenance of property as a nature preserve for the benefit of the public - there is no liability. *Beardsley v Kilmer*, 236 NY 80 (1923) ("Altruism ought to have some place in the consideration of enabling motives, and if one of the purposes is to perform an act or establish a business which will be of benefit to others and give them service not before enjoyed, we think such an act ought to confer the same protection as one which looks only to personal and selfish pains").

Where, as here, other motives exist, such as self-interest, or business advantage - or the maintenance and preservation of the Meyer Nature Preserve - a claim for *prima facie* tort simply does not lie. *Roberts, supra*, 92 A.D.2d at 444, *citing Squire Records v. Vanguard Recording Soc.*, 25 A.D.2d 190 (1st Dep't 1966), *aff'd* 19 N.Y.2d 797 (1967); *ATI, Inc. v. Ruder & Finn,*

---

[2] "Central to the cause of action for prima facie tort is that the defendant's intent have been solely to injure plaintiff, *i.e.*, that defendant have acted from 'disinterested malevolence' (citations omitted). Here, the complaint states, in a conclusory fashion, unsupported by factual allegations, that defendants' sole intent was to harm plaintiffs. . . . Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference. . . , nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *WFB Telecommunications, Inc., supra, quoting Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220 (1st Dep't 1991), *quoting Roberts v. Pollack*, 92 A.D.2d 440, 444 (1st Dep't 1983).

Inc., 42 N.Y.2d 454 (1977); *Hessel v. Goldman, Sachs & Co.*, 281 A.D.2d 247 (1st Dep't 2001).

C. Plaintiff Still Has not Alleged "Special Damages"

A claim for *prima facie* tort requires proof of special damages. The Amended Complaint fails to demonstrate - because it cannot demonstrate - that Plaintiff sustained any damages, and certainly not the "special damages" required by New York law.

Plaintiff alleges only that it sustained the following damages:

1. $5 million for its inability to use its purported easement;
2. $50 million for the diminution in value of the Seven Springs Parcel; and
3. $5 million for Plaintiff's inability to access the Seven Springs Parcel from the south over Oregon Road.

(Amd Cplt., ¶50)

This Court concluded that this boilerplate, generalized assertion of large round numbers was "specific and measurable." Order at 6. We believe this conclusion is contrary to New York law, and it ignores or misapprehends the special damages requirement. General allegations of loss, especially when supported by damages set forth in round numbers without particularization, do not constitute special damages. *Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435 (1960); *Pitcock v. Kasowitz, Benson, Torres & Friedman LLP*, ___ A.D.3d ___, ___N.Y.S.2d ___, 2010 WL 2400434 (1st Dep't June 17, 2010) (rejecting boilerplate allegations of special damages as legally insufficient); *Carrea v. Imagimed, LLC*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2010 WL 2309433 (2nd Dep't June 8, 2010) (same); *Mancuso v. Allergy Associates of Rochester*, 70 A.D.3d 1499 (4th Dep't 2010 (same); *Emergency Enclosures, Inc. v. National Fire Adjustment Co., Inc.*, 68 A.D.3d 1658 (4th Dep't 2009); *Vigoda v. DCA Productions Plus Inc.*, 293 A.D.2d

265 (1st Dep't 2002); *DiSanto v. Forsyth*, 258 A.D.2d 497 (2nd Dep't 1999).

Special damages "must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts'," *Epifani, supra, quoting Ginsberg v. Ginsberg*, 84 A.D.2d 573, 574 (2nd Dep't 1981), quoting Luciano v. *Handcock*, 78 A.D.2d 943, 944 (2nd Dep't 1980).

The conclusory allegations in the Amended Complaint do not identify the actual losses with sufficient - indeed, with any - particularity; and they do not allow this Court to conclude that any such damages (general or specific) were proximately caused by the issuance of the preliminary injunction, rather than by the world-wide economic slow-down - what former Federal Reserve Chairman Alan Greenspan called a "once in a century credit tsunami,"[3] and what even Trump has characterized as a *force majeure* sufficient to excuse his performance under a $40 million loan. *See Trump v. Deutsche Bank Trust Co. Americas*, 65 A.D.3d 1329 (2nd Dep't 2009) (rejecting Trump's argument that the worldwide economic crisis which prevented him from obtaining credit constituted a *force majeure* event which vitiated obligations under a $40 million loan agreement and note).

---

[3] Blank Rome LLP Trump v Deutsche Bank: Does the Credit Crisis Constitute Force Majeure Event? www.blankrome.com/index.cfm?contentID=37&itemID=1884

Point III

THIS CASE IS IMPROPER IN THIS COURT AND CERTAINLY PREMATURE; ANY APPLICATION FOR DAMAGES ARISING FROM THE PRELIMINARY INJUNCTION IN *SEVEN SPRINGS I* MUST BE MADE IN THAT ACTION

This action is legally insufficient, at worst; and it is premature, at best.

Plaintiff admits that the sole purpose of this action is to recover damages - damages which it has not articulated and which it may or may not sustain - from the preliminary injunction issued in *Seven Springs I.* That Order was conditioned on TNC's posting of a $100,000 bond, which TNC posted.

It is settled law that "[i]n order. . . to recover damages sustained as a result of the issuance of a preliminary injunction, there must be a final determination, be it explicit or implicit, that the plaintiff was not entitled to the preliminary injunction." *Forest Laboratories, Inc. v. Lowey*, 118 A.D.2d 828 (2nd Dep't 1986); *Sunrise Plaza Associates v. International Summit Equities Corp.*, 212 A.D.2d 690 (2nd Dep't 1995).

Plaintiff's only remedy (with one limited exception) is for damages under the bond - should Plaintiff be able to prove in *Seven Springs I* that the Preliminary Injunction Order was wrongfully issued. *Margolies v. Encounter, Inc.*, 42 N.Y.2d 475 (1977); *Bonded Concrete, Inc., supra*; *Town of Putnam Valley v. Cabot*, 50 A.D.3d 775 (2nd Dep't 2008).

Plaintiff's remedy is to make a motion in *Seven Springs I.* CPLR 6315;[4] *Forest*

---

[4] *Reingold v. Bowins*, 34 A.D.3d 667 (2nd Dep't 2006). CPLR 6315 provides for an assessment of damages which is binding in any subsequent action on a posted undertaking. Without an undertaking, there is no remedy for damages, as "there is no common law cause of action for damages sustained by an improperly procured preliminary injunction, nor does CPLR 6315 create a statutory cause of action." *Honeywell, Inc. v. Technical Bldg. Services*, 103 A.D.2d 433, 434 (3rd Dep't 1984).

Laboratories, Inc., supra. Any damages sustained by reason of a preliminary injunction should be ascertained upon a motion made to the Court that issued the injunction, CPLR 6315, and only then may a successful party commence an action to recover the damages that were determined on that motion. *2339 Empire Management, LLC, supra*, 71 A.D.3d at 998, *citing Margolies v. Encounter, Inc.*, 42 N.Y.2d at 479.[5] "[A]s a rule, liability on an injunction undertaking accrues only after there has been a final determination that the plaintiff was not entitled to the injunction, whether that determination is explicit or implicit." 67A N.Y.Jur. 2d Injunctions § 225 (July 2010 ed.); *Board of Managers of Pomona Park Condominiums v. Gennis*, 61 A.D.3d 905 (2nd Dep't 2009). This is because the undertaking is "the source and measure of liability." *Bonded Concrete, Inc., supra, citing City of Yonkers v. Federal Sugar Ref. Co.*, 221 N.Y. 206, at 209 (1917).

The one exception to this rule is if Plaintiff could establish that TNC procured the Preliminary Injunction Order by means of fraud or misrepresentation. *I.G. Second Generation Partners, L.P., supra*, 17 A.D.3d at 207. But the issuance of the Preliminary Injunction Order itself gives rise to a presumption of probable cause that attaches to TNC's conduct, *id.*, and that presumption is not overcome by the subsequent reversal of the order, *id.* (which of course has not occurred),[6] and it is not overcome by Plaintiff's mere naked pleading, in conclusory fashion, that TNC was solely motivated by "disinterested malevolence" or "malice" when it sought and obtained the Preliminary Injunction to protect its continued ownership of the subject property,

---

[5] *See Lelekakis v. Kamamis*, 25 Misc. 3d 1241(A), 2009 WL 4843780 (Table) (Sup. Ct. Queens Co. 2009) ("the party wrongfully enjoined may seek summary relief by motion for an assessment of damages in the action in which the injunction was issued").

[6] Plaintiff failed to perfect its appeal from the Preliminary Injunction Order.

and to protect the property itself from the effects of Plaintiff's trespass. *Id.* ("Plaintiffs have failed to allege any facts from which it might be inferred that the prior decision in defendants' favor in the underlying action was obtained by fraud or misrepresentation and have thus failed to overcome the presumption of probable cause"); *Tray Wrap, Inc*, *supra*; *Wilderhomes, LLC v. Zautner*, 23 Misc. 3d 1112(A), 885 N.Y.S.2d 714 (Table) (Sup. Ct. Albany Co. 2009) (same).

Point IV

PLAINTIFF HAS DISAVOWED AND DOES NOT ASSERT A CAUSE OF ACTION FOR SLANDER OF TITLE

This Court improperly found that the Amended Complaint states a cause of action for slander of title, given that Plaintiff has disavowed asserting any such claim. Having charted its own course, by denying that the Amended Complaint states a slander of title claim, this Court should not have found that the Amended Complaint states such a claim.

TNC, in its Reply Memorandum on its motion to dismiss (TNC's only post-amendment memorandum), argued that the Amended Complaint effectively sought to assert a claim for slander of title, and that such claim would - regardless of its merit - be barred by the applicable one-year statute of limitations. *39 College Point Corp. v. Transpac Capital Corp.*, 27 A.D.3d 454 (2nd Dep't 2006); *Hanbidge v. Hunt*, 183 A.D.2d 700 (2nd Dep't 1992) ("A cause of action sounding in slander of title is governed by a one-year Statute of Limitations").

Plaintiff opposed that argument, at least in part, by disavowing any intention to assert a slander of title claim. (See Ex. 8, at 10-11)

New York law is clear: parties are free to chart their own course in litigation, unless

enforcement is against public policy. *Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 214 (1984); *T.W. Oil v. Consolidated Edison of N.Y.*, 57 N.Y.2d 574, 579-580 (1982); *Vargas v. Marquis*, 65 A.D.3d 1332 (2nd Dep't 2009); *New York Cent. Mut. Fire Ins. Co. v. Dukes*, 14 A.D.3d 704 (2nd Dep't 2005); *J & A Vending, Inc. v. J.A.M. Vending, Inc.*, 303 A.D.2d 370 (2nd Dep't 2003).

Even if Plaintiff had "stated" a claim for slander of title - and it did not - any such claim was disavowed.

Point V

THE AMENDED COMPLAINT
CONTAINS NO BASIS FOR PUNITIVE DAMAGES

The Second Department has repeatedly held that punitive damages are unavailable absent "conduct of such an egregious nature directed at [the plaintiff], nor a pattern of such conduct directed at the public in genera." *Hylan Elec. Contracting, Inc. v. MasTec North America, Inc.*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2010 WL 2511156 (2nd Dep't June 22, 2010) (citations omitted); *Financial Services Vehicle Trust v. Saad*, 72 A.D.3d 1019 (2nd Dep't 2010); *99 Cents Concepts, Inc. v. Queens Broadway, LLC*, 70 A.D.3d 656 (2nd Dep't 2010); *Fragrancenet.com, Inc. v. Fragrancex.com, Inc.*, 68 A.D.3d 1051 (2nd Dep't 2009) ("Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations'").

This Court did not expressly address Plaintiff's request for punitive damages in its Order.

We respectfully submit that even at the pleading stage of this case, there is no basis on

which punitive damages can be sustained in this action - where Supreme Court in *Seven Springs I* has already determined that TNC had good cause to seek, and was entitled to a preliminary injunction in that case. There is no basis to conclude that Plaintiff's cursory, conclusory Amended Complaint even approaches the showing necessary to support a claim for punitive damages against TNC - who did nothing but defendant its rights in and to its own real property in *Seven Springs I.*

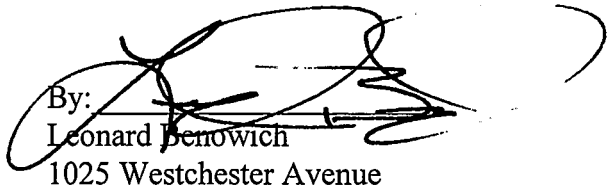
Conclusion

TNC's motion should be granted.

The Amended Complaint should be dismissed in all respects.

Dated: July 20, 2010

BENOWICH LAW, LLP



By:
Leonard Benowich
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400
Attorneys for Defendant
The Nature Conservancy

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\Reargument\insert-1-standard.wpd

1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

DONALD J. TRUMP,

Plaintiff,

-against-

Index No.: 603097/08
Motion Date: 2/24/10
Motion Seq. Nos.: 11, 12, 13, 14

THE CARLYLE GROUP, EXTELL DEVELOPMENT COMPANY, EXTELL RIVERSIDE L.L.C., CRP/EXTELL RIVERSIDE, L.P., GARY BARNETT, CRP RIVERSIDE G.P. L.L.C., CRP RIVERSIDE L.L.C., CARLYLE REALTY PARTNERS IV (CANADIAN) L.P., JOHN DOE 1, JOHN DOE 2 and HUDSON WATERFRONT ASSOCIATES, I THROUGH V, L.P.s,

Defendants.

----------X

BRANSTEN, J.

Motion sequence numbers 11, 12, 13 and 14 are consolidated for disposition.

In motion sequence number 11, defendants Hudson Waterfront Associates I-V LPs ("Hudson Partnerships") move, pursuant to CPLR 3211(a)(5) and (a)(7), to dismiss Plaintiff's Amended Complaint.

In motion sequence number 12, defendants The Carlyle Group, Extell Development Company, Extell Riverside L.L.C., CPR/Extell Riverside, L.P., Gary Barnett, CRP Riverside G.P. L.L.C., CRP Riverside L.L.C. and Carlyle Realty Partners IV (Canadian) L.P. (collectively, "C/E Defendants," and, with the Hudson Partnerships, "Collective Defendants"), move, pursuant to CPLR 3211(a)(5) and (a)(7) and CPLR 3016(b), to dismiss Plaintiff's Amended Complaint.

In motion sequence number 13, Plaintiff moves for leave to file a Second

Amended Complaint.

In motion sequence number 14, the C/E Defendants move against Plaintiff for sanctions pursuant to 22 NYCRR § 130-1.1 and/or costs under CPLR 3025(b).

The court addresses the instant motions in numerical order.

BACKGROUND

A. Procedural History

Plaintiff filed his first complaint ("Complaint") in this litigation on October 28, 2008. The matter was assigned to Justice Richard B. Lowe III, presiding judge of *Trump v. Cheng et al.*, Index No. 602877/2005 ("*Trump I*"), a case premised upon the same real estate transaction that underlies the causes of action as the case at bar.

The Collective Defendants moved to dismiss the Complaint in early May of 2009. Each defendant cited, in support of their motion, the preclusive effect of *Trump I* and pleading deficiencies in the Complaint.

On May 12, 2009, Plaintiff moved to recuse Justice Lowe. While stating that Plaintiff's claim was "unsupported and baseless," the Honorable Justice Lowe found, based upon Plaintiff's assertions, that Plaintiff "will question any actions taken by this court in the instant matter." Justice Lowe therefore recused himself as an "exercise of caution" (Order dated May 14, 2009). This court was then assigned the matter.

Plaintiff responded to each defendant's motion to dismiss the Complaint on May

22, 2009. On June 23, 2009, the stipulated due date for the Collective Defendants' reply, the parties further stipulated to stay the proceedings pending a decision in *Trump I* by the Appellate Division, First Department, and to withdraw the pending motions to dismiss.

The parties then stipulated to extend the Collective Defendants' time to answer the Complaint until September 14, 2009. On that date, both the C/E Defendants and the Hudson Partnerships again moved to dismiss the Complaint, upon the same grounds as the parties' previous motions. Plaintiff requested, and was granted, additional time to respond to the defendants' motions.

Plaintiff responded to the defendants' motions on November 2, 2009. The Collective Defendants each replied on November 11, 2009, thus completing in full the nearly-completed earlier round of briefing the defendants' motions to dismiss the Complaint.

Three weeks after full submission of the Collective Defendants' motions to dismiss, on December 1, 2009, Plaintiff filed an amended complaint (the "Amended Complaint"). While counsel for the C/E Defendants objected to Plaintiff's new pleading in a letter to this court dated December 8, 2009, the Collective Defendants withdrew their respective motions to dismiss the Complaint by stipulation dated December 14, 2009.

Each defendant moved to dismiss the Amended Complaint on January 6, 2010. In support of their motions, the defendants again cited the preclusive effect of *Trump I* and deficiencies in Plaintiff's claims. Plaintiff responded on January 14, 2010.

Plaintiff moved to file a second amended complaint (the "Second Amended Complaint") on February 1, 2010, two days prior to the Collective Defendants' time to reply in support of their respective motions to dismiss the Amended Complaint. Plaintiff served its motion to file a Second Amended Complaint on February 3, 2010, the due date of the defendants' replies. The Collective Defendants each oppose the motion as futile and as comprised of defective pleadings.

The Collective Defendants each replied in support of their motions to dismiss the Amended Complaint on February 3, 2010.

The C/E Defendants brought their motion against Plaintiff for costs and/or sanctions on February 11, 2010. Briefing was completed prior to oral argument on that motion, the Collective Defendants' separate motions to dismiss and Plaintiff's motion to file a Second Amended Complaint on February 18, 2010.

Plaintiff filed a motion to recuse this court on February 23, 2010.

Plaintiff moved for sanctions against all defendants on February 25, 2005. The court summarily denied Plaintiff's motion on that same day.

Plaintiff withdrew his motion for recusal on March 1, 2010.

B. Factual Background

This action is premised upon actions surrounding the 2005 sale of parcels of land comprising the former Penn Central rail yards on the Hudson River waterfront, between West 59th Street and West 72nd Street in Manhattan ("Hudson River Property"). The Hudson Partnerships sold the Hudson River Property to the C/E Defendants.

i. Trump I

The court presumes the parties' familiarity with the facts of *Trump I*, including the claims and defenses asserted therein. *See Trump v. Cheng*, 9 Misc. 3d 1120(A) (Sup. Ct., NY Co. 2005)(discussing the facts of the case). *Trump I* was premised upon the same real estate sale that forms the underlying basis of the claims in the instant case. Without attempting to describe *Trump I* in its entirety, Plaintiff Trump alleged in *Trump I* that the Hudson River Property was sold at less than fair value. Trump alleged that defendants Henry Cheng and Vincent Lo had arranged, on behalf of themselves and the other defendants, a $17.5 million dollar payment to Fineview Resources, Ltd. (BVI) ("Fineview"). Trump argued that Fineview was controlled by the *Trump I* defendants and that the payment was in exchange for the *Trump I* defendants' sale of the Hudson River Property to the then-non-parties, the C/E Defendants, at less than the property's alleged true value.

In July of 2006 Justice Lowe held that Trump's claims were derivative and that his failure to make demand upon the defendants was not excused. Justice Lowe therefore dismissed all but one of Plaintiff's claims. Judgment was entered on September 19, 2006. The Appellate Division, First Department affirmed the judgment dismissing the *Trump I* complaint in June 2009. *Trump v. Cheng*, 63 A.D.3d 623 (1st Dep't 2009). The Court of Appeals denied Trump's motion for leave to appeal on October 27, 2009. *Trump v. Cheng*, 13 N.Y.3d 833 (2009).

ii. *The Instant Case*

Plaintiff Trump, as in *Trump I*, asserts the Amended Complaint individually and derivatively on behalf of the Hudson Partnerships. Plaintiff owns a 30% interest in the

Hudson Partnerships. Also as in *Trump I*, the same Hudson Partnerships are named defendants.[1]

Non-party Hudson Waterfront Corporations I-V ("Hudson Corporations") hold a 1% interest in the Hudson Partnerships. Plaintiff claims that the Hudson Corporations, including its board of directors, which is dominated by non-party Henry Cheng and non-party Vincent Lo, owed a fiduciary duty to Plaintiff. Plaintiff asserts that the Hudson Corporations, its board of directors, separately and with Cheng, Lo, its investors, and additional non-parties Hudson Westside Associates I-V L.P.s ("Hudson Westside"), all approved, acquiesced and/or participated in and failed to disclose the alleged misconduct described in the Amended Complaint. The parties are familiar with the Amended Complaint, and the court will only address the facts stated therein as necessary. All non-parties accused in the Amended Complaint of wrongdoing were defendants in *Trump I*.

The Vornado Realty Trust now owns 70% interests in the Hudson Partnerships, having acquired all foreign investors' shares in the Hudson Corporations and Hudson Westside.

Plaintiff's Amended Complaint asserts no causes of action against the Hudson Partnerships or their alleged companion wrongdoers. Rather, the Hudson Partnerships are "named in the event that this action is found to be derivative." Compl., ¶ 13.

Plaintiff asserts three causes of action against the C/E Defendants. The Amended Complaint states claims against those defendants for: (1) "conspiracy to commit fiduciary

1 Plaintiff appears to omit his claim against Hudson Waterfront Associates, L.P., asserting claims only on behalf of and against Hudson Waterfront Associates I through V, L.P.s.

fraud;" (2) "the substantive wrong of committing fiduciary fraud;" and (3) "aiding and abetting a fiduciary fraud." Plaintiff admits that his three causes of actions may be derivative, and states that, upon such a finding, demand is excused and any benefit from this suit should inure to the Hudson Partnerships.

The Amended Complaint provides a tortured narrative to attempt to illustrate a duty to Plaintiff owed by the C/E Defendants. Plaintiff claims that either The Carlyle Group, L.P. or Extell Development Company acted in concert with the "fiduciaries to accomplish the fiduciary fraud when they made a $17.5 million secret payment" to Fineview (the "Fineview Payment"). Compl., ¶ 25. The Amended Complaint's fact section does not allege any specific actions or statements by the C/E Defendants. Plaintiff instead appears to rely upon the barest of allegations against the C/E Defendants in his asserted causes of action.

DEFENDANTS' MOTIONS TO DISMISS

Upon an examination of the claims of the Amended Complaint, the court finds that dismissal of the Amended Complaint in its entirety is required.

I. STANDARD OF LAW

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a) (1), a dismissal is warranted

> only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994) (internal quotations and citations omitted); *see also Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002). "It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency. *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep't 2006) *citing Robinson v. Robinson*, 303 A.D.2d 235, 235 (1st Dep't 2003).

II. THE HUDSON PARTNERSHIPS' MOTION TO DISMISS THE AMENDED COMPLAINT

(Motion Sequence No. 11)

The Hudson Partnerships move to dismiss the Amended Complaint on the grounds that Plaintiff's claims are barred by the doctrine of collateral estoppel and that Plaintiff's claims are derivative. The C/E Defendants join in and adopt the Hudson Partnerships' arguments for dismissal.

Plaintiff opposes the Collective Defendants' separate motions to dismiss with a response memorandum of law and an affirmation of counsel. While striving to provide Plaintiff all possible favorable inferences, the court is mindful that Plaintiff's counsel's affirmation is not an affidavit upon personal knowledge, that the attached newspaper articles are hearsay and that Plaintiff's statement of facts are argumentative and replete with supposition. *See Leon*, 84 N.Y.2d at 87-88; *see also Young v. Fleary*, 226 A.D.2d 454, 455 (2d Dep't 1996) (finding newspaper article hearsay and therefore insufficient to defeat a motion for summary judgment).

A. Delaware Law Applies

Because the Hudson Partnerships are Delaware entities, Delaware substantive law applies to Plaintiff's claims for breach of fiduciary duties, to the determination of whether Plaintiff's claims are derivative or individual and whether demand upon the Hudson Partnerships was excused. New York Partnership Law § 121-901 ("the laws of the jurisdiction under which a foreign limited partnership is organized ... govern its organization and internal affairs and the liability of its limited partners"); *see Trump v. Cheng*, 9 Misc. 3d 1120(A), *4 (Sup. Ct., New York County 2005).

B. Trump's Claims are Derivative

In order to determine whether Plaintiff's claims are derivative or direct under Delaware law, the

> court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004). The "issue must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" (*id.* at 1033). The Delaware law standard for determining direct and derivative claims is the same for partnerships as for corporate cases. *See Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 15 (Del. Chanc. 1992); *JFK Family Ltd. P'ship v. Millbrae Natural Gas Dev. Fund 2005, L.P.*, 21 Misc. 3d 1102(A), *13 (Sup. Ct., Westchester County 2008).

The court notes that all of Plaintiff's causes of action are overtly stated to be direct claims against only the C/E Defendants. Plaintiff reiterates this statement throughout the Amended Complaint. However, it is "the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint." *In re Syncor Int'l Corp. Shareholders Litigation*, 857 A.2d 994, 997 (Del. Ch. 2004). It is the facts of the Amended Complaint that determine whether a direct claim exists. (*Id.*).

Despite his overt pleadings, however, Plaintiff considers that his claims are or may be derivative. The Amended Complaint has named the Hudson Partnerships as both defendant and derivative plaintiff and Plaintiff argues that demand upon Vornado

(currently a 70% owner of the Hudson Partnerships) is excused. The court has examined the facts of the Amended Complaint and exhibits thereto, as well as Plaintiff's response to the Hudson Partnerships' motion to dismiss. The court finds that Plaintiff's claims are derivative and that demand is not excused.

Plaintiff's claims seek damages of $17.5 million dollars for the C/E Defendants alleged "fiduciary fraud" in paying Fineview $17.5 million dollars to "become [] the purchaser of the [Hudson River] property." Compl., ¶ 24. Plaintiff fails to allege any individual harm caused to him by the Fineview Payment. Rather, assuming *in arguendo*, that the Fineview Payment was improper, any duty breached and any injury suffered as a result thereof would be to the Hudson Partnerships. Plaintiff fails to allege how any (unpleaded) harm to him differs from harm to the Hudson Partnerships. Further, any recovery of the $17.5 million dollar payment would remit to and be for the benefit of the Hudson Partnerships. Plaintiff's claims are derivative. *Tooley*, 845 A.2d at 1039; *Green v. LocatePlus Holdings, Corp.*, 2009 WL 1478553, *1-2 (Del. Ch. 2009).

B. Plaintiff Has Not Made Demand Upon Vornado and Demand is not Excused

Delaware law requires, as a condition precedent to a plaintiff bringing derivative suit against a partnership or corporation, that the plaintiff make a pre-suit demand upon the board of directors to prosecute the contemplated action. *See* Del. Chanc. Ct. Rule 23.1; *Simon v. Becherer*, 7 A.D.3d 66, 71-72 (1st Dep't 2004). Demand may be excused

upon the plaintiff setting forth "*particularized factual allegations* sufficient to create a reasonable doubt either as to whether the directors are disinterested and independent or whether the transaction at issue resulted from a valid exercise of business judgment. Del. Chanc. Ct. Rule 23.1 (emphasis in original); 6 Del. Code § 17-1001. Plaintiff has not made a pre-suit demand upon Vornado. Instead, the Amended Complaint attempts to plead that demand was excused. Compl., ¶¶ 60-67.

Plaintiff states that:

> 64. It is in Vornado's interest that no judgment for conspiracy to commit and the commission of fiduciary fraud be returned against the Carlyle/Extell Defendants.
>
> 65. If Plaintiff is successful in the present suit, that would evidence the fraudulent actions of the General Partner, its investors, its Board of Directors, Cheng, Lo, and substantially increase the likelihood of a lawsuit being brought against the General Partner, its investors, the Board of Directors, Cheng, and Lo.
>
> 66. Were such suit brought and judgment rendered against the General Partner, its investors, its Board of Directors, Cheng, and Lo, Vornado in the first instance would be required to pay any judgment.

Compl., ¶¶ 64-66. For these reasons, Plaintiff alleges that "Vornado cannot be expected to exercise good faith business judgment, disinterestedness and independence in its decision as to whether to bring suit against the Carlyle/Extell Defendants." Compl., ¶ 67.

The statements in the Amended Complaint do not allege with "*particularity*" the reasons why a presuit demand on Vornado was not "likely to succeed." *See* Del. Chanc. Ct. Rule 23.1. Plaintiff merely alludes that "Vornado's interest" is contrary to judgment against the C/E Defendants. Plaintiff fails to state with specificity why Vornado would

forego the possibility to recover any improperly made payment.

Reviewing Plaintiff's pleadings in full, Plaintiff's cited Exhibit D states, with specific regard to *Trump I*, that Vornado would "indemnify the Sellers for liabilities and expenses arising out of Mr. Trump's claim that the limited partnerships that Vornado Sub is acquiring did not sell the Rail Yards at a fair price . . . ." Compl., Ex. D, p. 3 of 6. While liability for indemnification could provide some semblance of a basis, though far from a finding, for an excused demand, no support for that liability is found here. Plaintiff expressly disclaims that the matter at bar pertains to his previously alleged claims regarding the price of the Hudson River Property. Compl., ¶ 22. Exhibit D specifically applies to *Trump I* and states nothing about the current litigation, the C/E Defendants or the Fineview Payment. Plaintiff fails to explain how Vornado's possible indemnification for certain claims of *Trump I*, a closed case, would lead to current or future liability.

Plaintiff's conclusory allegations are insufficient "to create a reasonable doubt either as to whether the directors are disinterested and independent or whether the transaction at issue resulted from a valid exercise of business judgment." *Trump v. Cheng*, 63 A.D.3d 623, 624 (1st Dep't 2009) *citing Simon*, 7 A.D.3d at 71-72.

The court finds that the Amended Complaint asserts three derivative causes of action. Plaintiff has not provided sufficient reasons for excuse of demand to withstand this motion to dismiss. The court therefore must dismiss the Amended Complaint.

C. Collateral Estoppel

The Hudson Partnerships, joined by the C/E Defendants, further argue that the claims in the Amended Complaint are barred by the doctrine of collateral estoppel. Due to the abundance of reasons supporting dismissal of the Amended Complaint on its merits, stated above and below, the court need not address the issue in full and makes no holding thereupon.

III. THE C/E DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

(Motion Sequence No. 12)

Though the court has dismissed the complaint, additionally, and alternatively, the court will addresses the merits of the C/E Defendants' motion to dismiss the Amended Complaint.

The C/E Defendants argue that Plaintiff's claims must be dismissed for failure to state a cause of action pursuant to 3211(a)(7) and for failure to state a claim for fraud with the particularity required by CPLR 3016(b). Plaintiff opposes.

A. Plaintiff's Claims Against the C/E Defendants

New York law, differing from federal law,[2] does not recognize a claim for "fiduciary fraud." Thus, providing Plaintiff with every favorable inference on this motion to dismiss. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977) ("the sole

---

2 *See* 11 U.S.C.A. § 523.

criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail), the court examines Plaintiff's claims as either claims for fraud or breach of fiduciary duty.

The extent of Plaintiff's general allegations against the C/E Defendants consist of the following:

> 25. Carlyle/Extell wilfully, intentionally, knowingly and wrongfully acted with the knowledge of the fiduciaries to accomplish the fiduciary fraud when they made a $17.5 million secret payment to a London Bank to the account of an off-shore company, Fineview Resources Limited (BVI), believed to be dominated and controlled by the fiduciaries, Cheng, and Lo, the General Partner, its investors and its Board of Directors, all without the knowledge of the Plaintiff [sic].
>
> 26. Upon information and belief, the Carlyle/Extell Defendants and Cheng, Lo, the General Partner, its investors, and its Board of Directors, by their willful, intentional, knowing, and wrongful misconduct, are joint tortfeasors, aiders and abettors and principals in the wrongdoing, and each is jointly and severally liable for the fraudulent misconduct described herein.
>
> 27. In or about 2009, the attorney for Extell, its related companies and Gary Barnett, stated that her clients were unaware of any services performed by Fineview Resources Limited (BVI), but were simply told how to pay the monies.
>
> 28. Upon information and belief, the Carlyle/Extell Defendants have admitted to the District Attorney, New York County their role in the described wrongful conduct.
>
> Compl., ¶¶ 25-28.

Plaintiff's causes of action are addressed out of numerical order.

i. Plaintiff's Second Cause of Action Against the C/E Defendants for "the Substantive Wrong of Committing Fiduciary Fraud"

Plaintiff's second cause of action asserts that:

> 55. The substantive wrong of fiduciary fraud was committed when in November 2005 the Carlyle/Extell Defendants, to the knowledge of the fiduciaries, willfully, intentionally, knowingly, and wrongfully made the payment of the sum of $17.5 million as described above, this deliberately concealed from the Plaintiff.

(a) Breach of Fiduciary Duty

Plaintiff does not plead that the C/E Defendants, the purchasers of the Hudson River Properties and therefore the party opposite the Hudson Partnerships in the sale, owed him a fiduciary duty. Plaintiff does not plead any relationship existed between the C/E Defendants and Hudson Partnerships other than a conventional business relationship between sophisticated business entities. Absent special circumstances, a conventional business relationship does not create a fiduciary relationship. *Feigen v. Advance Cap. Mgmt. Corp.*, 150 A.D.2d 281, 283 (1st Dep't 1989); *see also AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 21-22 (2d Dep't 2008) (stating that a special relationship creating a fiduciary relationship may arise when one party controls another party for the good of that other party). Plaintiff asserts no facts or special circumstances between

Plaintiff and the C/E Defendants giving rise to a fiduciary relationship. *See EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19-22 (2005).

Plaintiff has not stated a claim of breach of fiduciary duty. *See also Peacock v. Herald Square Loft Corp.,* 67 A.D.3d 442, 443 (2009) (dismissing plaintiff's claims for breach of fiduciary duty for failure to plead the claims with specificity required by CPLR 3016(b)).[3]

(b) Fraud

To state a claim for fraud, Plaintiff must allege that "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance." *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006); *Iotex Communications, Inc. v. Defries*, 1998 WL 914265, *6, 1998 Del Ch LEXIS 236, *18-19 (Del. Ch. 1998) (dismissing fraud claims when applying New York law, which court recognized as "decisively to the same effect" as Delaware law); *cf. Bergold v. Anglin*, 1988 WL 25859, *2, 1988 Del LEXIS 64, *5-6 (Del. 1988). Upon making a claim for fraud, the heightened pleading requirements of the Delaware Chancery Court and CPLR 3016 apply, and the claimant must plead "the circumstances constituting the wrong . . . in detail." CPLR 3016(b); Del. Chanc. Ct. Rules, Rule 9(b).

---

3 New York and Delaware law are the same with regard to breach of fiduciary duty and aiding and abetting a breach of fiduciary duty. *See JFK Family Ltd. Partnership v. Millbrae Natural Gas Dev. Fund 2005 L.P.*, 21 Misc. 3d 1102(A), *18 n18 (Sup. Ct., Westchester County 2008).

Absence of any of these required elements mandates that this court find a failure to plead a prima facie case. *Global Minerals and Metals Corp. v. Holme,* 35 A.D.3d 93, 98 (1st Dep't 2006); *see Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584, 587 (Del. 2008).

Plaintiff's Amended Complaint pleads no material false representation by the C/E Defendants. Plaintiff thus does not, and is unable to, plead the remaining elements of a fraud claim: Plaintiff may not claim that the C/E Defendants intended to defraud Plaintiff with an affirmative representation; Plaintiff may not allege how he changed his position or otherwise relied upon any purported misrepresentations or omissions to his detriment; and Plaintiff may not claim that he has suffered resulting damage from the non-existent material misrepresentation. The Amended Complaint states only that the C/E Defendants made the Fineview Payments.

The court does not confuse the heightened pleading requirement of CPLR 3016(b) with the standard needed to prove a claim for fraud. *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008). "The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of." *Id.* at 491. Plaintiff's failure to allege *any* specific allegations of the elements of fraud by the C/E Defendants require that this court dismiss Plaintiff's second cause of action for failure to state a claim.

The court further notes that throughout Plaintiff's multiple complaints and various pleadings, the C/E Defendants' alleged $17.5 million dollar payment to Fineview is labeled "secret." However, the Hudson Partnerships' attorneys, in a November 2, 2005

"letter agreement constitut[ing] the joint instructions of the Sellers [and] the Purchasers" of the Hudson River Property directed the Commonwealth Land Title Insurance Company to disburse funds in furtherance of the transaction. Affirmation of Richard H. Dolan [in support of the C/E Defendants' Motion to Dismiss], Ex. B, p EX0636). The letter instructs the title insurance company to "[d]isburse the Funds in accordance with the terms of Exhibit N annexed hereto." *Id.*, Ex. B, p EX0639 (emphasis in original). Exhibit N, titled "Funds Disbursement Statement," mandates that funds be disbursed "To Fineview Resources Limited (BVI); CRP/Extell Riverside L.P. - For a Finder's fee (pursuant to wire instructions on Schedule F): $16,500,000.00. *Id.*, Ex. B, p EX0671. Plaintiff acknowledges that the Fineview Payment was $17.5 million dollars in total. *See* Compl., Statement of James F. Galvin, ¶¶ 31-36. The court finds that the knowledge and disclosure of the $17,500,000 payment to Fineview is sufficient to find that Plaintiff's claim that the Fineview Payment was "secret" is inherently incredible.

Plaintiff's second cause of action against the C/E Defendants for the substantive wrong of committing a fiduciary fraud is dismissed.

ii. Plaintiff's Third Cause of Action Against the C/E Defendants for "Aiding and Abetting a Fiduciary Fraud"

Plaintiff's third cause of action alleges that the C/E Defendants:

> 58. . . . willfully, intentionally, knowingly, and wrongfully aided and abetted the fiduciaries' breach of their duties owed to Plaintiff when the Carlyle/Extell Defendants provided the means by which the fiduciaries were able to breach their duties to Plaintiff, this deliberately concealed from

Plaintiff.

Inherent in both an aiding and abetting claim for breach of fiduciary duty and for aiding and abetting fraud is the element of scienter. The court therefore addresses Plaintiff's claims for aiding and abetting a breach of fiduciary duty and aiding and abetting fraud together.

(a) Aiding and Abetting a Breach of Fiduciary Duty

A party asserting a claim for aiding and abetting a breach of fiduciary duty must establish: (1) a breach of fiduciary duty; (2) that the participant knowingly induced or participated in the breach; and (3) damages suffered as a result of the breach. *Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d 461, 464 (1st Dep't 2007), *Kaufman v. Cohen*, 307 A.D.2d 113, 126 (1st Dep't 2003); *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 370 (Del. Ch. 2008). A litigant "may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty." *Global Minerals and Metals Corp. v. Holme*, 35 A.D.3d 93, 101 (1st Dep't 2006). Rather, a litigant must allege with specificity that the participant "affirmatively assist[ed], help[ed] conceal or fail[ed] to act when required to do so, thereby enabling the breach to occur." *Kaufman*, 307 A.D.2d at 126.

(b) Aiding and Abetting Fraud

"In order to plead properly a claim for aiding and abetting fraud, the

> complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud. Actual knowledge of the fraud may be averred generally. Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated."

Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co., 64 A.D.3d 472, 476 (1st Dep't 2009) (internal quotations and citations omitted).

The Underlying Fraud/Breach of Fiduciary Duty

The court found, *supra*, that the C/E Defendants have not breached a fiduciary duty to Plaintiff. Assuming, *in arguendo* only, that another party or parties did commit a breach of fiduciary duty (the court here makes no such holding), Plaintiff has failed to properly plead that the C/E Defendants "knowingly induced or participated" therein.

Knowledge (Scienter)

Plaintiff claims that the C/E Defendants "willfully, intentionally, knowingly, and wrongfully" aided the "fiduciaries," and, thus, "provided the means by which the fiduciaries were able to breach their duties to Plaintiff." Compl., ¶ 58. Plaintiff offers no support for his conclusory pleading. Plaintiff therefore fails to set forth facts from which scienter may be inferred. *Giant Group, Ltd. v. Arthur Andersen, LLP.* 2 A.D.3d 189, 190 (1st Dep't 2003).

The Amended Complaint further fails to adequately plead that the C/E Defendants

had actual or constructive knowledge of, or that the C/E Defendants substantially assisted, in any alleged breach of fiduciary duty or fraud. *Liberman v. Worden*, 268 A.D.2d 337, 338 (1st Dep't 2000). A pleading for aiding and abetting liability must allege actual knowledge of the underlying breach of duty. *Kaufman*, 307 A.D.2d at 125. While such knowledge may be stated generally, and this court, like the Appellate Division, is mindful of the "inherent difficulty in pleading a defendant's actual state of mind," unsupported allegations of knowledge are insufficient to state a claim for aiding and abetting liability. *Id.* (dismissing claim for aiding and abetting a breach of fiduciary duty). Plaintiff has made only a one-sentence claim that the C/E Defendants' "knowingly" aided the fiduciaries' alleged breach of duty and that an attorney for the C/E Defendants stated that her clients were unaware of the basis for the Fineview Payment. Plaintiff has pleaded no facts with sufficient particularity to support its claim(s). Plaintiff's allegations are insufficient as a matter of law to allow this court to find a cause of action for either aiding and abetting fraud or aiding and abetting a breach of fiduciary duty.

Substantial Assistance

Finally, in order to properly allege its claims, Plaintiff must detail the C/E Defendants' connection with the alleged fraud. *Sterling Nat. Bank v. Ernst & Young, LLP.* 9 Misc. 3d 1129(A), *7 (Sup. Ct., NY County 2005) *citing Natl. Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 149 (1st Dep't 1987). Plaintiff must also show that any action by the C/E Defendants was the proximate cause of Plaintiff's alleged harm. Aider

and abettor liability requires more than but-for causation; it requires that Plaintiff's injury be a direct and foreseeable result of the conduct in question. *See Kolbeck v. LIT America, Inc.*, 939 F. Supp. 240, 249 (SD NY 1996).

Plaintiff's cause of action centers on the Fineview Payment. Plaintiff inherently alleges it was harmed by Plaintiff's partners' failure to share the Fineview Payment. The court finds that the C/E Defendants' payment is sufficiently removed from Plaintiff's claimed harm to prevent this court from finding any foreseeable causation of Plaintiff's alleged injury by the Fineview Payment. The C/E Defendants bear no responsibility for subsequent actions upon the money involved in the Fineview payment.

The court further finds that, for the reasons stated above, Plaintiff has not sufficiently pleaded either a claim for aiding and abetting fraud or aiding and abetting a breach of fiduciary duty.

Plaintiff's third cause of action against the C/E Defendants for aiding and abetting a fiduciary fraud is dismissed.

iii. Plaintiff's First Cause of Action Against the C/E Defendants for "Conspiracy to Commit Fiduciary Fraud"

Plaintiff's first cause of action alleges that the C/E Defendants engaged in a "conspiracy to commit fiduciary fraud," stating:

> 51. In or about 2005, the Carlyle/Extell Defendants and the fiduciaries, the General Partners, its investors, its Board of Directors, Cheng, Lo, and Westside through the known conspirator, deliberately concealed the wrongdoing from Plaintiff and conspired and agreed by and between

themselves to commit fiduciary fraud with the object being that set forth in Paragraph 24 above.

52. The overt act in the conspiracy was the wiring of $17.5 million to Fineview Resources Ltd. (BVI), which was concealed from the knowledge of the Plaintiff.

Paragraph 24 of the Amended Complaint states:

24. There is fiduciary fraud when unknown to the Plaintiff, persons and entities enter into a conspiracy to pay, and thereafter pay monies to a fiduciary in order to become either the purchaser of the property or for and because of the fiduciary's status, even where they pay the proper price for the property.

The State of New York does not recognize an independent tort for conspiracy. *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) *citing Brackett v. Griswold*, 112 N.Y. 454, 467 (1889); *Waggoner v. Caruso*, 68 A.D.3d 1, 6 (1st Dep't 2009); *see also Lindsay v. Lockwood*, 163 Misc. 2d 228, 234, n3 (Sup. Ct., Monroe County 1994). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of New York, Inc.*, 68 N.Y.2d at 969. In order for a conspiracy to be actionable, Plaintiff must plead an agreement to do something that independently would constitute a tort. *Smukler v. 12 Lofts Realty*, 156 A.D.2d 161, 163 (1st Dep't 1989).

The Amended Complaint does not sufficiently plead either a breach of fiduciary duty or a claim for fraud (*see supra*). The Amended Complaint therefore does not plead an independent tort, and thus fails to posit a claim for conspiracy. *See Transit Mgmt.,*

LLC v. Watson Indus., Inc., 23 A.D.3d 1152, 1155-56 (4th Dep't 2005) (summary judgment).

The court further notes that Plaintiff's cause of action for conspiracy repeats the factual basis of the Amended Complaint's causes of action for "fiduciary fraud" and "aiding and abetting fiduciary fraud" (fraud and breach of fiduciary duty). Plaintiff's claims are therefore duplicative thereof and must be dismissed. *Kew Gardens Hills Apartment Owners, Inc. v. Horing Welikson & Rosen, P.C.*, 35 A.D.3d 383, 386 (2nd Dep't 2006); *American Baptist Churches of Metro. N.Y. v. Galloway*, 271 A.D.2d 92, 101 (1st Dep't 2000).

Plaintiff's first cause of action against the C/E Defendants for conspiracy to commit fiduciary fraud is dismissed.

B. Plaintiff has not Alleged any Cause of Action Against Gary Barnett

The C/E Defendants argue that Plaintiff has failed to allege any cause of action against Defendant Gary Barnett. Because the court has dismissed all causes of action against the C/E Defendants, which include defendant Barnett, this part of the C/E Defendants' motion to dismiss is moot.

For the reasons stated above, the C/E Defendants' motion to dismiss is granted. For these reasons and for the reasons stated in Section II, *supra*, the Amended Complaint is dismissed in its entirety, with prejudice.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT
(Motion Sequence Number 13)

In motion sequence number 13, Plaintiff moves for leave to file a Second Amended Complaint. While Plaintiff's proposed Second Amended Complaint purports to remove the Hudson Partnerships, the pleading continues to name those parties as "nominal defendants." Plaintiff's Second Amended Complaint further seeks to refine Plaintiff's causes of actions as direct, rather than derivative, claims. The facts in the second amended complaint remain "essentially as they were." Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion for Leave to File and Serve a Propose [sic] Second Amended Complaint ("Plaintiff's Motion Seq No 14 Reply"), p 1; *see* Tr. 2/24/2010.

Generally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party and where the amendment is not patently lacking in merit. CPLR 3025(b); *Millard v. Alliance Laundry Systems, LLC*, 20 A.D.3d 866, 868 (4th Dep't 2005) (internal citations omitted). However, the court will view plaintiff's application in light of the history of the case, and the party seeking amendment has the burden of establishing the merit of the proposed amendment. *Lambert v. Williams*, 218 A.D.2d 618, 621 (1st Dep't 1995); *see Monteiro v. R.D. Werner Co.*, 301 A.D.2d 636, 637 (2d Dep't 2003) ("movant must make some evidentiary showing that the proposed amendment has merit, and a proposed amendment that is plainly lacking in merit will not

be permitted"). "[T]he motion must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment. Specious amendments should not be allowed." *Nab-Tern Constructors v. City of New York (Yankee Stadium)*, 123 A.D.2d 571, 572-73 (1st Dep't 1986); *see also Morgan v. Prospect Park Assocs. Holdings, L.P.*, 251 A.D.2d 306, 306 (2d Dep't 1998).

The decision whether to grant leave to amend a complaint is committed to the sound discretion of the court. *See Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983); *see also* CPLR 3025(b).

The Collective Defendants assert that Plaintiff's claims in his proposed Second Amended Complaint are defective for the same reasons as Plaintiff's claims in his Amended Complaint. They contend that Plaintiff's motion to amend should therefore be denied as futile. *See Kaye v. Trump*, 58 A.D.3d 579, 580 (1st Dep't 2009). The court agrees.

A. Plaintiff's Proposed Second Amended Complaint Is Without Merit

Plaintiff's restyling of his claims in the proposed Second Amended Complaint, as summarized by the C/E Defendants, "adds no new claims, no new parties, and no new material allegations. Rather, it rearranges the allegations of the amended complaint without enhancing them." Memorandum of Law of the [C/E Defendants] in Opposition to Motion to File Second Amended Complaint, and in Support of Cross-Motion for Sanctions and Costs, p 3. While Plaintiff attempts to levy, and make much of, a (hearsay)

New York Times article as justification for "refining" his complaint, Plaintiff has neither provided any valid reason why the article cures the infirmities of the Amended Complaint or why the article adds material facts. The court notes that the newspaper article predates the Amended Complaint by over two months. The court further notes that Plaintiff's Second Amended Complaint is not verified under CPLR § 3020.

As Plaintiff's counsel admits, the facts of the new pleading remain the same and certain causes of action and parties were dropped by this motion, rather than a simple agreement between the parties, merely because it seemed "the more formal way to do it" (Tr 2/18/10, 55:24). Nothing has been added to the proposed new pleading to remove the infirmities fatal to the Amended Complaint. Plaintiff's claims in the proposed new pleading therefore suffers from the same infirmities.

In addition, Plaintiff has not submitted a proper affidavit of merit with his motion to amend. *Glatt v. Mariner Partners*, 66 A.D.3d 440, 441 (1st Dep't 2009) (dismissing motion to amend for failure to submit an affidavit of merit). Plaintiff's attorney's affirmation, which merely introduces New York Times articles that were available well prior to Plaintiff's filing of his Amended Complaint and attempts to contend that the proposed pleading will cause no prejudice, is insufficient. *Schulte Roth & Zabel, LLP v. Kassover*, 28 A.D.3d 404, 404-05 (1st Dep't 2006).

B. Plaintiff's Proposed Second Amended Complaint Would Cause Prejudice

Further, Plaintiff's claim that the Second Amended Complaint will "cause no

undue prejudice to the defendants, since a letter was sent on February 1, 2010 notifying them that we intended to seek leave to file and serve a Second Amended Complaint," Affirmation of Jay Goldberg, Feb 2, 2010, ¶ 2, fails to show that prejudice will not result from allowing the Second Amended Complaint. Plaintiff does not provide the claimed letter in his moving or reply papers, nor state how the letter was sent. The court notes, however, that Plaintiff's letter was allegedly sent two weeks after Plaintiff submitted his response to the each defendants' motion to dismiss and only two days before each defendants' deadline to reply. Plaintiff served its motion to amend on the same day the Collective Defendants' replies to their respective motions to dismiss were due. The court notes that forcing the C/E Defendants to again move to dismiss a Second Amended Complaint on claims that are materially and factually the same as stated, and found wanting, in the Amended Complaint is prejudicial.

The court further notes that placing the Hudson Partnerships as "nominal defendants" effectively posits those defendants in the same position as the C/E Defendants. Should the court allow the Second Amended Complaint, the Hudson Partnerships may be forced to either respond, move to dismiss or move to remove their name from the case caption. The court finds that forcing such action upon the Hudson Partnerships, combined with nullifying the defendants' current motion to dismiss, prejudices the Hudson Partnerships.

Plaintiff has not met his burden to establish any merit to the proposed Second Amended Complaint. *Lambert*, 218 A.D.2d at 621. Even allowing that the Amended

Complaint has theoretically dropped its derivative causes of action, Plaintiff's claims differ in no material way than those denied in section III, *supra.* Further, to allow Plaintiff to file the proposed Second Amended Complaint will prejudice each defendant. Plaintiff's motion to file a Second Amended Complaint is denied. *Edenwald Contr. Co.*, 60 N.Y.2d at 959.

THE C/E DEFENDANTS MOTION FOR COSTS AND/OR SANCTIONS
(Motion Sequence No. 14)

In motion sequence number 14, the C/E Defendants move against Plaintiff for costs under CPLR 3025(b) and/or sanctions under 22 NYCRR § 130-1.1. The C/E Defendants contend that Plaintiff's proposed Second Amended Complaint contains no new claims, parties or substantive facts and that Plaintiff's motion for leave to file the Second Amended Complaint evidences a pattern of conduct undertaken primarily to delay or prolong this litigation.

The C/E Defendants base their motion upon the sequence of facts in this litigation described above, with particular regard to Plaintiff's service of multiple complaints. The C/E Defendants contend that they have completed three full rounds of motion to dismiss briefing; that Plaintiff's repeated new pleadings have rendered the defendants' first two rounds of briefing useless; and that Plaintiff now baselessly seeks to waste another round of briefing. The C/E Defendants argue that the proposed Second Amended Complaint

merely restates and reorders the claims of the Amended Complaint. The C/E Defendants contend that Plaintiff's actions have and continue to needlessly drive up litigation costs and that Plaintiff merely uses the parties' prior motions to dismiss as blueprints to attempt to remedy its pleadings.

22 NYCRR 130-1.1(a) authorizes the court to award any party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." Conduct is deemed frivolous if, among other things, "it is completely without merit in law" or "asserts material factual statements that are false." In determining whether conduct is frivolous, courts must consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Plaintiff has repeatedly stymied the Collective Defendants' efforts to put forth motions to dismiss. The court is mindful of, and unimpressed with, both the timing of Plaintiff's amended pleadings and Plaintiff's counsel's attacks upon, rather than towards the arguments of, opposing counsel. However, the court narrowly finds that Plaintiff's submissions were not "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" and are therefore not sanctionable under 22 NYCRR 130-1.1. Nor do Plaintiff's pleadings give rise to the imposition of

costs under CPLR 3025(b). Rather, counsel has, however inartfully, acted as a zealous advocate for his client upon what facts are believed known to him. Unfortunately for Plaintiff, those facts do not give rise to any claimed or inferred cause of action.

This court reminds counsels that while costs or sanctions are not here deemed warranted, "[t]here comes a point when a court can no longer permit counsel to engage in frivolous conduct" at others' expense, and upon reaching that point, the court will not hesitate to impose costs and/or sanctions. *Gassab v. R.T.R.L.L.C.*, 22 Misc.3d 1140(A), * 4 (Sup. Ct., NY County 2009) (Bransten, J), *aff'd* 2010 WL 273750 (1st Dep't 2010). Plaintiff has here narrowly avoided the imposition of costs or sanctions. Continued prosecution of claims without basis and attacks upon persons will place Plaintiff beyond this point.

The C/E Defendants' motion for costs and/or sanctions is denied.

Accordingly, it is

ORDERED that defendants Hudson Waterfront Associates I-V. LPs' motion (sequence no. 11) to dismiss Plaintiff's Amended Complaint is granted, and it is further.

ORDERED that the C/E Defendants' (The Carlyle Group, Extell Development Company, Extell Riverside L.L.C., CPR/Extell Riverside, L.P., Gary Barnett, CRP Riverside G.P. L.L.C., CRP Riverside L.L.C. and Carlyle Realty Partners IV (Canadian) L.P.) motion (sequence no. 12) to dismiss Plaintiff's Amended Complaint is granted, and

it is further

ORDERED that Plaintiff Donald J. Trump's motion (sequence no. 13) for leave to file a Second Amended Complaint is denied with prejudice, and it is further

ORDERED that the C/E Defendants' motion (sequence no. 14) against Plaintiff for sanctions pursuant to 22 NYCRR § 130-1.1 and/or costs under CPLR 3025 (b) is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 29, 2010

ENTER:

/s/
Hon. Eileen Bransten, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09

REPLY AFFIRMATION IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO REARGUE AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

LOIS N. ROSEN, an attorney admitted to practice before the Courts of the State of New York, affirms as follows under penalties of perjury:

1. I am counsel to the law firm of Oxman Tulis Kirkpatrick Whyatt & Geiger LLP, attorneys for defendants Noel B. Donohoe and JoAnn Donohoe, and am fully familiar with the facts set forth herein. This reply affirmation is submitted in further support of the Donohoes' motion for an order, pursuant to CPLR 2221, granting reargument of the Donohoes' motion to dismiss the Complaint and Plaintiff's cross-motion for leave to serve an amended complaint. In addition, this affirmation is submitted in opposition to Plaintiff's cross-motion to serve a Second Amended Complaint. Upon granting reargument, the Donohoes respectfully request that the Court dismiss the Complaint in its entirety, and deny Plaintiff's initial motion and subsequent motion to serve amended pleadings.

2. The Donohoes adopt the arguments set forth by co-defendants The Nature Conservancy ("TNC") and Robert Burke and Teri Burke (collectively, the "Burkes") in further support of their respective motions to reargue and in opposition to Plaintiff's cross-motion for leave to serve a Second Amended Complaint. Since most of the substantive legal arguments are

56

well addressed in the accompanying papers submitted by TNC and the Burkes, the Donohoes will not burden the Court with a needless recitation thereof. Instead, they will limit their reply to: (a) opposing Plaintiff's cross-motion on the ground that the Second Amended Complaint falls woefully short of containing any legally cognizable claim as against them; and (b) refuting Plaintiff's response to the collateral estoppel argument raised in the Donohoes' prior dismissal motion. For the reasons set forth herein (and in the accompanying papers of TNC and the Burkes), Defendants' motions to reargue should be granted in their entirety and Plaintiff's cross-motion should be denied.

Plaintiff's Cross-Motion for Leave to Serve a Second Amended Complaint Should be Denied

(i) The second amended complaint contains no additional facts sufficient to state a valid cause of action against the Donohoes.

3. Plaintiff argues that leave to amend should be granted because the proposed Second Amended Complaint "brings to the Court additional facts and clearly resolves all of the issues raised by the Defendants." (Affirmation of Julius W. Cohn dated August 20, 2010 ["Cohn Aff."], ¶3) Plaintiff seeks permission to serve a proposed Second Amended Complaint, which contains three causes of action: *prima facie* tort (the cause of action set forth in its prior pleading), slander of title and injurious falsehood.

4. The proposed complaint contains only two "additional facts" pertaining to the Donohoes which relate to any alleged tortious conduct committed by them. Neither of these facts can correctly serve as the factual predicate for any of Plaintiff's three causes of action as against the Donohoes.

5. Seven Springs first alleges that, as part of Defendants' alleged improper conduct, "the Donohoe Defendants falsely represented to co-Defendant TNC and published to the Supervisor

of the Town of North Castle that the Oregon Road roadway 'belongs to the Nature Conservancy'". (Second Amended Complaint, ¶49) Not only is this allegation wholly conclusory, but it fails to provide the requisite specificity necessary to put the Donohoes on notice as to the context in which this alleged statement was made. If it was made in the course of the prior litigation, the statement is absolutely privileged and cannot serve as a basis for any claim of wrongful conduct.

6. Alternatively, this statement cannot serve as the basis for a claim of wrongful conduct as against the Donohoes because the statement is true. During the course of the 2006 litigation, Seven Springs admitted that it did not own the Oregon Road roadway, but only claimed an easement over it. It also admitted that TNC owns the roadway.

7. At oral argument in connection with TNC's application for a temporary restraining order before the Honorable Rory J. Bellantoni on March 18, 2008, Seven Springs' counsel responded to the Court's question regarding who owns the disputed parcel as follows:

> A hundred yards in they [TNC] claim to have ownership of it. Maybe they do, maybe they don't, but *we certainly don't own it. We are not saying we own it, but we have a private easement over it* ... . (Tr. 23)(emphasis added)[1]

8. After a sidebar during oral argument, Justice Bellantoni stated on the record that "*it is undisputed or is not in dispute at this point that the Nature Conservancy owns that portion of Oregon Road in question*, only as to whether or not the original petitioner in this case, and that is Seven Springs, has at this point some kind of easement over that property". (Tr. 61-62)(emphasis added)

9. Plaintiff's counsel later reiterated that, "*The portion of Oregon Road that is in dispute ... is in the middle of two parcels owned by the Nature Conservancy*". (Tr. 116)(emphasis added)

[1] The transcript of this oral argument is annexed as Exhibit A to Exhibit C of the affirmation of Stuart E. Kahan dated July 29, 2010 ("Kahan Aff.") previously submitted in support of the instant motion.

10. In view of the foregoing, it is "undisputed" that TNC owns that portion of Oregon Road that lies at the heart of this controversy. Accordingly, assuming *arguendo* that the Donohoes stated to TNC and the Supervisor of North Castle that TNC owned this portion of roadway, the statement is true and cannot be relied upon by Plaintiff to support a claim of injurious falsehood, slander of title or *prima facie* tort.

11. The second purported statement made by the Donohoes likewise cannot serve as the basis for any claim of tortious conduct as against them. Plaintiff avers that counsel for the Donohoes made the following statement on December 9, 2008:

> "...But right now, today, as I stand here, the Nature Conservancy's position along with my client's position is that there is no easement. (Second Amended Complaint ¶55)

12. This statement, which was made in open court during oral argument on December 9, 2008, is absolutely privileged as a matter of law (*Park Knoll Associates v Schmidt,* 59 NY2d 205, 208 (1983); *Sinrod v Stone,* 20 AD3d 560, 561 (2d Dep't 2005)("Statements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding")(citations omitted).

13. Even Plaintiff concedes that "a party may not be held in damages for asserting his rights in court", but then posits that, notwithstanding the privilege, "a cause of action in *prima facie* tort will lie *where prior litigation was instituted* solely with the intent of harming another party without either excuse or justification" or *where a party "initiated litigation* in order to defame or injure another party". (Cohn Aff. ¶13) Notably, Plaintiff's argument contemplates circumstances in which a party *initiated* a lawsuit in bad faith or with the intent of injuring another party. In this case, the Donohoes did not institute any lawsuit but are merely defending

themselves in an action initiated by Plaintiff; therefore. this exception to "absolute privilege" does not apply.

14. Moreover, in order to argue that the Donohoes' second statement was in some way improper, Plaintiff plucked one part of the oral argument out of context. A review of the entire colloquy between the Court and myself (as Donohoes' counsel) on December 9, 2008 reveals that the Donohoes did no more than encourage the Court to review the facts and make its own determination on the merits:

> THE COURT: But let me ask you this. Even if Seven Springs does not have an easement and that land belongs to the Conservancy, how does your client stop the Conservancy from doing what it wants to with its land?
>
> MS. ROSEN: I am not saying that we can. But right now, today, as I stand here, The Nature Conservancy's position along with my client's position is that there is no easement.
>
> And we are in the fight with the Nature Conservancy to make sure that the Court evaluates this issue and makes whatever decision it believes to be appropriate. (A copy of the December 9, 2008 transcript is annexed as Exhibit B to Exhibit C of the Kahan Affirmation)

15. It is clear from the foregoing that my intent was to suggest that Justice Bellantoni evaluate the easement issue and make an appropriate decision. Plaintiff cannot correctly insinuate from the language quoted above that the Donohoes made this statement "with the exclusive intention of injuring or damaging Plaintiff ... and/or to prevent the Plaintiff from exercising its rights of ownership and easements", as alleged in paragraph 46 of the proposed Second Amended Complaint.

(ii) Plaintiff cannot correctly assert that there will be "no prejudice to defendants' if its cross-motion is granted.

16. Plaintiff also argues that there would be no prejudice to defendants inasmuch as the "instant action has not even entered the discovery phase". (Cohn Aff. ¶3) While the Donohoes

may suffer no actual prejudice vis-à-vis the litigation if Plaintiff is now permitted to re-start this litigation a third time, they nevertheless are seriously adversely impacted each time Plaintiff makes another motion to correct its prior deficient pleading. The Donohoes (who lack the financial resources of Plaintiff and its principal Donald Trump) are forced to expend significant time and effort in opposing each motion.

17. Plaintiff has already served both an original and amended pleading; there is no reason that this Court should grant permission to amend again. Despite Plaintiff's assertion to the contrary, the Second Amended Complaint was not drafted to "comply with the facts as they unfold". (Cohn Aff. ¶3) To the contrary, the Second Amended Complaint "recites facts uncovered during the discovery phase" of the related 2006 action. These facts have long been known to Plaintiff; therefore it is, at best, disingenuous, for Plaintiff to infer that it has only recently learned of alleged new facts. Such blatant litigation gamesmanship with New York's rules of civil procedure should not be tolerated by this Court.

In Opposing Defendants' Reargument Motions, Plaintiff does not Successfully Refute the Donohoes' Claim that Collateral Estoppel Serves as a Bar.

18. Plaintiff seeks to sidestep a discussion of the impact of collateral estoppel on this litigation by arguing that "this Court was aware of and took the 'collateral estoppel' argument into account but simply discredited it". (Cohn Aff. ¶11) In reaching this conclusion, Plaintiff imputes language into the Order which simply is not there. While the Court paraphrased the parties' various arguments (including the Donohoes' argument with respect to collateral estoppel), it did not discuss the merits of or in any way "discredit" them. The Court concluded only that it "cannot determine as a matter of law that plaintiff has failed to state a cause of action." (*See* Order, p. 6)

19. In its prior motion, the Donohoes argued at length that relevant principles of collateral estoppel bar Plaintiff from litigating in this case issues that are already before the Court in the 2006 action. Most significantly, issues relating to the TNC's right to injunctive relief and limiting the undertaking to $100,000 (to compensate Plaintiff in the event it were determined that the injunction were wrongly issued) have already been decided in the prior action. To the extent that Plaintiff herein asks the Court to reconsider these issues (under the guise of a new complaint), it is barred by the doctrine of collateral estoppel.

WHEREFORE, for the reasons set forth hereinabove and in the accompanying papers submitted by co-defendants TNC and the Burkes, the Donohoes respectfully request that the their motion for reargument be granted in its entirety and that Plaintiff's cross-motion be denied.

Dated: White Plains, New York
September 1, 2010

Lois N. Rosen
LOIS N. ROSEN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendants.

----------X

AFFIDAVIT OF SERVICE

Index No: 21162/09

STATE OF NEW YORK)

COUNTY OF WESTCHESTER) ss:

LORRAINE COWEN, being duly sworn, deposes and says: I am not a party to the action: I am over the age of 18 years old; I reside in Scarsdale, New York and on September 1, 2010, I served a copy of the within Reply Affirmation in Further Support of Defendants' Motion for Leave to Reargue and in Opposition to Plaintiff's Cross-Motion for Leave to Amend upon the parties listed below by mailing same by regular mail in a sealed envelope, with postage paid thereon, in a official depository of the U.S. Postal Service within the State of New York.

Lorraine Cowen

Sworn to before me this
1st day of September, 2010

NOTARY PUBLIC

LOIS N. ROSEN
NOTARY PUBLIC, State of New York
No. 4720985
Qualified in Westchester County
Commission Expires August 31, 20 10

TO: Cohen & Spector
200 East Post Road
White Plains, New York 10601
Attn: Julius W. Cohn, Esq.

Benowich Law, LLP
1025 Westchester Avenue
White Plains, New York 10604
Attn: Leonard Benowich, Esq.

Wilson Elser Moskowitz Edelman & Dicker LLP
3 Gannett Drive
White Plains, New York 10604
Attn: Janine A. Mastellone, Esq.

ORIGINAL

Index No. 21162/09 *Year 20*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

REPLY AFFIRMATION IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO REARGUE AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER LLP
Attorneys for Defendants Noel B. Donohoe and Joann Donohoe

120 BLOOMINGDALE ROAD
SUITE 100
WHITE PLAINS, NY 10605
(914) 422-3900

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated:..... Signature .....

Print Signer's Name.....

Service of a copy of the within *is hereby admitted.*

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon.* *, one of the judges of the within-named Court, at* *on* *20* *, at* *M.*

Dated:

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER LLP
Attorneys for

To:

120 BLOOMINGDALE ROAD
SUITE 100
WHITE PLAINS, NY 10605

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 20

.....

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 20 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service by Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Personal Service — by delivering the same personally to the persons at the address indicated below:

☐ Service by Facsimile — by transmitting the same to the attorney by facsimile transmission to the facsimile telephone number designated by the attorney for that purpose. In doing so, I received a signal from the equipment of the attorney served indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) as indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Service by Electronic Means — by transmitting the same to the attorney by electronic means upon the party's written consent. In doing so, I indicated in the subject matter heading that the matter being transmitted electronically is related to a court proceeding:

☐ Overnight Delivery Service — by depositing the same with an overnight delivery service in a wrapper properly addressed, the address having been designated by the addressee(s) for that purpose or, if none is designated, to the last-known address of addressee(s). Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

Sworn to before me on , 20

.....

.....
(Print signer's name below signature)

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

Rec'd
By Clerk
on 8/27/10

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

REPLY AFFIRMATION IN FURTHER SUPPORT OF TNC'S MOTION FOR REARGUMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

LEONARD BENOWICH, an attorney admitted to practice in the Courts of this State, affirms the following under penalty of perjury:

I. Introduction and Summary of Position

1. I am a member of Benowich Law, LLP, counsel of record for Defendant, The Nature Conservancy ("TNC").

2. Unless otherwise indicated, I have personal knowledge of the facts and circumstances set forth herein and submit this reply affirmation (a) in further support of TNC's motion for reargument and renewal, and (b) in opposition to Plaintiff's cross-motion - its second - seeking leave to further amend its complaint in this case. TNC's motion should be granted and Plaintiff's cross-motion should be denied.

II. TNC's Motion for Reargument/Renewal

3. Plaintiff's papers - including its second cross-motion for leave to amend - demonstrate that TNC's motion should be granted and this case should be dismissed.

4/9

4. *First*, Plaintiff contends that TNC's motion misapplies the law and asks this Court to apply a CPLR 3212 standard on the CPLR 3211 motion to dismiss. (Cohn Aff., at 2-3) Plaintiff is wrong. As we pointed out in TNC's moving papers, the standard on a motion to dismiss - where, as here, the Plaintiff has relied on material outside the four corners of its amended complaint - is that the Plaintiff must demonstrate that it "has," not just that it has "stated," a cause of action. *See e.g. Meyer v. Guinta*, 262 A.D.2d 463 (2nd Dep't 1999). Indeed, as we pointed out in TNC's moving papers, this Court actually cited the *Meyer* case for the correct standard applicable on the underlying motion to dismiss, but mistakenly applied a lesser standard, concluding only that Plaintiff had "stated" a cause of action.

5. The cases cited by Plaintiff on this point, *Lucido v. Mancuso*, 49 A.D.3d 220 (2nd Dep't 2008); *Guggenheimer v. Ginzburg*, 42 N.Y.2d 268 (1977); and *Millard v. Michael Eigen Jewelers*, 5 Misc. 3d 1022(A), 2004 WL 2792448 (Sup. Ct. N.Y. Co. 2004), simply do not support Plaintiff's argument.

6. The law in New York, as articulated by the Court of Appeals, and the law in this Department, is that: "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleadings has a cause of action, not whether she has stated one;" and also: is well settled that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action." *Meyer*, 262 A.D.2d, at 464.

7. Moreover, a plaintiff does not state - and it certainly does not have - a cause of action simply by alleging elements of a cause of action, such as malice or disinterested malevolence, in bare conclusory fashion:

> . . . allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration," nor to that *arguendo* advantage (*Gertler v. Goodgold*, 107 A.D.2d 481, 485, 487 N.Y.S.2d 565, *affd. for reasons stated below* 66 N.Y.2d 946, 498 N.Y.S.2d 779, 489 N.E.2d 748).

Maas v. Cornell University, 94 N.Y.2d 87, 91 (1999); *Velez v. Captain Luna's Marina*, 74 A.D.3d 1191 (2nd Dep't 2010) ("[B]are legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration"); *F.W.J. Realty Corp. v. County of Suffolk*, 73 A.D.3d 977 (2nd Dep't 2010) (same); *Sweeney v. Sweeney*, 71 A.D.3d 989 (2nd Dep't 2010) (same); *Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372 (2nd Dep't 2002) (same); *Tarzia v. Brookhaven Nat. Laboratory*, 247 A.D.2d 605 (2nd Dep't 1998) ("plaintiffs' bare assertion that the defendants 'negligently misrepresented to the plaintiffs the risk created by the use, discharge and deposit of the hazardous materials' is legally insufficient to state a cause of action for negligent misrepresentation").

8. The Second Department has particularly applied this rule in cases of this sort - where the plaintiff alleges a cause of action in which "malice" is an element. *Simaee v. Levi*, 22 A.D.3d 559 (2nd Dep't 2005) (pleading must "allege facts indicating that the defendants' actions were motivated by disinterested malevolence"); *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc.*, 5 A.D.3d 352 (2nd Dep't 2004); *EECP Centers of America, Inc. v. Vasomedical, Inc.*, 265 A.D.2d 372 (2nd Dep't 1999) (complaint dismissed for failing to allege any facts to indicate that the sole motivation for the appellant's actions was disinterested malevolence).

9. Plaintiff's amended complaint contains no such particularity, and Plaintiff has acknowledged these deficiencies seeking leave to serve and file the equally futile proposed Second Amended Complaint.

10. The standard applicable to the underlying motion to dismiss is not the same as the standard applicable on a CPLR 3212 motion. The standard to be applied on the dismissal motion in this case is intended to weed-out complaints - like Plaintiff's numerous complaints in this case - which allege that another party acted with malicious or disinterested malevolence, where there is no articulable factual basis for such an allegation other than the imagination of Plaintiff and its counsel. The Amended Complaint and the proposed Second Amended Complaint both fail to satisfy this mandatory standard.

11. *Second*, Plaintiff contends that TNC's motion fails to adequately identify which part of its motion seeks reargument, and which seeks renewal. (Cohn Aff., ¶4) Once again, Plaintiff is wrong. TNC's motion is largely one for reargument. The entire motion seeks reargument - with one particular, identified exception: as we indicated in TNC's moving papers (and as Plaintiff correctly identified), TNC's motion seeks leave to renew in one way, by asking this Court to consider a portion of the transcript of proceedings in *Seven Springs, LLC v. The Nature Conservancy, et al.*, Index No. 9130/06 ("*Seven Springs I*") (*see* Ex. 9) which had been annexed to the motion to dismiss previously served and filed by other defendants in this case and which had been considered by the Court in its consideration of all three (3) motions to dismiss. In all other respects, TNC's motion is one for leave to reargue, and the motion papers are properly delineated. CPLR 2221.

12. *Third*, Plaintiff now appears to change its position, once again, and contends that

its first Amended Complaint did assert a cause of action for slander of title (and, if it did not, Plaintiff now seeks leave to serve and file the proposed Second Amended Complaint, in order to assert such a claim). But this claim for slander of title (like the proposed claim for injurious falsehood) is time-barred by the one-year statute of limitations. *39 College Point Corp. v. Transpac Capital Corp.*, 27 A.D.3d 454 (2nd Dep't 2006); *Hanbidge v. Hunt*, 183 A.D.2d 700, 583 N.Y.S.2d 288 (2nd Dep't 1992) ("A cause of action sounding in slander of title is governed by a one-year Statute of Limitations").

13. Plaintiff argues that it can circumvent that statute of limitations because it claims that it gave notice of this claim in its previously-commenced action, *Seven Springs I,* and that the assertion of the damages claims in this case relates back to Plaintiff's claims for a declaratory judgment in that case. Plaintiff, once again, is flatly wrong, and the case cited as authority for this proposition, *Town of Guidlerland v. Texaco Refining and Marketing, Inc.*, 159 A.D.2d 829 (3rd Dep't 1990), is simply inapplicable (if for no other reason) where, as is the case here, the two cases have not been consolidated. *DeLuca v. Baybridge at Bayside Condominium I*, 5 A.D.3d 533 (2nd Dep't 2004).

14. Moreover, Plaintiff's attempt to have this action relate back to the commencement of *Seven Springs I* is too cute by half. Were that argument to be accepted, this Court would be allowing a complaint to relate back to a time even before the underlying acts occurred or the cause of action accrued. The gravamen of the allegations in this case relates to the manner in which these defendants defended themselves in *Seven Springs I.* These claims could not have been asserted in *Seven Springs I* - precisely because the underlying acts had not even occurred, and the claims had arisen or accrued at the time that case was filed. This is not a case where

claim for damages had been asserted against one party, and another party who was not previously named, due to mistake or discovery, is now sought to be added to a timely-commenced action.[1]

III. Plaintiff's Cross-Motion for Leave to Amend and to Serve and File a Second Amended Complaint Should be Denied

15. Plaintiff's cross-motion is the second time that Plaintiff has sought leave to amend. Plaintiff first sought leave to amend when TNC moved to dismiss its complaint. Now, after TNC's motion for reargument has identified the shortcomings in its amended complaint, Plaintiff apparently agrees that its amended complaint is legally insufficient and seeks leave to amend yet again, to serve and file a proposed Second Amended Complaint.

16. Plaintiff's cross-motion and its proposed Second Amended Complaint fail to cure any of the defects and deficiencies in its prior pleading, and it now purports to assert not one but three (3) causes of action, for *prima facie* tort, for slander of title, and for injurious falsehood.

A. The *Prima Facie* Tort Claim is Futile

17. The proposed amended pleading's assertion of two other claims - in addition to *prima facie* tort - which rely on precisely the same allegations and seek the same damages - demonstrates that Plaintiff's purported claim for *prima facie* tort must be dismissed, because *prima facie* tort cannot be maintained where another cause of action might be.

18. *First*, the purported claim for *prima facie* tort must now be dismissed. The cause

---

[1] The proposed Second Amended Complaint also refers to an April 2006 letter sent by TNC's counsel to the Town of North Castle's Supervisor and Town Attorney, a copy of which is annexed hereto as **Exhibit 10.** Because the statements in this letter were made in April 2006 - more than three years before this action was commenced on September 22, 2009 - they are beyond even the 3-year statute of limitations and, thus, may not be the basis of any *prima facie* tort claim. Accordingly, the limited detail added in the proposed Second Amended Complaint demonstrates that the proposed pleading is meritless as a matter of law.

of action for *prima facie* tort "was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action which is not independently viable." *Epifani v. Johnson*, 65 A.D.3d 224, 232 (2nd Dep't 2009); *Etzion v. Etzion*, 62 A.D.3d 646, 651-652 (2nd Dep't 2009) (the cause of action was "designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a "catch all" alternative for every cause of action that cannot stand on its legs); *DeNaro v. Rosalia*, 59 A.D.3d 584 (2nd Dep't 2009); *Lancaster v. Town of E. Hampton*, 54 A.D.3d 906, 908 (2nd Dep't 2008).

19. Moreover, because the other two claims sought to be asserted in this proposed Second Amended Complaint are time-barred, the *prima facie* tort claim should also be dismissed, because it is well-settled law that a plaintiff cannot use a *prima facie* tort as a device to avoid the statute of limitations governing defamation. "The practice of redefining a cause of action to avoid the applicable Statute of Limitations was specifically condemned in *Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453 (1967)." *Milone v. Jacobson*, 78 A.D.2d 548 (2nd Dep't 1980):

> In applying a Statute of Limitations, this court declared some years ago, 'We look for the reality, and the essence of the action and not its mere name.' (Citation omitted.) Concluding as we do that this cause of action sounds in defamation, it would be highly unreal and unreasonable to apply some Statute of Limitations other than the one which the Legislature has prescribed for the traditional defamatory torts of libel and slander . . . . A contrary result might very well enable plaintiffs in libel and slander cases to circumvent the otherwise short limitations period by the simple expedient of

'redescribing [the] defamation action to fit this new 'noncategory'' of intentional wrong."

Morrison, supra.

20. *Second*, although the proposed Second Amended Complaint now is sprinkled with purported references or quotes to statements made by TNC's counsel during oral argument or in papers submitted in *Seven Springs I*, each and every one of those references and quotes demonstrates that the statements therein are absolutely privileged,[2] and, as we demonstrate infra, ¶40), Plaintiff's citation-less reference to these statements seems intended for one purpose: to conceal from this Courts the full statements and the context in which they were made. As a matter of law, TNC's actions and conduct and those of its counsel in *Seven Springs I* - are absolutely privileged.[3] *Lerwick v. Kelsey*, 24 A.D.3d 931 (3rd Dep't 2005); *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106 (1st Dep't 2004); *Martinson v. Blau*, 292 A.D.2d 234 (1st Dep't 2002) (affirming dismissal of *prima facie* tort claim that defendant gave false testimony as a witness in a New Jersey court proceeding); *Carniol v. Carniol*, 288 A.D.2d 421 (2nd Dep't 2001); *Jaeger v. Board of Educ. of Hyde Park Cent. School Dist.*, 258 A.D.2d 507 (2nd Dep't 1999).

21. And, as we pointed out in TNC's memorandum in support of its motion for

---

[2] To the extent the proposed Second Amended Complaint refers to TNC's counsel's April 2006 letter, any *prima facie* tort claim would be time-barred because that letter was written more than three years before this claim was first asserted.

[3] Actions taken and statements made in litigation are absolutely privileged, *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359 (2007); *Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 209 (1983); *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.23d 136 (2nd Dep't 1994); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163 (1st Dep't 2007) ("the principle underlying the absolute privilege for judicial proceedings is that 'the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to the litigation,' which freedom 'tends to promote an intelligent administration of justice'"); *Sinrod v. Stone*, 20 A.D.3d 560 (2nd Dep't 2005).

reargument, many of those statements were made in the context of TNC's successful application for a preliminary injunction. Accordingly, Plaintiff would have to plead facts, not just its lawyer's conjecture on information and belief, which support at least an inference that TNC acted maliciously when it sought and obtained the preliminary injunction. The fact that Supreme Court granted that preliminary injunction, after considering voluminous papers and extensive argument from all counsel, means that TNC is entitled to the presumption that it sought and obtained that injunction properly and in good faith, for good cause. *I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 207 (1st Dep't 2005); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.*, 168 A.D.2d 238 (1st Dep't 1990). Plaintiff's proposed Second Amended Complaint contains no allegations which address, much less overcome, that presumption.

22. Plaintiff's counsel tries to anticipate this "privilege" defense in paragraph 13 of his affirmation, where he argues that the privilege defense does not apply in this case. Of course, although counsel cites to some cases (none of which supports his argument), counsel does not state (and the proposed Second Amended Complaint does not allege) "why" the privilege is inapplicable in this case. Significantly, Plaintiff's counsel recognizes that it is "an absolute privilege." (*Id.*) The cases cited in paragraph 13 of counsel's affirmation all deal with a circumstance where - as counsel himself lays out - the defendant somehow grossly and fraudulently manipulated the underlying litigation or the legal process.[4]

---

[4] In *Serrano v. Flight Motel, Inc.*, 95 Misc. 2d 669 (Sup. Ct. Queens Co. 1978), the court allowed a claim for *prima facie* tort to proceed where the defendant had manipulated the name of the defendant against which it allowed a default judgment to be taken (the plaintiff had sued the "LaGuardia Motel" but defendant had manipulated the caption to name the defendant as a different entity "LaGuardia Hotel Sire Plan, Inc."), a company which it was later disclosed had been in bankruptcy all along. Even so, this was not a case of defamation, but fraud, and no defense of privilege was raised in that case.

23. But that is not this case. Here, it is Plaintiff that commenced *Seven Springs I*; TNC and the other defendants did nothing more than defend themselves in that action and take the position that Plaintiff does not have the rights it claims to have therein.

24. *Third*, Plaintiff now appears to argue that TNC's defense of its position in *Seven Springs I* - that Seven Springs does not have the easement it asks that Court to declare - must have been malicious and motivated solely by disinterested malevolence because of a decision in an unrelated 20-year old case, *Coleman v. Village of Head of the Harbor*, 163 A.D.2d 456 (2nd Dep't 1990). (*See* proposed Second Am'd Cplt ¶51) But that decision has nothing to do with this case. Other than the fact that TNC was a defendant in that case, too, that decision makes plain that it is inapplicable to, and does not control, the disposition of this case. That case simply does not mean that this Plaintiff has the rights it claims to have in *Seven Springs I*, as TNC intends to (and will) demonstrate in *Seven Springs I*. Plaintiff's reliance on the *Coleman* case is also of new vintage. Plaintiff had not relied on or cited *Coleman* in this case or in *Seven Springs I* until last month.

25. But this Court need not entertain Plaintiff's suggestion - because for years Plaintiff and its representatives had taken precisely the same position that TNC is taking in *Seven*

Andrews v. Steinberg, 122 Misc. 2d 468 (Sup. Ct. N.Y. Co. 1983) also is quite unlike this case and perhaps any other case. In that case, Andrews - an attorney - sued his former client. "After plaintiff's replacement as counsel, defendant testified at a traverse hearing that plaintiff had created for her a false affidavit which was typed over her signature on a blank sheet of paper which, she claimed, plaintiff had previously requested her to sign. It is this testimony which plaintiff claims was false. As a result of such testimony, plaintiff was the subject of a complaint made to the Departmental Disciplinary Committee. The Committee later determined that there was no basis on which to proceed against plaintiff." Significantly, that Court observed that no claim of privilege had been raised, but also held that the former client's statement "would thus appear to be privileged." 122 Misc. 2d, at 477.

Springs I: that Plaintiff had no rights - not ownership to and not an easement over - the portion of Oregon Road owned by TNC and which it now claims to have the right to use.

26. For example, in a February 1998 Draft Environmental Impact Statement,[5] Plaintiff acknowledged that "the owners of the Seven Springs [Parcel] site have no rights to utilize any part of this portion of the roadway," and that TNC "fully owns the entire road bed [of Oregon Road] south of [the] Seven Springs [Parcel]." This statement - which is precisely TNC's position in this case and in *Seven Springs I* - was repeated by Plaintiff's professionals on numerous occasions.

27. It is the height of *chutzpah* and bad faith for Plaintiff to sue TNC in this case for taking the position in *Seven Springs I* that Plaintiff itself took before the Town of North Castle! Plaintiff is playing fast and loose with this Court. This Court should not permit such gamesmanship.

B. The Slander of Title Claim

28. As described above, any claim for slander of title is subject to a one-year statute of limitations and is, thus, time-barred. This claim is also futile for the reasons set forth in TNC's prior memoranda submitted on its underlying motion to dismiss.

C. The Newly-Added Injurious Falsehood Claim

29. The newly-concocted claim, for injurious falsehood, must also be dismissed.

30. *First*, this claim, like that for slander of title, is also subject to a one-year statute of limitations. CPLR 215(3); *Morrison, supra.*

31. *Second*, although the proposed pleading is less than articulate as to the context in

---

[5] Excerpts from this Draft EIS report are annexed hereto as **Exhibit 11.**

which each of the statements was made (and this vagueness seems to be intentional), each of the statements was made by TNC's counsel in the context of the *Seven Springs I* litigation; none of the statements is alleged to have been made to a third person; and each of the statements is, given that context, as a matter of law, privileged or deemed the opinion of an attorney and not a false statement. *Gilliam v. Richard M. Greenspan, PC*, 17 A.D.3d 634 (2nd Dep't 2005).

32. "The tort of trade libel or injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment." *Waste Distillation Technology, Inc. v. Blasland & Bouck Engineers, PC*, 136 A.D.2d 633 (2nd Dep't 1988). This tort requires pleading and proof of: (a) falsity of the alleged statements; (b) publication to a third person; (c) malice; and (d) special damages. *Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 435, 440 (1960). Moreover, "[t]he communication must play a material and substantial part in inducing others not to deal with the plaintiff. . ." *Waste Distillation Technology, Inc., supra.*

33. The proposed pleading is deficient. Especially given that the only statement made by TNC or its counsel which was not made in the context of *Seven Springs I* was the April 2006 letter - which predated *Seven Springs I*, and was written more than three (3) years before this action was commenced.

34. Moreover, the statements contained in that letter - which Plaintiff refers to but does not quote - establish beyond any doubt that TNC's counsel was expressing its legal opinion on the question whether Plaintiff had the easement rights it claimed to have.

35. In paragraph 48 of the proposed pleading, Plaintiff alleges that TNC wrote to the

Towns of North Castle and New Castle that Plaintiff did not own half of the roadbed of Oregon Road. Not so. The letter was not sent to the Town of New Castle, and the letter does not say what Plaintiff alleges.

36. In paragraph 52, Plaintiff alleges that this letter as written to thwart Plaintiff from developing its property in North Castle. Of course, the letter states that it had an entirely different purpose - "to express TNC's disagreement with Seven Springs's claim [to an easement over that portion of Oregon Road which lies within the land owned by TNC] and to request that, before the Town of North Castle considers any application by Seven Springs which is based on its claim of such a private easement, Seven Springs should be required to obtain a judicial determination that it does or does not enjoy such a private easement." (*See* Ex. 10, at 1)

37. This letter was written by TNC's counsel, not TNC, and it was sent to the Town of North Castle, but not the Town of New Castle. It is only by suggestion and innuendo that Plaintiff's counsel can even pretend to make the argument he does, but certainly not in good faith. Without quoting the language of the letter, any claim for libel or injurious falsehood must fail.

38. Not surprisingly, the text of the letter belies the taint given it in the proposed Second Amended Complaint (*see* ¶¶48-52). In that letter, my law firm wrote to the Supervisor of the Town of North Castle and its Town Attorney, stating our opinion on whether Plaintiff had the rights it claimed then, and now. After reviewing the law applicable to these issues, on page 5 of that letter, we wrote that:

> Under all of the circumstances - including the fact that the conveyance to TNC was to a charitable entity that was to use the land as a nature preserve - *we believe* there is, at the very least, a question of fact as to whether Seven Springs does, in fact, have a private easement over TNC's land (emphasis added);

On page 6 we wrote:

> *We believe* that Seven Springs has little, if any, evidence to support the claim that it has such a private easement (emphasis added);

On page 7 we wrote:

> Under these circumstances, *we believe* that Seven Springs should be required to establish its claim to any private easement over TNC's land in court, where all of the evidence on all issues can be assessed in accordance with New York law (emphasis added);

And on page 7, we concluded our letter as follows, making clear that we were stating only a legal analysis:

> This letter is a *summary of the legal analysis which we believe* compels the conclusion that Seven Springs has not established that it does, in fact enjoy a private easement over that portion of Oregon Road that lies within TNC's land. This letter does not constitute a full exposition of each and every fact or argument which supports our claim or *belief* that Seven Springs does not enjoy the private easement it claims and which its title company appears willing to ensure (emphasis added).

39. Significantly, this letter was accompanied by a letter dated April 27, 2006 from Stewart Title Company, which stated that Stewart "cannot conclude, and would not be willing to insure, that Seven Springs has a private easement over that portion of Oregon Road which lies

within TNC's lands." *See* Ex. 10.

40. Any and all other statements which are not included in the proposed Second Amended Complaint were statements submitted to or made in Court, in the context of *Seven Springs I* (*see* Cohn Aff., ¶¶53-54, 57), and they were absolutely privileged. A review of these statements - in *haec verba* - shows that it is Plaintiff that has twisted the truth and the facts by concealing the actual statements made in an obvious effort to mislead this Court.[6] Moreover, each of these statements was made in open court, and none was even repeated to a third party.

41. *Third*, Plaintiff's proposed Second Amended Complaint demonstrates that its

---

[6] In paragraph 53, for example, counsel refers to a portion of the transcript of proceedings held in *Seven Springs I* on March 18, 2008. Although Plaintiff does not cite to the page of that 149-page transcript, the statement appears on page 31. And, although Plaintiff's current counsel takes issue with my description of Oregon Road, it is significant that Plaintiff's then counsel did not dispute that characterization (*see* pages 31-33), and had himself described Oregon Road as "a dirt road" (P.23/L3-4); "it's like stone and dirt." (P.29, L19-20) (Copies of these pages are annexed as **Exhibit 12.**)

In paragraph 54, counsel refers to a statement I purportedly made, again in open court, which purportedly mischaracterized Plaintiff's complaint. But plaintiff's citation-less quotation conceals counsel's intentional attempt to deceive this Court. My full statement - on page 21 of the transcript of those proceedings in open court - was:

> But there is no claim in this case - plaintiff's complaint does not allege and it does not seek a declaration that it owns any part of the roadway or the roadbed of Oregon Road. *At least, Your Honor, in the southern part where you are correct. The Nature Conservancy owns to the east and the west and the roadbed. That's the fact. They don't contend any other way.*"

Counsel conveniently failed to omit the highlighted sentences, which belie counsel's misleading characterization. Transcript of Proceedings of December 9, 2008, at 21-22. (Copies of these pagers are annexed as **Exhibit 13.**)

The statement referred to in paragraph 57 - where I supposedly told the Court that "its not plain from the deeds that [Plaintiff has] that legal right" (and I cannot locate that statement within the 149-page transcript) accurately states TNC's position in this case and is nothing more than a lawyer's advocacy and opinion, precisely the kind of statements that are privileged - especially where, as here, Plaintiff has yet to establish that it has an easement over the TNC Parcel.

prior amended complaint did not allege special damages; and the proposed special damages allegations in the Second Amended Complaint do not satisfy New York law - for several reasons: (a) some of the purported damages are general overhead damages; (b) some of the purported damages have not even been incurred; and (c) none of the damages is the result of anything that TNC has done.

42. In paragraph 73(a), Plaintiff seeks more than $2.3 million in real estate taxes it claims to have paid to the Town of North Castle. Plaintiff admits that these damages are not special damages at all - because Plaintiff alleges that it would have to have paid these taxes anyway, until it established that it had the easement rights it claims - but has not yet received in *Seven Springs I.* These damages are a product of the more than 4-years Plaintiff has delayed the litigation of *Seven Springs I* and not of anything else.

43. In paragraph 73(b), Plaintiff seeks more than $330,000 for onsite maintenance; this, too, is general overhead.

44. In paragraph 73(c), Plaintiff seeks more than $1.7 million which it claims it paid to consultants for "SEQRA processes," apparently in order to prepare and develop its development proposals. Plaintiff, a developer, would have to have generated these plans in any event.

45. In paragraph 73(d), Plaintiff seeks more than $145,000 in general overhead, for payroll taxes and employee benefits, although Plaintiff does not allege that it had to employ anyone especially due to anything TNC did.

46. In paragraph 73(e), Plaintiff seeks the very round number of $63 million - which it claims is the diminished value of nine homes, which it claimed could have been sold at a profit

of $7 million per home. Of course, this hypothetical damage is neither special nor ascertainable, especially in the absence of contracts for sale, and because the homes have neither been built nor sold. *DiSanto v. Forsyth*, 258 A.D.2d 497 (2nd Dep't 1999); *Camarda v. Vanderbilt*, 147 A.D.2d 607 (2nd Dep't 1989). Moreover, round numbers, as the Court of Appeals has held, are simply insufficient to state special damages. *Drug Research Corp., supra.* Moreover, given that *Seven Springs I* has not been litigated, and given that Plaintiff has not yet developed any of the land on which these speculative homes might have been built, these damages - all of them - are speculative and not special.

47. Finally, for reasons we have briefed several times before, there is no basis for any award of punitive damages in this case.

IV. Conclusion

48. Plaintiff's very cross-motion recognizes that its prior amended complaint is inadequate.

49. For the foregoing reasons, the proposed Second Amended Complaint is also inadequate and futile.

50. Accordingly, this Court should (a) grant TNC's (and the other defendants') motions for reargument and/or renewal and dismiss the Amended Complaint; and (b) deny Plaintiff's cross-motion for leave to amend in all respects.

Dated: August 26, 2010

Leonard Benowich

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\Reargument\Reply.wpd

10

Roosevelt & Benowich, LLP
Attorneys at Law
A Limited Liability Professional Partnership
Including Professional Corporations

1025 Westchester Avenue
White Plains, New York 10604
Tel: (914) 946-2400
Fax: (914) 946-9474

NYC Tel: (212) 786-2800

April 28, 2006

Hon. Reese Berman
Supervisor, Town of North Castle
Town Hall
15 Bedford Road
Armonk, New York 10504

Roland A. Baroni, Jr., Esq.
Town Attorney, Town of North Castle
Town Hall
15 Bedford Road
Armonk, New York 10504

Re: The Nature Conservancy
Seven Springs, LLC

Dear Supervisor Berman and Mr. Baroni:

This firm represents The Nature Conservancy ("TNC").

We write with respect to the claim by Seven Springs, LLC ("Seven Springs") that it has a private easement over that portion of "Oregon Road" which lies within the land and property owned by TNC.

We also write to express TNC's disagreement with Seven Springs's claim and to request that, before the Town of North Castle considers any application by Seven Springs which is based on its claim of such a private easement, Seven Springs should be required to obtain a judicial determination that it does or does not enjoy any such private easement.

Initially, we understand that Seven Springs's title company has agreed to insure that Seven Springs has fee title to the land described on Schedule A of the Title Report dated December 8, 2005 (Title No. 05-7402-55281.SS.W) "together with an easement in common with others southerly over a strip of land known as Oregon Road to the public road known as Oregon Road."

We asked Stewart Title Insurance Company to examine the title. In a letter dated April 27, 2006, Stewart advised us that, for various reasons, it "cannot conclude, and would not be willing to insure, that Seven Springs has a private easement over that portion of Oregon Road which lies within TNC's lands." A copy of that letter is attached for your information.

We also reviewed the letter dated February 16, 2006, in which Stephen J. Bobolia, of Fidelity Title, Ltd., advised you that, in his opinion, Seven Springs does have a private easement for access over the abandoned portion of Oregon Road lying within TNC's land.

Because we believe that Mr. Bobolia's letter contains a rather abbreviated review of the applicable facts and the law regarding implied easements, we take this opportunity to set forth a slightly more comprehensive review of the legal issues presented by this matter.

Mr. Bobolia states that the courts have held that "private easements arise where title to both the land in the bed of the street and abutting parcels derive from a common owner" (emphasis added). Mr. Bobolia cites two cases for this proposition: Low v. Humble Oil & Refining Co., 51 Misc. 2d 281, 273 N.Y.S.2d 85 (Sup. Ct. Broome Co., 1966), *modified*, 27 A.D.2d 629, 276 N.Y.S.2d 55 (3rd Dep't 1966), and Dwornik v. State of New York, 251 App. Div. 675 (4th Dep't 1937), *aff'd*, 283 N.Y. 597 (1940).

We believe the rule of law is somewhat different than that stated by Mr. Bobolia. Indeed, in a subsequent appeal in Low v. Humble Oil & Refining Co., 31 A.D.2d 676, 295 N.Y.S.2d 859 (3rd Dep't 1968), the Third Department wrote that:

> While we are mindful of the argument advanced by defendant under the doctrine of 'ancient streets' which grants to an abutting owner a private easement in the bed of a street if Both the lot and street were owned And laid out by a common grantor, and the lot is then sold with reference to the street (citations omitted),...insofar as 7th North Street is concerned, the 'ancient streets' doctrine is inapplicable since the record clearly shows that when the lots in question were laid out in 1914 as shown on the Map of Buckley Gardens, 7th North Street was already in existence having been laid out as early as 1897 by another owner.

31 A.D.2d at 677 (emphasis added).

Similarly, in Dwornick, the Fourth Department characterized the doctrine - known as the "ancient streets doctrine" - as follows:

> The doctrine is invoked when it appears that a common grantor, owning the land comprising the street in question and also other lots, has given deeds to lots, bounding them by the street, thereby not only dedicating the street to public use, but also, at the same time, creating private easements, in the street....

251 App. Div. at 676 (emphasis added).

Among other things, Mr. Bobolia's letter uses the term "common owner," when in fact the cases use the phrase "common grantor." As a matter of fact, TNC and Seven Springs do not have a common grantor. TNC acquired its land from the Eugene and Agnes E. Meyer Foundation in 1973, while Seven Springs acquired its land from Rockefeller University ("RU") in 1995.

That fact is significant. In Stupnicki v. The Southern New York Fish and Game Association, Inc., 41 Misc. 2d 266, 244 N.Y.S.2d 558 (Sup. Ct. Columbia Co., 1962), *aff'd*, 19 A.D.2d 921, 245 N.Y.S.2d 333 (3rd Dep't 1963), for example, the Court denied a claim of an implied easement where there was a *common source of title*, but not a *common grantor*. In that case, the parties owned adjacent parcels of land, and the defendant claimed a right to pass over that portion of the plaintiff's land that had been a town road (now abandoned) that bisected the parties' properties, so that each of them owned land on both sides of that road. That Court wrote:

> ...[T]his is not the situation where the owner of a tract subdivides the tract into lots and makes a map of the subdivision, on which are laid out lots and streets and then sells lots, with reference to such map. In such a case, the lot purchasers, of course, have a private easement, over the streets shown on such map, whether such streets are ever dedicated or not and whether improved or not. The grantees of such a common grantor do have a private easement by grant or implication. This is not the case here. The fact that ownership of the respective parcels can be traced back for many years to the one owner of an immense parcel of land, out of which the parcels of the parties hereto were ultimately carved, does not bring this case within the doctrine of an easement by grant or implication, as in the case of the owner of a tract who subdivides it into lots, shown on a map, with streets, etc. and then sells the lots to various parties, who buy in reliance thereon. The terms

> 'common grantor' and 'common source of title' are not synonymous.

41 Misc. 2d at 271 (emphasis added).

Where, as here, a party claims to have a private easement by implication, New York law holds that whether there is or is not such an easement is a question of the intention of the grantor, and that the proponent of such an easement - here Seven Springs - must demonstrate its entitlement to the easement by clear and convincing evidence, Manhattan Beach Community Group, Inc. v. Laboz, 224 A.D.2d 394, 638 N.Y.S.2d 112 (2nd Dep't 1996); Glennon v. Mayo, 221 A.D.2d 504, 633 N.Y.S.2d 400 (2nd Dep't 1995), precisely because such easements by implication are disfavored under the law. Abbott v. Herring, 97 A.D.2d 870, 469 N.Y.S.2d 268, 270 (3rd Dep't 1983), *aff'd*, 62 N.Y.2d 1028, 479 N.Y.S.2d 498 (1984).

"[O]ne who claims an implied easement has the burden of establishing all the facts necessary to support it." Tarolli v. Westvale Genesee, Inc., 6 N.Y.2d 32, 34, 187 N.Y.S.2d 762 (1959). In language particularly relevant to this case, the Tarolli Court wrote that:

> We do not have here the situation of a grantor subdividing his property and selling lots bounded on a street shown on his subdivision map. (Citations omitted). Nor is this a case where a private right of way has been in use for many years and the surrounding circumstances show that it must have been the intent of the parties to give the grantee continued use of the passageway (citations omitted). Merely bounding premises by a road (for purposes of description like using any other mark or monument) 'is very different from selling by reference to a map or plat on which the grantor has laid out streets' (citation omitted). The controlling authorities say that the claim of an easement solely by implication usually raises a question of intent to be determined in light of all the circumstances, and that running a boundary along a road is one such circumstance only (citations omitted).

6 N.Y.2d at 34 (emphasis added), *quoting* Matter of City of New York (Northern Blvd.), 258 N.Y. 136, 147-149 (1932); *see* Fennica Builders, Inc. v. Hersh, 159 A.D.2d 679, 679-80, 553 N.Y.S.2d 180 (2nd Dep't 1990) ("The reference to the abandoned street 'Dorian Court' in the plaintiff's deeds was merely descriptive of the boundaries. The language of description did not imply such an easement, since the lot in question has frontage on another existing public way. One who claims an implied easement has the burden of establishing all the facts necessary to support it").

Whether an easement is to be implied in connection with a given conveyance ultimately depends on the intentions of the parties at the time of the conveyance. "'[T]he main factor to be considered is the intent of the parties to the grant, taking into consideration the circumstances attending the transaction, the particular situation of the parties, the state of the country and the state of the thing granted'." Manhattan Beach Community Group, Inc., *supra*, 224 A.D.2d at 394, *quoting* Matter of City of New York (Northern Blvd.), *supra*, 258 N.Y. at 147-48. The claim of an easement by implication raises a question of the intent of the grantor, which is a question of fact that generally requires a trial. Michalski v. Decker, 16 A.D.3d 469, 792 N.Y.S.2d 103 (2nd Dep't 2005); Glennon v. Mayo, 221 A.D.2d 504, 633 N.Y.S.2d 400 (2nd Dep't 1995) (determination after non-jury trial and consideration of "the surrounding circumstances"); Fennica Builders, *supra* (denying motion for summary judgment); Fortunoff Silver Sales, Inc. v. Euston Station, Inc., 74 A.D.2d 895, 425 N.Y.S.2d 862 (2nd Dep't 1980) (summary judgment denied; record presented questions of fact).

Under all of the circumstances - including the fact that the conveyance to TNC was to a charitable entity that was to use the land as a nature preserve - we believe that there is, at the very least, a question of fact as to whether Seven Springs does, in fact, have a private easement over TNC's land. We also believe it is significant that there is no mention of any such easement in the deeds to TNC or to RU. *See* Sam Development, LLC v. Dean, 292 A.D.2d 585, 586, 740 N.Y.S.2d 90 (2nd Dep't 2002), *citing* Matter of Estate of Thomson v. Wade, 69 N.Y.2d 570, 573, 516 N.Y.S.2d 614 (1987) ("if the common grantor conveys both the dominant and servient properties, the easement must be provided for in the deed to the dominant property and in the deed conveying the servient property").

Even if Seven Springs could - and we do not believe that it can - prove that the land it acquired from RU had enjoyed such a private easement, there is substantial evidence that RU abandoned any such private easement right when it affirmatively consented to the abandonment and closing of Oregon Road by both New Castle and North Castle. RU's consent occurred in 1990 and 1991, several years before RU conveyed to Seven Springs. *See* Holloway v. Southmayd, 139 N.Y. 390, 409 (1893):

> [Seven Springs] was bound to know, when the grant was made to [it], that the public highway no longer existed, and that he must be presumed to have bought it in view of that fact. With such knowledge, chargeable to [it], [Seven Springs] could not be heard to say that by bounding the grant upon the highway his grantors had conveyed an easement in the highway.

Citing King v. City of New York (Trustees of St. Patrick's Cathedral), 102 N.Y. 172, 175 (1886):

> Merely bounding premises by a public highway for purposes of description, and where it is referred to as any fixed mark or monument might be, is very different from selling by reference to a map or plat on which the grantor has laid out streets, and made a dedication, and exposed himself to the equities of an estoppel. And then the road was in fact closed when the deed was made to Brennan, who knew, or was bound to know that the public highway no longer existed, and must be presumed to have bought and fixed his price in view of that fact.

The Second Department has held that "[p]ermitting the unimpeded growth of trees may constitute evidence of abandonment." Sam Development, *supra, citing* Arthur J. Quesnel Family Trust v. Harstedt, 285 A.D.2d 704, 727 N.Y.S.2d 200 (3rd Dep't 2001) (question of fact is presented where a right-of-way is obstructed by foliage and growth, and the dominant estate has frontage on a public road from which that property was accessed without resort to the right-of-way); Chapman v. Vondorpp, 256 A.D.2d 297, 681 N.Y.S.2d 320 (2nd Dep't 1998) (issue of fact precluded summary judgment where there was evidence that trees had been growing on the easement for 30 years, the easement had become impassable for vehicles, and the dominant property had ingress and egress from another road; "the use of an alternate route of access while permitting unimpeded growth of trees to obstruct the right of way for several decades may be indicative of an intent to abandon the easement").

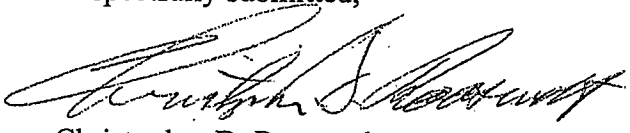
RU's abandonment - before it conveyed to Seven Springs - precludes Seven Springs's claim to an easement. "Once extinguished, an easement is gone forever and cannot be revived," Sam Development, *supra, quoting* Stilbell Realty Corp. v. Cullen, 43 A.D.2d 966, 967, 352 N.Y.S.2d 656 (2nd Dep't 1974), except it may be renewed in a subsequent conveyance of either lot if sufficient language is used to evince an intent to recreate the easement *de novo*.

Under New York law, Seven Springs has the burden of proving, by clear and convincing evidence, that it has a private easement by implication over TNC's lands. We believe that Seven Springs has little, if any, evidence to support the claim that it has such a private easement.

Under these circumstances, we believe that Seven Springs should be required to establish its claim to any private easement over TNC's land in court, where all of the evidence on all issues can be assessed in accordance with New York law.

This letter is a summary of the legal analysis which we believe compels the conclusion that Seven Springs has not established that it does, in fact, enjoy a private easement over that portion of Oregon Road that lies within TNC's land. This letter does not constitute a full exposition of each and every fact or argument which supports our claim and belief that Seven Springs does not enjoy the private easement it claims and which its title company appears willing to ensure.

Respectfully submitted,



Christopher D. Roosevelt

CDR:bb
Encls.

White Plains Office
707 Westchester Avenue, Suite 411
White Plains, NY 10604
914-993-9393 phone
914-997-1698 fax
800-433-4698
stewartwhiteplains.com
NYSE: STC

April 27, 2006

Christopher D. Roosevelt, Esq.
Roosevelt & Benowich, LLP
1025 Westchester Avenue
White Plains, New York 10604

RE: The Nature Conservancy ("TNC")
Seven Springs, LLC
06-30710-W

Dear Mr. Roosevelt:

At your request, we have examined the title to the premises owned by the two referenced entities in the area of Oregon Road from Byram Lake Road running southerly to the public portion of Oregon Road in North Castle.

We have also reviewed the letter dated November 15, 2005 from Jonathan A. Richards at Fidelity National Title to Jason D. Greenblatt at the Trump Organization, and the letter dated February 16, 2006 from Stephen J. Bobolia at Fidelity Title, Ltd. to Roland Baroni, Jr., Esq.

Based on our research, we are unable to conclude that Seven Springs, LLC enjoys a private easement over that portion of Oregon Road which lies within TNC's land. Under all of the circumstances, the fact that Seven Springs might enjoy a private easement over that portion of Oregon Road where it's land abuts Oregon Road is insufficient for us to conclude that Seven Springs enjoys a private easement over the portion of Oregon Road that lies within TNC's land.

Among other things, Oregon Road appears to pre-date Eugene Meyer's acquisition of the lands now owned by TNC and Seven Springs; the deeds by which both TNC and Rockefeller University acquired their lands from the Meyer Foundation refer to Oregon Road as well as to metes and bounds descriptions, and not to a subdivision map; there is no evidence that Meyer intended to or did dedicate Oregon Road to public use while at the same time creating a private easement in favor of the lands conveyed to Rockefeller University over the lands conveyed to TNC; and Seven Springs and TNC do not share a common grantor.

Even if Seven Springs' grantor (Rockefeller University) enjoyed such a private easement (and we do not believe that was the case), there is evidence that any such easement was affirmatively abandoned by Rockefeller University before the conveyance to Seven Springs.

Accordingly, we cannot conclude, and would not be willing to insure, that Seven Springs has a private easement over that portion of Oregon Road which lies within TNC's lands.

Very Truly Yours,

Paula L. Klein
Vice President-Senior Counsel

329

ANNEXED TO THE FOREGOING:
EXHIBIT A-FEBRUARY 1998 DRAFT ENVIRONMENTAL IMPACT STATEMENT
[329-330]

SEVEN SPRINGS

DRAFT ENVIRONMENTAL IMPACT STATEMENT

Volume 2

February 1998

2. Access from Oregon Road in North Castle

By eliminating the man-made barricade and improving the existing dirt roadway, it would be possible to extend the existing Oregon Road (south) in North Castle to the north into the Seven Springs site. However, this road connection, in the absence of condemnation, would require approval from The Nature Conservancy, which fully owns the entire road bed south of Seven Springs, and from the Town of North Castle, which officially closed the road in 1990. At the present time, the owners of the Seven Springs site have no rights to utilize any part of this portion of the roadway.

Such a road connection had been suggested as part of the original planning for the Seven Springs project. Hence, it was included in the DEIS scoping document as an alternative. The approximately 1,500 feet of off-site road bed has an average width of 12 feet. It borders steep slopes and wetlands. If it were utilized for site access, widening and grading would be necessary. Retaining walls would be required as part of any proposed construction to minimize excavation and disturbance of steep slopes. The same characteristics would apply regardless of whether the potential road were designed for permanent or emergency access.

3. No Access to Sarles Street

The Seven Springs development could occur with one means of access, rather than two, eliminating the proposed access to Sarles Street. This alternative, shown in Exhibit 5-46 and 5-47, would result in less impact to wetlands, wetland buffers and steep slope areas to the immediate east of Sarles Street. It would also avoid disturbance of the rock wall, regrading, and tree removal required to develop adequate sight distance under the proposed action. The traffic impacts of an alternative with no access to Sarles Street would result in some additional volumes on Oregon Road (north) and at the intersection of Byram Lake Road and Oregon Road.

However, levels of service and recommended improvements would be the same as under the proposed action and the residential alternatives with access to both Sarles Street and Oregon Road (north).

The arrival and departure distributions for the residential development with no access to Sarles Street are shown on Exhibits 5-48 and 5-49. The resulting site generated traffic volumes, illustrated on Exhibits 5-50 to 5-55, were added to the Year 2000 N0-Build Traffic Volumes resulting in the Year 2000 Build Traffic Volumes shown on Exhibit 5-56 to 5-61.

12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER PART RJB

SEVEN SPRINGS, LLC.,

Plaintiff,

-against-

INDEX # 9130/06

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendant.

Westchester County Courthouse
111 Dr. Martin Luther King Blvd.
White Plains, New York 10601
March 18, 2008

BEFORE:

HON. RORY J. BELLANTONI,
Acting Justice of the Supreme Court

HOWARD BRESHIN,
SENIOR COURT REPORTER

APPEARANCES:

DELBELLO, DONNELLAN, WEINGARTEN, WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601
BY: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.

LEONARD BENOWICH, ESQ.
Attorneys for Defendant Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604

OXMAN, TULIS, KIRKPATRICK, WHYATT & GEIGER, LLP
Attorneys for Defendants Burke and Donohoe
120 Bloomingdale Road
White Plains, New York 10605
BY: JOHN KIRKPATRICK, ESQ.

STEPHENS, BARONI, REILLY & LEWIS, LLP
Attorneys for Defendant Town of North Castle
175 Main Street
White Plains, New York 10601
BY: GERALD REILLY, ESQ.
CHRISTEN HOLT, ESQ.

that road, and Con Edison has been on that road to service those utilities.

THE COURT: I guess my question was more aimed at if that portion had been abandoned, I guess it would be reasonable for everyone to assume that a stay wouldn't have been necessary in that this would have played itself out, a preliminary injunction the way that everybody might suppose it's a declaratory judgment action, you are seeking to have those rights declared by the Court, and then all of a sudden we have somebody in there destroying in one sense property, and in somebody else's opinion creating what you are entitled to create.

I guess what I am trying to figure out, why somebody jumped the gun in here and went in there and started clearing.

MR. DONNELLAN: The road is already there. The road has been there a hundred years. I have been there.

The road is cleared. Some weeds grow on it, some twigs and some logs fall on it, but the road is there and it's been there for a very, very long time, and it's accessed, like I said, by Con Edison for utility purposes. It has been accessed from the north by my client for some period of time.

THE COURT: When you say from the north, the portion of the road beyond where the gate was put up or the gate was changed?

MR. DONNELLAN: Where the gate was put up, and it's also an important point, we actually own that property. There is only a very small portion of this property, of the road that is claimed to be owned by the Nature Conservancy. The bottom portion of it --

THE COURT: You own the property where the gate is actually located?

MR. DONNELLAN: Yes, your Honor.

THE COURT: How far beyond that

gate does the ownership become disputed?

MR. DONNELLAN: A hundred yards, maybe, something like that, a hundred yards.

The piece of property that is down by the gate was acquired by Seven Springs, and then it also owns a large piece of property up in the north where this Oregon Road goes to, and a portion of that Oregon Road is also owned by Seven Springs. It's a piece in between where the Nature Conservancy owns both sides of that road.

MR. KIRKPATRICK: Your Honor, the matter of the gate is somewhat in dispute. Our position would be that Seven Springs has purchased half the right-of-way and the Nature Conservancy owns the other half of the right-of-way, so the gate is arguably half along his property.

MR. DONNELLAN: I would agree with that.

MR. REILLY: Judge, if I can just add in response --

THE COURT: Which half.

MR. DONNELLAN: The west half?

THE COURT: From the center of the roadway.

MR. DONNELLAN: Correct.

THE COURT: We are talking about now splitting somewhere in the middle?

MR. DONNELLAN: Yes. That is actual ownership. Anyone who owns to the center line of that road has a right of access for ingress and egress over the entire road, they do and we do.

THE COURT: I am just trying to understand what has happened to the land. I have an affidavit from someone who lives nearby who tells me there was somebody in a truck in there pulling some weeds up. There is an allegation of irreparable harm.

I am not sure if those folks were on your property weeding it or on their

property.

MR. DONNELLAN: The road is a dirt road fairly wide that goes all the way up, and there was some light maintenance of the road that included removing some weeds, twigs that are on the road but not doing anything else.

THE COURT: Is that portion of the road, is it undisputed who owns that, or is it on the disputed parcel? You said it is about a hundred yards in.

MR. DONNELLAN: It is both. A hundred yards in they claim to have ownership of it. Maybe they do, maybe they don't, but we certainly don't own it. We are not saying we own it, but we have a private easement over it, and the Appellate Division has, number one, found that we have stated a claim, a proper claim and a cause of action for that right over it, and the facts with respect to that claim, your Honor, are not disputed. It's a chain of title.

THE COURT: Just hold onto it for

It's not that anymore, and significantly they have not brought in an affidavit of someone who did what they did.

THE COURT: This portion, is this portion-- this was a portion of Oregon Road that was closed, is that correct?

MR. BENOWICH: Yes.

MR. DONNELLAN: A portion of Oregon Road, your Honor, that's been a road for a hundred years, right. At some point in time the Town of North Castle made it a public highway, became a public highway because of use, not because of non-use.

THE COURT: Was it paved?

MR. BENOWICH: Never.

MR. DONNELLAN: It's like stone and dirt. I haven't walked all the way up. Maybe you guys know more, but it's more than a pathway. You can look at it from Google Earth and you can see it's a road.

MR. BENOWICH: There is no

macadam.

THE COURT: There is a question that keeps bouncing around our training seminars whether or not we are allowed to use--

MR. DONNELLAN: Google Earth.

THE COURT: Some judges opine it's an improper ex parte communication, I am not sure who with.

MR. BENOWICH: After you sign the TRO, we can all go up and look at the road.

THE COURT: If we can use Lexus and West Law, I don't know why we can't do that research. If we look at the photos, it might be problematic and I can go on with that, with your permission I will do that. I won't use it to render any decision or any pictures I see on the Internet unless they are admitted into evidence in some proceeding, but I guess that's the ultimate concern with the ethics of that which is to rely on something that

is not in evidence versus legal research, but with your permission, if I can pull it up, I will do that. Any objection to that?

MR. BENOWICH: No objection, your Honor.

THE COURT: So this was at some point at least improved but not paved.

MR. BENOWICH: Not improved.

THE COURT: Not even with the stones?

MR. BENOWICH: It was flattened out by use, with people walking on it just as if when people walk from a house to the beach, it becomes somewhat distinct.

This has not been paved. It was not prepared for vehicular use, and it has simply been used and that's the appearance it has.

MR. DONNELLAN: Your Honor, on the survey that we have submitted, it's the last Exhibit E in our papers, there is a macadam drive, a paved driveway. It

goes up to the Town of Bedford. I will pull that out.

MR. BENOWICH: That, your Honor, ends at the dirt road that is Oregon Road which is what we are talking about. His survey does not identify Oregon Road as a macadam road.

THE COURT: I hate doing this because I can never fold them again.

MR. BENOWICH: I am sure they will get you another one.

MR. DONNELLAN: Your Honor, in the bottom left-hand survey you will see Oregon Road.

THE COURT: Okay.

MR. DONNELLAN: That's coming from what still is the paved portion, public portion of Oregon Road which goes down to the south, and then you have the disputed portion of Oregon Road and it comes up to where you see a driveway. That driveway winds up, and although you can't see it from this where it says sheet one up on top, Town of

Bedford, that driveway winds around and comes to the mansion, the residence that is up in the right-hand corner.

THE COURT: Okay.

MR. DONNELLAN: So that driveway is paved and comes down to the dirt road, Oregon Road, but that road has been used in the past, right, for vehicular traffic, and that's the reason why the road is shaped the way that it is, if you look at it, because you can see tire tracks over time make a mound in the center of the road and I have seen that on that road.

I don't know when that has happened. It's obviously over a long period of time, but the fact whether it was used 10 years ago, 20 years ago, 90 years ago doesn't really matter. No one, neither the Town nor the Nature Conservancy, whatever their good purposes are, don't have the right to take private rights away from another property owner, and their allegations

13

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER: CIVIL TERM

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

v. Index #: 9130/2006

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Westchester County Courthouse
111 Dr. M.L.K., Jr. Boulevard
White Plains, New York 10601
December 9, 2008

B E F O R E:

HON. RORY J. BELLANTONI,
Supreme Court Justice

A P P E A R A N C E S:

DELBELLO, DONNELLAN, WEINGARTEN WISE & WIEDERKEHR,LLP
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601
By: BRADLEY D. WANK, ESQ.

BENOWICH LAW, LLP
Attorneys for The Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604
By: LEONARD BENOWICH, ESQ.

Betsy Watson
Senior Court Reporter

A P P E A R A N C E S:
(Cont.)

OXMAN, TULIS, KIRKPATRICK WHYATT & GIEGER, LLP
Attorneys for the Burkes and Donohoes
120 Bloomingdale Road
White Plains, New York 10605
By: LOIS N. ROSEN, ESQ.

STEPHENS, BARONI, REILLY & LEWIS, LLP
Attorneys for the Town of North Castle
175 Main Street, suite 800
White Plains, New York 10601
By: ROLAND BARONI, ESQ.
Also present: KRISTIN L. CINQUE, ESQ.

BOIES, SCHILLER & FLEXNER, LLP
Observer
333 Main Street
Armonk, New York 10504
BY: OLAV A. HAAZEN, ESQ.

-PROCEEDINGS-

questionable and out to the roadway.

And the issue is whether there is an easement, not whether there is outright ownership.

MR. WANK: Your Honor, Nature Conservancy on their deed, it is referred to in two parcels. One on the west side of Oregon Road. The other on the east side of Oregon Road.

THE COURT: Where --

MR. WANK: Oregon Road is still there. Oregon Road is referenced on the North Castle tax map as the road going through the middle.

MR. BENOWICH: But there is no claim in this case -- plaintiff's complaint does not allege and does not seek a declaration that it owns any part of the roadway or the road bed of Oregon Road.

At least, your Honor, in the southern part where you are correct, The Nature Conservancy owns to the east and to the west and the road bed. That's the fact. They don't contend any other

-PROCEEDINGS-

way.

So to get back to your Honor's question which was, I guess, relating to Mr. Wank's objection to my characterization that the land is owned by my client. The land is owned by my client. It is certainly not owned by his client.

And in any event, for them to come here -- what they are doing, Judge, is asking you to have a settlement conference so you can force me and my client to let the plaintiff use my client's land in its negotiations with Bedford, as they have had negotiations with North Castle, so that they can play that chip as freely as they want.

It is not their land. They brought a lawsuit to find out whether they do or do not have rights that they claim over it. And your Honor has not reached that determination.

To the contrary, your Honor has granted us a preliminary injunction. So

Certificate of Service (by U.S. Mail)

LEONARD BENOWICH, an attorney duly admitted to practice in this Court, hereby affirms, under the penalty of perjury, that on August 26 2010, I served a true copy of the foregoing **REPLY AFFIRMATION IN FURTHER SUPPORT OF TNC'S MOTION FOR REARGUMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND**, upon the following counsel:

Julius W. Cohn, Esq.
Cohn & Spector
200 East Post Road
White Plains, New York 10601
Attorneys for Plaintiff

Lois Rosen, Esq.
OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
Attorneys for Defendants Noel B. and Joann Donohoe

Janine A. Mastellone, Esq.
WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
3 Gannett Drive
White Plains, New York 10604-3407
Attorneys for Defendants Robert and Teri Burke

by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the party and/or parties listed above.

Dated: August 26, 2010, 2010

Leonard Benowich

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Index No. 21162/09

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

REPLY AFFIRMATION IN FURTHER SUPPORT OF TNC'S MOTION FOR REARGUMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

Benowich

BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

To

Service of a copy of the within is hereby admitted.

Dated:.....

Attorney(s) for .....

staple here

staple here

1. Place cover this side up on top of first page of document. Staple as indicated.

2. Lift bottom of cover up and over top, folding on top score line

3. Fold cover down behind papers on remaining score line.

Blumberg's Law Products®

STATE OF COUNTY OF ss.:

I, the undersigned, an attorney admitted to practice law,

Check Applicable Box

☐ Certification By Attorney certify that the within has been compared by me with the original and found to be a true and complete copy.

☐ Attorney's Affirmation state that I am the attorney(s) of record for in the within action; I have read the foregoing and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.:

I, being duly sworn, depose and say: I am

Check Applicable Box

☐ Individual Verification the in the within action: I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

☐ Corporate Verification the of a corporation and a party in the within action; I have read the foregoing and know the contents thereof: and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief. and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.: (If both boxes are checked—indicate after names, type of service used.)

I, being sworn, say: I am not a party to the action, am over 18 years of age and reside at

On I served the within

Check Applicable Box

☐ Service By Mail by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within this State, addressed to each of the following persons at the last known address set forth after each name:

☐ Personal Service on Individual by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as *a party therein:*

Sworn to before me on

.....
The name signed must be printed beneath

FAN

AUG 31 2010

CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
MAY 18 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No.: 21162/09

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR REARGUMENT AND IN OPPOSITION FOR LEAVE TO SERVE A SECOND AMENDED COMPLAINT

James B. Cooney, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following under the penalty of perjury:

1. I am associated with the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, attorneys of record for the Defendants, ROBERT BURKE and TERI BURKE (hereinafter, the "Burke Defendants"). This Affirmation is respectfully submitted in further support of the Burke Defendants' motion for an Order pursuant to CPLR § 2221, granting reargument of the Burke Defendants' motion to dismiss the Plaintiff's complaint as well as the Plaintiff's cross-motion to serve an Amended Complaint, and in opposition to Plaintiff's cross-motion to serve a Second Amended Complaint. Upon granting reargument, the Burke Defendants request that this Court dismiss the Plaintiff's complaint in its entirety, and deny the Plaintiff's cross-motion to serve an Amended Complaint, as well as denying Plaintiff's cross-motion to serve a Second Amended Complaint.

2. The Burke Defendants adopt the arguments set forth by The Nature Conservancy ("TNC") in further support of its motion to reargue and in opposition to

Plaintiff's cross-motion for leave to serve a Second Amended Complaint, in so far as they do not relate to the specific allegations of the complaint concerning TNC or its counsel. Thus, so as not to burden the Court with duplicative and voluminous documentation, the Burke Defendants respectfully refer the Court to the exhibits already annexed to TNC's reply affirmation in further support on TNC's motion for reargument and in opposition to Plaintiff's cross-motion for leave to amend.

3. In addition to the arguments raised by TNC and adopted by the Burke Defendants herein, it is respectfully submitted that the Plaintiff should not be granted leave to serve the proposed Second Amended Complaint as this proposed pleading fails to cure the deficiencies of the prior pleadings vis-à-vis the Burke Defendants so as to survive the Burke Defendants' reargument motion to dismiss.

I. PLAINTIFF'S CROSS-MOTION FOR LEAVE TO SERVE A SECOND AMENDED COMPLAINT SHOULD BE DENIED

A. Plaintiff's Proposed Second Amended Complaint is Patently Insufficient and Fails to Plead Cognizable Claims Against the Burke Defendants

4. It is well-settled that "[l]eave to amend a pleading should be freely given (see CPLR 3025[b]), provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit." Sheila Properties, Inc., v. A Real Good Plumber, Inc., 59 A.D.3d 424, 426, 874 N.Y.S.2d 145 (2d Dep't 2009)(emphasis added); see also Gitlin v. Chirinkin, 60 A.D.3d 901, 901-02, 875 N.Y.S.2d 585 (2d Dep't 2009). Here, Plaintiff's application for leave to amend its complaint, now for a second time, should be denied. As fully briefed in the Burke Defendants' prior papers, Plaintiff's complaint, even as amended, does not meet the

standard so as to withstand a motion to dismiss. In addition, Plaintiff's proposed Second Amended Complaint fails to cure the prior pleading's deficiencies and still does not plead legally cognizable claims as against the Burke Defendants.

5. Plaintiff's proposed Second Amended Complaint reasserts the cause of action for *prima facie* tort and adds two additional causes of action for slander of title and injurious falsehood. It also reasserts the same conclusory, unsubstantiated allegation that the Burke Defendants took the "position" in the 2006 lawsuit that the Plaintiff is not entitled to a private easement. The only new allegation in the proposed Second Amended Complaint that specifically implicates the Burke Defendants is the following un-cited, quoted partial statement made on December 9, 2008, by "the attorney for the Burke and Donohoe Defendants", which states:

> . . . But right now, today, as I stand here, the Nature Conservancy's position along with my client's position is that there is no easement . . .

Plaintiff's proposed Second Amended Complaint, ¶ 55.

6. This statement, however, made in the course of the 2006 litigation, was in open court at oral argument and is therefore absolutely privileged.[1] See, e.g., Park Knoll

[1] The subject quotation is from a transcript of an oral argument, dated December 9, 2008, before Judge Bellantoni, regarding settlement negotiations in the 2006 lawsuit. The full exchange is as follows:

> THE COURT: But let me ask you this. Even if Seven Springs does not have an easement and that land belongs to the Conservancy, how does your client stop the Conservancy from doing what it wants to with its land?
>
> MS. ROSEN: I am not saying that we can. But right now, today, as I stand here, The Nature Conservancy's position along with my client's position is that there is no easement.
>
> And we are in the fight with the Nature Conservancy to make sure that the Court evaluates this issue and makes whatever decision it believes to be appropriate.

Transcript of Oral Argument, dated December 9, 2008, pages 52-53. Copies of pp. 1, 52, and 53 are annexed hereto as **Exhibit "A."**

Associates v. Schmidt, 59 N.Y.2d 205, 209, 464 N.Y.S.2d 424 (1983); Weiner v. Weintraub, 22 N.Y.2d 330, 331, 292 N.Y.S.2d 667 (1968); Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 365, 834 N.Y.S.2d 494 (2007)(actions taken and statements made in litigation are absolutely privileged).

7. As fully briefed in the Burke Defendants' previous papers, Plaintiff's *prima facie* tort claim therefore fails because, among other things, the partial statement made in a court proceeding, *supra*, is absolutely privileged. This defense also holds true regarding Plaintiff's additional claims of slander of title and injurious falsehood. Therefore, Plaintiff's claims of *prima facie* tort, slander of title, and injurious falsehood are deficient.

8. Furthermore, Plaintiff fails to establish the elements for slander of title and injurious falsehood. To prove slander of title, one must show (1) communication falsely casting doubt on the validity of a complainant's title; (2) reasonably calculated to cause harm; and (3) resulting in special damages. See 39 College Point Corp. v. Transpac Capital Corp., 27 A.D.3d 454, 455, 810 N.Y.S.2d 530 (2d Dep't 2006). Here, because the partial statement made in a court proceeding, *supra*, is Plaintiff's only specific allegation attributable to the Burke Defendants, it is a privileged statement which does not satisfy the required element of "communication" so as to adequately plead slander of title. The "communication" element of this cause of action cannot be premised on an absolutely privileged statement made in the course of legal proceedings. See Xiao Mei Teng v. Mintz, 2008 NY Slip Op 31262U, *6, 2008 N.Y. Misc. LEXIS 9894, *7 (Sup. Ct., Nassau Co. April 23, 2008); Andrews v. Steinberg, 122 Misc. 2d 468, 475, 471 N.Y.S.2d 764; 1983 N.Y. Misc. LEXIS 4133 (Sup. Ct. N.Y. Co. Dec. 23, 1983).

Therefore, this additional cause of action asserted in the proposed Second Amended Complaint is deficient.

9. Plaintiff's injurious falsehood claim also is deficient for the same reason. To prove injurious falsehood, a Plaintiff must show (1) falsity of the alleged statements; (2) publication to a third person; (3) malice; and (4) special damages. Drug Research Corp. v. Curtis Publ'g Co., 7 N.Y.2d 435, 440, 199 N.Y.S.2d 33 (1960). Here, again, because the partial statement made in a privileged court proceeding, *supra*, is absolutely privileged, it cannot form the basis of the "statement" element of this cause of action. See Xiao Mei Teng v. Mintz, 2008 NY Slip Op 31262U at *6; Andrews v. Steinberg, 122 Misc. 2d at 475. Also, Plaintiff has not alleged the partial statement was published to a third person. Therefore, Plaintiff fails to adequately plead this tort.

10. Additionally, as fully briefed in the Burke Defendants' previous papers and co-defendant TNC's Reply Affirmation, Plaintiff's Amended Complaint and proposed Second Amended Complaint fail to comply with the requirement of pleading special damages. Among other things, part of the claimed damages are general damages, part are damages not yet incurred, and none of the damages are attributable to the Burke Defendants' actions. Therefore, Plaintiff's claims of *prima facie* tort, slander of title, and injurious falsehood are deficient also by failing to plead special damages.

11. Therefore, Plaintiff's proposed Second Amended Complaint does not rectify the deficiencies of the original and Amended Complaint, and fails to adequately plead the causes of action for *prima facie* tort and the new causes of action of slander of title and injurious falsehood, as against the Burke Defendants. As a result, Plaintiff's proposed

Second Amended Complaint is palpably insufficient and thus the cross-motion for leave to serve the proposed Second Amended Complaint should be denied.

B. Plaintiff's Lawsuit, as Pleaded in the Amended Complaint and the Proposed Second Amended Complaint, Constitutes an Impermissible SLAPP Suit

12. Plaintiff's current lawsuit seeking $60,000,000, as sought in the Amended Complaint and now in the proposed Second Amended Complaint, is nothing more than an attempt to penalize the Burke Defendants for (a) their opposition at the Town of Bedford Planning Board to Plaintiff's site approval application pending at that time and (b) the Burke Defendants' defense of the claims asserted against them in the 2006 action. As such, the Amended Complaint, as well as the proposed Second Amended Complaint, constitute an impermissible "Strategic Lawsuit Against Public Participation ('SLAPP suit')," Civil Rights Law § 76-a, and should be dismissed pursuant to CPLR §§ 3211(g) and 3211(a)(7).

13. It is respectfully submitted that the Court overlooked and/or misapprehended the more stringent pleading requirements of a SLAPP suit and therefore the Court should grant reargument of the Burke Defendants' motion to dismiss, and upon reargument, grant said motion to dismiss, deny Plaintiff's cross-motion for leave to serve an Amended Complaint, as well as Plaintiff's latest cross-motion for leave to serve a Second Amended Complaint.

14. Plaintiff's new counsel, Mr. Cohn, asserts that Plaintiff's lawsuit is not a SLAPP suit subject to dismissal because the instant action commenced in 2009 alleging tort claims is based upon private parties' rights to real property and thus not involving "public petition and participation," as defined in Civil Rights Law § 76-a. See Cohn's

Affirmation in Support of Cross Motion and in Opposition to Motions for Reargument and/or Renewal, dated August 20, 2010, page 7, ¶ 15. This contention, however, is without merit.

15. Pursuant to Civil Rights Law § 76-a, a SLAPP suit is an "an action [or] claim . . . for damages . . . brought by a public applicant or permittee [i.e., the Plaintiff],[2] and is materially related to any efforts of the Defendant [i.e., the Burke Defendants] to report on, comment on, rule on, challenge or oppose such application or permission." Civil Rights Law § 76-a (emphasis added).

16. Here, the Plaintiff's instant lawsuit, comprised of a *prima facie* tort cause of action and the additional causes of action of slander of title and injurious falsehood asserted in the proposed Second Amended Complaint, relate to the prior 2006 lawsuit regarding a claimed easement regarding the same project by Plaintiff and is based solely on the Burke Defendants' efforts to "comment on," "challenge," and "oppose" the Plaintiff's then pending site approval application before the Town of Bedford. Therefore, the Plaintiff's current lawsuit is nothing more than an impermissible SLAPP suit and should be dismissed.

17. Moreover, the Plaintiff's opposition papers to the Burke Defendants' motions to dismiss and for reargument, including the attempt to seek leave to serve a proposed Second Amended Complaint, ignore the provisions under CPLR § 3211(g), which require the Plaintiff to demonstrate that its claims, even as amended or re-amended, have a "substantial basis in law." CPLR § 3211(g).

---

[2] The Plaintiff is a "public applicant or permittee" as defined, because it "applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body . . .." Civil Rights Law § 76-a (emphasis added).

18. Indeed, where a moving party demonstrates that an action is a SLAPP suit, which the Burke Defendants have done, the Court must dismiss the action unless the responding party demonstrates that the claim(s) have a substantial basis in law, "as demonstrated by clear and convincing evidence." Civil Rights Law § 76-a2; see also Matter of Related Properties, Inc., v. Town Board of Town/Village of Harrison, 22 A.D.3d 587, 591, 802 N.Y.S.2d 221 (2d Dep't 2005).

19. Here, neither the Complaint, the Amended Complaint, nor the proposed Second Amended Complaint, sets forth any evidence supporting the Plaintiff's claims against the Burke Defendants. Rather, the Plaintiff's new counsel, Mr. Cohn, merely alleges in his Affirmation that the lawsuit falls out of the SLAPP suit parameters, and the proposed Second Amended Complaint bases its claim against the Burke Defendants by a single reference to a statement by the Burke Defendants' attorney at the December 9, 2008 Court Hearing, before the Honorable Rory J. Bellantoni. See Plaintiff's Proposed Second Amended Complaint, ¶ 55; see also Exhibit "A." However, based upon the prevailing case authority, all such judicial proceedings are absolutely protected. See, e.g., Park Knoll Associates v. Schmidt, 59 N.Y.2d at 209; Weiner v. Weintraub, 22 N.Y.2d at 331; Rosenberg v. MetLife, Inc., 8 N.Y.3d at 365.

WHEREFORE, it is respectfully requested that the Court grant reargument, and upon reargument, grant the Burke Defendants' motion to dismiss and deny the Plaintiff's cross-motion for leave to serve an Amended Complaint, as well as the Plaintiff's cross-motion for leave to serve a Second Amended Complaint, and for such other, further, and different relief as this Court deems just and proper.

Dated: White Plains, New York
August 27, 2010

Yours, etc.,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: _____
James B. Cooney
Attorneys for Defendants ROBERT BURKE and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

TO: Cohn & Spector
Attorneys for the Plaintiff
Attention: Julius W. Cohn, Esq.
200 East Post Road
White Plains, New York 10601
(914) 428-0505

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

A

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER: CIVIL TERM

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

v. Index #: 9130/2006

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Westchester County Courthouse
111 Dr. M.L.K., Jr. Boulevard
White Plains, New York 10601
December 9, 2008

B E F O R E:

HON. RORY J. BELLANTONI,
Supreme Court Justice

A P P E A R A N C E S:

DELBELLO, DONNELLAN, WEINGARTEN WISE & WIEDERKEHR,LLP
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601
By: BRADLEY D. WANK, ESQ.

BENOWICH LAW, LLP
Attorneys for The Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604
By: LEONARD BENOWICH, ESQ.

Betsy Watson
Senior Court Reporter

to whether or not Seven Springs has an eastment over this portion of Oregon Road. And my client's position, they don't.

So no one has mentioned any possibility of settlement to my clients or offered them any input into any settlement agenda.

If plaintiff would like to do that --

THE COURT: But let me ask you this. Even if Seven Springs does not have an easement and that land belongs to the Conservancy, how does your client stop the Conservancy from doing what it wants to with its land?

MS. ROSEN: I am not saying that we can. But right now, today, as I stand here, The Nature Conservancy's position along with my client's position is that there is no easement.

And we are in the fight with the Nature Conservancy to make sure that the Court evaluates this issue and makes

-PROCEEDINGS-

whatever decision it believes to be appropriate.

But unless and until there is some kind of settlement proposal from the plaintiff, I think it is premature to involve the Court in a resolution when there has not yet been a proposal.

THE COURT: I would agree with that.

MS. ROSEN: Thank you, your Honor.

MR. BARONI: Since I, kind of, started this request, I really believe that if the clients, supervisor of the Town, Mr. Trump, not a subordinate, people from Boston, and Mrs. Rosen's clients were all present, that we might accomplish something. I think just doing it among the attorneys is not going to carry the day.

So unless the Court feels disposed to bringing in all the principles and having that type of a conversation, I think we are going to all have to proceed through discovery.

THE COURT: Well, again, I would

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

Rose Alexandre being duly sworn, deposes and says:

That I am not a party to this action, am over eighteen years of age and reside in the State of New York.

That on the 27th day of August, 2010 deponent served the within REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR REARGUMENT AND IN OPPOSITION FOR LEAVE TO SERVE A SECOND AMENDED COMPLAINT by depositing a true copy of same enclosed in a FedEx Priority Overnight (Saturday Deliviery) properly addressed wrapper, in an official depository under the exclusive care and custody of FedEx within the State of New York, addressed to each of the following persons at the last known address set forth after each name, as follows:

TO: SEE ANNEXED

Alexandre
Rose Alexandre

Sworn to before me this
27th day of August, 2010

Notary Public

JAMES B. COONEY
Notary Public, State of New York
No. 02CO6220917
Qualified in New York County
Commission Expires April 19, 2014

TO: COHN & SPECTOR
Attorneys for the Plaintiff
Attention: Julius W. Cohn, Esq.
200 East Post Road
White Plains, NY 10601
(914) 428-0505

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
Attorneys for Defendants
NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

BENOWICH LAW, LLP
Attorneys for Defendant
THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

Index No. 21162/09

James B. Cooney
08139.00589

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR REARGUMENT AND IN OPPOSITION FOR LEAVE TO SERVE A SECOND AMENDED COMPLAINT

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Attorneys For Defendants – ROBERT BURKE and TERI BURKE

Office & Post Office Address, Telephone
3 GANNETT DRIVE
WHITE PLAINS, NEW YORK 10604
(914) 323-7000

Sear Aff
9/2/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Index No.: 21162/09

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

REPLY AFFIRMATION IN SUPPORT OF CROSS MOTION FOR LEAVE TO SERVE SECOND AMENDED COMPLAINT

Defendants.

----------X

JULIUS W. COHN, an attorney at law duly licensed to practice in the State of New York, under penalty of perjury hereby affirms and subscribes as follows:

1. I am a member of the law firm of Cohn & Spector, attorneys for Plaintiff Seven Springs, LLC ("Seven Springs"), and am fully familiar with all of the facts and circumstances heretofore had herein. I make this Affirmation in support of Plaintiff's cross motion for leave to serve and file a Second Amended Complaint. For the purposes of brevity and judicial economy this Affirmation addresses and replies to the points raised in all Defendants' opposition papers.

THE DEFENDANTS HAVE FAILED TO DEMONSTRATE A BASIS FOR REARGUMENT

2. TNC's motion for reargument misapplies the applicable law relative to a CPLR §3211 motion. At the outset, in this Court's Decision and Order dated June 21, 2010 this Court in part stated

> ". . . The allegations of Plaintiff's Amended Complaint have been addressed in Defendants' reply papers and considered by the Court."

3. TNC (at ¶4, p. 2 of the Benowich Affirmation of August 26, 2010) ("the Benowich Affirmation") cites (in support of the arguments therein set forth) Meyer v. Guinta, 262 A.D.2d 463 (2nd Dept. 1999), TNC's counsel stating ". . . this Court actually cited the Meyer case for the correct standard

57

applicable on the underlying motion to dismiss but mistakenly applied a lesser standard . . .". TNC's counsel misreads Meyer and misapplies it in his argument. Specifically, in Meyer the Court converted a CPLR §3211(a)(7) motion to one for summary judgment under CPLR §3212 by reason of examining documentary evidence that plainly, flatly contradicted the allegations in the Complaint. Meyer is not the only case misapplied by TNC.[1] The Affidavit of Donald Trump does not "flatly contradict" the allegations of the Amended Complaint or demonstrate that Seven Springs does not have the claims it alleged in the Amended Complaint. Rather, the Court was correct in stating that it had considered the Defendants' arguments and taken them into consideration along with Plaintiff's submission of its then proposed Amended Complaint and Mr. Trump's Affidavit. If TNC does not like the wording of this Court's conclusion as stated in its June 21, 2010 Decision and Order, it has the right of appeal. TNC's reargument motion is based on semantics and no more. The assumptions and principles of law were correctly applied.

4. Contrary to the contention set forth in the Benowich Affirmation at ¶5, p. 2, the cases there mentioned and originally cited by Plaintiff do support the Plaintiff's argument. They stand, *inter alia*, for the principle that one does not examine the merits of the claim but simply whether one has properly stated a claim. Thus, in Millard v. Michael Eigen Jewelers, 5 Misc.3d 1022(A), 799 N.Y.S. 2d 161 (Sup. N.Y. Co. 2004) the Court stated:

> "In a CPLR §3211 motion to dismiss, the factual allegations of the complaint are deemed true and the affidavits submitted on a motion are considered only for the limited purpose of determining whether the Plaintiff has stated a claim, not whether Plaintiff has one . . ."

---

[1]The Benowich Affirmation, has cited no less than 43 cases (not including the Coleman citation) and has misapplied most if not all of the same. For the purposes of brevity, this writer declines to analyze all 43 cases in this writing. Examples will be shown, *infra*.

5. The additional cases cited on behalf of the Plaintiff and referred to in ¶5 of the Benowich Affirmation stand for the same principle.

6. The Defendants' motion papers do not demonstrate any "errors of law" committed by this Court; instead, the Defendants' motion papers repeat the identical legal arguments stated before, apparently simply hoping to obtain a different result by rehashing the same material. That is not the purpose of a reargument motion and reargument should be denied.

THERE IS NO BASIS FOR TNC'S MOTION TO RENEW

7. CPLR §2221(e) mandates that a motion for leave to renew (1) shall be identified specifically as such and goes on to state (CPLR §2221(e)(2)) that the motion:

> "2. shall be based upon new facts not offered on the prior motion that would change the prior determination . . ."

8. At ¶11 of the Benowich Affirmation TNC's counsel in part states:

> ". . . TNC's motion seeks leave to renew in one way, by asking this Court to consider a portion of the transcript of proceedings . . . which had been annexed to the motion to dismiss previously served and filed by other Defendants in this case and which had been considered by the Court in its consideration of all three (3) motions to dismiss." **(Emphasis Supplied)**

9. Since TNC is offering no new evidence which was unavailable and which TNC admits was already considered by the Court, there is no basis for a renewal motion

DEFENDANT TNC's PLEAS FOR DISMISSAL ARE PREMATURE AND INVALID

10. At ¶¶17 and 18 of the Benowich Affirmation TNC's counsel maintains that the *prima facie* tort claim "must be dismissed" and "must now be dismissed". Plaintiff's cross motion seeks leave to serve and file a Second Amended Complaint. Defendants do not address why such leave should not be

granted but rather address the merits of their presumed affirmative defenses (we have yet to have an answer to any Complaint under this index number, let alone discovery). If the Defendants wish to assert affirmative defenses in the future, they are free to do so when they answer. The issue before this Court is whether leave to amend should be granted and it is horn book law that such leave is freely granted. Plaintiff's principal moving papers on its cross motion cite cases in which the Second Department has freely allowed a Second Amended Complaint to be served and filed. Defendants' privilege argument is not sustainable.

11. In ¶¶ 17 through 19 of the Benowich Affirmation it is argued that one cannot plead a claim in *prima facie* tort contemporaneously with pleading claims for slander of title and injurious falsehood. Such is not the case; pleading in the alternative is specifically permissible and recognized as such at the pleading stage by the Second Department, Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc., 5 A.D.3d 352, 774 N.Y.S. 2d 56 (2nd Dept. 2004) wherein that Court affirmed a denial of a 3211(a)(7) motion to dismiss causes of action alleging injurious falsehood and *prima facie* tort with the following language:

> ". . . in addition, the Plaintiff alleged facts from which it can be inferred, at the pleading stage of this action, that the Defendants acted with the "disinterested malevolence" necessary to give rise to a cause of action alleging *prima facie* tort . . ."

12. Clearly, at the pleading stage such varying causes of action as are set forth in the proposed Second Amended Complaint are permitted. TNC's argument is simply without basis or merit.

13. There is no statute of limitations bar, and any consideration of that argument would be premature.

14. At the outset, a statute of limitations defense is an affirmative defense. In their continued attempt to avoid discovery in this action, the Defendants are attempting to put the cart before the horse. An example of the Defendants' attempting to prematurely raise the statute of limitations as a bar can

be found in the Benowich Affirmation at ¶14, p. 5; there TNC's counsel attempts to restrict the meaning and scope of the claims asserted by Plaintiff to actions taken by defense counsel in the course of litigating the declaratory judgment action. Not so. The denial of access and use of Plaintiff's property occurred outside of the declaratory judgment action and constitute continuing wrongs through and including the date of dictation of this Affirmation. In addition, the conduct of the Defendants within the declaratory judgment litigation as well as the denials of access and use outside of that action are clearly expressed in the proposed Second Amended Complaint and substantiate the three causes of action set forth therein. Seven Springs's agents, servants and employees cannot drive down Oregon Road to the south solely by reason of the Defendants' actions and no more. That situation exists today.

15. Paragraph 14, p. 26, FN1 of the Benowich Affirmation mixes and confuses Defendants' motions to reargue with opposition to the proposed Second Amended Complaint which is the subject of Plaintiff's cross motion for leave to amend. TNC's counsel seizes upon an April 2006 letter sent to the Town of North Castle, attached as Exhibit 10 to TNC's reply/opposition papers. TNC's counsel is apparently offering Exhibit 10 in support of TNC's motion to reargue and then uses that exhibit as a purported demonstration that the "limited detail added in the proposed Second Amended Complaint" is both restricted to this 2006 document (which it is not) and that the actions reflected by such 2006 document are "time barred". The 2006 document is not just one piece of isolated evidence, it is part of an alleged premeditated, long-term and deliberate scheme which is continuing through the present. It is one of the wrongful acts which precipitated the Plaintiff's 2006 Complaint (the declaratory judgment action) seeking an injunction against such interference, and which placed the Defendants on notice of such kinds of activities (in 2006). The Complaint in the declaratory judgment action in part states:

> "No personal claim is made against any Defendant named herein unless such defendant shall assert a claim adverse to the

claim as set forth herein." (original Complaint, ¶33; Amended Complaint, ¶34).

16. The Defendants were on notice that they would be liable for damages and injury arising from their conduct, and their wrongful scheme continues.

17. Defendants' claim of privilege is misplaced; the fact that some of the actions and statements alleged in the proposed Second Amended Complaint involve litigation conduct, does not shield the Defendants from the torts alleged in the proposed Second Amended Complaint. While Plaintiff maintains that this subject matter is premature in relation to the motions presently before this Court, in the interest of protecting Plaintiff's record it must be stated that the cases relied upon in the Benowich Affirmation and set forth at ¶20 therein do not stand for what TNC's counsel maintains nor do they demonstrate a bar to any of Plaintiff's claims as set forth in the proposed Second Amended Complaint. Thus, Lerwick v. Kelsey, 24 A.D.3d 931 (3rd Dept. 2005) dealt with the qualified privilege of a corporate board member relative to communications made about another individual's employment; Arts4All, Ltd. v. Hancock, 5 A.D.3d 106 (1st Dept. 2004) concerns statements made by a witness while testifying at a judicial proceeding as being absolutely privileged and is not applicable to the instant matter, in addition to which the Arts4All court sustained a complaint for libel, denying a 3211(a)(7) motion to strike the complaint; Martinson v. Blau, 292 A.D.2d 234 (1st Dept. 2002) specifically stated that "there is an exception to this privilege where the testimony is part of a larger scheme to defraud" citing Newin Corporation v. Hartford Accident & Indemnity Co., 37 N.Y.2d 211, 333 N.E.2d 163, 371 N.Y.S.2d 884. In Newin, the Court of Appeals holding favors the Plaintiff's position on this motion, holding both (1) that no absolute privilege will shield a litigant from false or perjurious statements made in litigation which are part of a fraud committed as part of a larger scheme and (2) that such allegations, at the pleading stage, are "legally sufficient on their faces."

DEFENDANTS ERRONEOUSLY INTERPRET THE SECOND AMENDED COMPLAINT AS BEING RESTRICTED TO DEFENDANTS' CONDUCT IN THE DECLARATORY JUDGMENT ACTION

18. A reading of the Benowich Affirmation reflects that TNC's counsel focuses (and asks this Court to focus) solely upon the portions of the proposed Second Amended Complaint that address statements made during the course of litigation and which are taken from stenographic transcripts of oral arguments made in Court. The proposed Second Amended Complaint is not so limited. Thus:

a. Paragraph 48 of the proposed Second Amended Complaint alleges that TNC "falsely represented in written correspondence to the Towns of North Castle and New Castle that Plaintiff did not own half of the roadbed of Oregon Road running along the western border and situate in the Town of North Castle." As aforementioned, TNC's counsel focuses only on one piece of correspondence (attached as Exhibit 10 to the Benowich affirmation), argues that the document TNC attaches to its own papers is "time barred" and cannot be complained of, and expresses "opinion" which is claimed to be privileged. TNC's counsel attempts to restrict the allegations in ¶48 of the proposed Second Amended Complaint to a single document and then argues as to why the document must "fail" to support a cause of action. The fallacy of that argument is that, for the Complaint to stand, it must be specific as to the type of acts but it need not specify every possible evidentiary example of such acts. TNC will certainly be entitled to demand a Bill of Particulars setting forth an appropriate amplification of the pleading, but TNC is not entitled to restrict the pleading to one item of evidence. The object of a pleading is to place a party on notice of the nature of the transgressions complained of, and one need not enumerate every single instance of such wrong.

b. Paragraph 49 of the proposed Second Amended Complaint alleges that the Donohoe Defendants, as part of the pattern and consistent course of conduct falsely represented to co-

Defendant TNC and published to the Supervisor of the Town of North Castle that Oregon Roadway "belongs to The Nature Conservancy". Clearly this goes beyond any in-court statements or the April 2006 letter.[2]

c. The proposed Second Amended Complaint, at ¶35, alleges that the Defendants "embarked upon a plan which was maliciously designed to prevent Plaintiff from opening and using such part of the road by asserting that Plaintiff had no right, title or interest therein" and ¶36 of the proposed Second Amended Complaint alleges that the Defendants "in furtherance of such plan communicated both verbally and in writing to the Town of North Castle and to neighboring residents and homeowners in the pertinent geographic area that Plaintiff had no right, title or interest in the closed section of Oregon Road . . .". Clearly, the allegations of the proposed Second Amended Complaint go well beyond a single paper writing and well beyond in-court statements or conduct claimed to be "privileged" by the Defendants. With reference to and response to the Burke Defendants' opposition to Plaintiff's request for leave to serve a Second Amended Complaint, James B. Cooney, Esq., an attorney for the Burkes, in his Affirmation dated August 27, 22010 ("the Cooney Affirmation") at ¶5 states:

> ". . . The only new allegation in the proposed Second Amended Complaint that specifically implicate the Burke Defendants is a statement attributed to the Burkes set forth at paragraph 55 of the proposed Second Amended Complaint".

That simply is not accurate. Paragraphs 35 and 36 of the proposed Second Amended Complaint clearly relate to all Defendants' acts. The Burkes, if so obliged, can ask for an amplification of the pleadings, as the same apply to them, once this action passes beyond the initial pleading stage.

19. Clearly, a reading of the proposed Second Amended Complaint sets forth with the required specificity the nature of the actions alleged by the Defendants and the damages sustained so as to be proper on its face.

---

[2]The Donohoe Defendants apparently have not submitted any reply on the reargument motion.

20. The 2006 document, addressed to officials of the Town of North Castle (Exhibit 10 to the Benowich Affirmation) was an unsolicited letter and the allegations of the proposed Second Amended Complaint (¶46, p. 9) set forth that the Defendants "engaged in a pattern and/or consistent course of conduct designed to impede and/or prevent the Plaintiff from exercising its rights of ownership and easements . . .". Paragraph 48 refers to false representations in written correspondence, specifically to the Towns of North Castle and New Castle. The Benowich Affirmation (p. 12, ¶33) alleges that the 2006 letter was "the only statement made by TNC or its counsel which was not made in the context of (the declaratory judgment action)" and is thus "time barred". Apart from going to the merits of the claim (and thus premature on the instant motion and cross motion), Benowich (in his Affirmation at ¶2) states: "I have personal knowledge of the facts and circumstances set forth herein and submit this Reply Affirmation . . .". If Benowich is offering himself as a witness to every and any act that TNC has done, he is (at this early stage of this action) placing his own veracity at issue and, accordingly, should not continue as counsel for TNC.[3] The third paragraph on the first page of the 2006 letter in part reads as follows:

> "We also write to express TNC's disagreement with Seven Springs's claim and to request that, before the Town of North Castle considers <u>any</u> application by Seven Springs which is based on its claim of such a private easement, Seven Springs <u>should be required</u> to obtain a judicial determination that it does or does not enjoy any such private easement." **(Emphasis supplied)**.

The letter, by reason of the above and other portions thereof, constitutes a continuing tort by asking the Town of North Castle to withhold consideration of <u>any</u> application by Seven Springs, as

---

[3]The April 2006 letter written by Benowich's then partner, Christopher D. Roosevelt, Esq., <u>was not provided by TNC in discovery in the declaratory judgment action</u>, although all such material was duly demanded. Rather, the April 2006 letter <u>was concealed by TNC</u> and was only obtained during the winter of 2009 when the Town of North Castle, then a Defendant in the declaratory judgment action (and before it was let out of the case) produced it to the Plaintiff.

of April 28, 2006 or any future date. The efforts to block and prevent Plaintiff's use and enjoyment of its property constitutes a continuing tort demonstrating the precise elements of injurious falsehood and slander of title, in addition to *prima facie* tort. As this Court is aware, these claims are not identical to defamation and the defamation pleading requirements.[4] A cause of action for injurious falsehood is distinguished from a cause of action founded on false defamatory statements. As such, it has been held that injurious falsehood injures the Plaintiff only by misleading others into action that is detrimental to him and is governed by more lenient rules of liability, Lucci v. Engel, 73 N.Y.S.2d 78 (Sup. Ct., NY Cty., 1947). As set forth in the undersigned's Affirmation in support of the cross motion, Schauder v. Weiss, 88 N.Y.S.2d 317 (Sup. Ct., Kings Cty. 1949) also held that "the stringent rules of libel and slander do not apply [to injurious falsehood] and consequently the defense of privilege may not be interposed." The April 28, 2006 letter is not merely "deemed the opinion of an attorney and not a false statement" (the Benowich Affirmation, ¶31, p. 12) or of TNC's counsel (Benowich) "expressing its legal opinion" (the Benowich Affirmation, ¶34, p. 12); the April 28, 2006 letter was clearly a demand that no application by Seven Springs be considered by the Town of North Castle at that time or in the future until the Plaintiff obtained a judicial determination. This request was made by TNC's counsel at the time that TNC had actual knowledge as a prevailing Defendant in Coleman v. Village of Head of the Harbor, 163 A.D.2d 456 (2nd Dept. 1990) that Seven Springs enjoyed the same rights to an express easement out of its property in a southerly direction over Oregon Road that TNC had already obtained by identical language in its deed in the Coleman case. In the same way that TNC withheld the April 28, 2006 letter in discovery in the declaratory judgment action, it withheld any reference to Coleman in either (1) the April 28, 2006 letter to the Town of North Castle; (2) before the Court in the declaratory judgment action or (3) in the instant action in prior motion practice attacking the original

[4]Further to the "failure" of TNC to produce the April 28, 2006 letter in discovery in the declaration action while the Town of North Castle rightfully did produce the document, TNC had the document all along and produces it as Exhibit 10 to the Benowich Affirmation. Query: How could Benowich produce this letter now and withhold it during the discovery in the declaratory judgment action?

Complaint. Clearly, the import of the April 28, 2006 letter, as part of the "pattern and/or consistent course of conduct designed to impede and/or prevent the Plaintiff from exercising its rights ownership and easements" (proposed Second Amended Complaint, ¶46) is both properly pleaded and, if attacked, will withstand any scrutiny in that regard. The effort by Benowich ("on personal knowledge") to demonstrate that the Second Amended Complaint is flatly contradicted by the documentary evidence is absurd where such letter clearly demonstrates such injury complained of at ¶¶46 and 48 of its proposed Second Amended Complaint. Also, the April 28, 2006 letter is "susceptible to a malicious interpretation as motivated solely by a desire to injure Plaintiff, *i.e.* "Common-Law Malice", Melious v. Besignano, 22 Misc.3d 1123(A) (Sup. Ct., Richmond Cty. 2009).

21. It should also be noted that the Donohoe Defendants served opposition to Plaintiff's cross motion on September 1, 2010 at 4:18 p.m. via email. Such opposition is thus untimely and should be rejected by the Court. Accordingly, as to the Donohoes, Plaintiff's cross motion should be deemed unopposed.

WHEREFORE, it is respectfully requested that the Defendants' motions for reargument and (where stated) for renewal be in all respects denied and Plaintiff's cross motion for leave to serve and file the Second Amended Complaint in the form annexed be in all respects granted, together with such other and further relief as to this Court may seem just, proper and equitable.

Dated: White Plains, New York
September 1, 2010

JULIUS W. COHN, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC, **Index No.: 21162/09**

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

REPLY AFFIRMATION IN SUPPORT OF CROSS MOTION FOR LEAVE TO SERVE SECOND AMENDED COMPLAINT

COHN & SPECTOR
Attorneys for Plaintiff
200 EAST POST ROAD
WHITE PLAINS, N. Y 10601-4959
Tel.: (914) 428-0505 Fax: (914) 428-0519

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Personally served upon Bernard 9/2/10 9:45 AM
MR. Bernard Refused to Sign or Receipt
Dated: _____ Signature _____
Print Signer's Name _____ Attorney, 9/2/10

Service of a copy of the within Repl'y Affirm *is hereby admitted.* w/out prejudice *Dated:* 9/2/10

_____
Attorney(s) for Burkes

Service admitted w/out prejudice

PLEASE TAKE NOTICE

NOTICE OF ENTRY *that the within is a true copy of an entered in the office of the clerk of the within named Court on , 2010.*

NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on ,at M.*

Dated: White Plains, New York
September 1, 2010

COHN & SPECTOR
200 EAST POST ROAD
WHITE PLAINS, N. Y 10601-4959

Attorney(s) for Stated Plaintiff

September 16, 2010

Benowich Law, LLP
1025 Westchester Avenue
White Plains, NY 10604
T (914) 946-2400
F (914) 946-9474
benowichlaw.com

Benowich

Hon. Francis A. Nicolai
Justice of the Supreme Court
Supreme Court, Putnam County
20 County Center
Carmel, NY 10512

Re: Seven Springs v. The Nature Conservancy, et al.
Index No.: 21162/09

Dear Justice Nicolai:

This firm is counsel to Defendant The Nature Conservancy.

We write to bring to Your Honor's attention a recent decision by Justice Lowe in the Supreme Court, New York County, which deals with several of the issues presented on Defendants' various motions to renew and reargue Your Honor's previous Order denying Defendants' motions to dismiss the complaint in this case.

The decision is *Weiss v. Lowenberg, et al.*, New York County Index No. 117716/09. Although the opinion is dated August 24, 2010, the decision was reported in today's New York Law Journal.

Respectfully submitted,

Leonard Benowich

LB/gpb
Enc.

cc: Lois Rosen, Esq. (w/encls)
Janine Mastellone, Esq. (w/encls)
Julius Cohn, Esq. (w/encls)

C:\Main Files\TNC\Seven Springs II\Correspondence\Court\Nicolai - 9-16-10.wpd

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

----------x

MICHAEL C. WEISS, as Executor of the Estate of ABRAHAM WEISS, MICHAEL C. WEISS, Individually, and JOSEPH TRENK

Plaintiffs

-against-

TERRENCE LOWENBERG, TODD COHEN, DENNIS KONNER, ESQ., and FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK

Defendants

Index No: 117716/09

DECISION AND ORDER

----------x

RICHARD B. LOWE, III, J:

Plaintiffs Michael C. Weiss ("Weiss"), as executor of the Estate of Abraham Weiss ("Estate"), Weiss, individually, and Joseph Trenk ("Trenk") (collectively, the Plaintiffs) bring the instant action against Defendants Terrence Lowenberg ("Lowenberg"), Todd Cohen ("Cohen"), Dennis Konner, Esq. ("Konner") (collectively, the Defendants) for slander *per se* of Weiss, slander of title, injurious falsehood, and slander *per se* of Trenk. The Plaintiffs bring the instant action against Defendant First American Title Insurance Company of New York ("First American") for tortious interference with contract.

In Motion Sequence 002, Defendants move to (i) dismiss the First, Third, Fourth, and Fifth Causes of Action of the Complaint as against Defendant Konner in their entireties with prejudice pursuant to CPLR § 3211(a)(1), in that there are defenses founded upon documentary

evidence; pursuant to CPLR § 3211(a)(7), in that the First, Third, Fourth, and Fifth Causes of Action fail to state a cause of action; and pursuant to CPLR § 3016(a), in that the Third and Fourth Causes of Action do not set forth the particular words complained of; (ii) in the alternative, should any Cause of Action against Konner survive the motion to dismiss, striking Plaintiffs' demands for punitive damages; (iii) granting such other and further relief as the Court may deem just and proper; and (iv) dismiss the Second Cause of Action of the Complaint as against Defendant First American with prejudice.

BACKGROUND

The Estate owned real property known as 234 Mulberry Street, New York, New York (Block 494, Lot 6), and 236 Mulberry Street, New York, New York (Block 949, Lot 7), residential apartment buildings (collectively, the "Property"). Plaintiff Weiss is the Executor of the Estate, and Plaintiff Trenk is the attorney for the Estate.

234-236 Mulberry Realty LLC ("Mulberry") is a limited liability company organized under the laws of the State of New York. Defendants Lowenberg and Cohen are the principals of Mulberry, and Defendant Konner acted as Mulberry's attorney and was a Vice-President of Mulberry. Mulberry and the Estate entered into a Contract of Sale dated May 8, 2008 (the "Contract") for the sale of the Property. Pursuant to the Contract, the Estate agreed to sell the Property to Mulberry for the sum of $8,000,000. Mulberry retained Defendant First American, an insurance carrier, to provide title insurance for the Contract. A prior November 17, 2008 closing did not occur because Mulberry did not have sufficient funds to pay the purchase price after a potential investor declined to invest. After several adjournments of the closing date and the Estate's sending of a letter relaying that time was of the essence, the closing was scheduled for December 19, 2008 (the "Closing Date").

Prior to the Closing Date, First American waived objections to title based on unpaid estate taxes. However, the Plaintiffs argue that Konner, Lowenberg, and Cohen conspired to avoid the closing by raising a bogus objection that related to these unpaid estate taxes and questioning the honesty of Trenk and Weiss, who had signed a Probate Petition, which listed the value of the Property at $3,000,000. At the Closing, Defendants raised these issues to imply that the Estate was allegedly unready, unable, and unwilling to close title to the Property on the Closing Date. Moreover, First American changed its position. Although First American had previously omitted the objection to title relating to the unpaid estate taxes, it now stated that it would not be omitted but instead excepted. The Estate then went on to offer that it would escrow the entire sales proceeds, and also included an offer to close through another title company, Stewart Title Guaranty Company, which would omit the objection related to unpaid estate taxes. Notwithstanding, Defendants refused to close and left the Closing.

On or about December 19, 2009, Plaintiffs filed this action against Konner, Lowenberg, Cohen, and First American. In the instant action, Plaintiffs allege they have causes of action against Defendants Konner, Lowenberg, and Cohen for slander *per se* of Weiss, slander of title, injurious falsehood, and slander *per se* of Trenk. The Complaint also includes a cause of action against First American for tortious interference with contract. Defendants Konner and First American move to dismiss pursuant to CPLR §§ 3211(a)(1), (a)(7), 3016(a), or in the alternative, striking Plaintiffs' demands for punitive damages.

DISCUSSION

I. *Motion to Dismiss Pursuant to CPLR § 3211(a)(7)*

Pursuant to CPLR § 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause

of action." The Court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion . . ." (*Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001].) However, this rule will not apply where a plaintiff supports a defamation claim with only mere conclusory state-of-mind allegations. (*See Green v Combined Life Ins. Co. of New York*, 2010 N.Y. Slip. Op. 572 [1st Dep't 2010].)

a. Cause of Action for Defamation Against Konner

The elements of a defamation claim are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." (*Epifani v Johnson*, 65 A.D.3d 224, 233 [2d Dep't 2009].) Claims of defamatory statements must be pled with particularity in which the precise defamatory words are set forth. (*CPLR 3016(a).*) Plaintiffs aver that as to the claims for slander *per se* of Weiss, Konner made the following defamatory statements: "that Weiss had 'committed perjury' when he signed the [probate] Petition under oath, that Weiss had signed a 'fraudulent' petition, that Weiss was 'dishonest,' that Weiss was 'untrustworthy,' and that Weiss had not paid the appropriate estate tax, which was not then due." (*Compl.* ¶ 22.) Plaintiffs argue that these statements accused Weiss of criminal acts, were made with malice, that they were known by Konner and others to be false, and that they were published to all persons present at the Closing. As to the claims for slander *per se* of Trenk, the Plaintiffs allege that Konner made the following defamatory statements: "that Trenk had acted fraudulently and unethically in connection with the filing of the Probate Petition that perjuriously undervalued the Property, that Trenk was 'dishonest,' and that Trenk was 'untrustworthy.'" (*Compl.* ¶ 52.) As for the slander of title and injurious falsehood claims, Plaintiffs allege that Konner made "statements at the December 19, 2008 closing, falsely casting

doubt" either "on the validity of the title of the Property" or "on the value of the Property." (*Compl.* ¶¶ 38, 45.)

i. Absolute Privilege

Defendant Konner argues that under the law of defamation, the alleged statements made by him are privileged. Konner contends that lack of privilege is an affirmative element of a defamation claim because "[p]ublic policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action." (*Toker v Pollak*, 44 N.Y.2d 211, 218 [1978].) New York courts have held that "administration of justice requires that the rights of clients should not be imperiled by subjecting their legal advisers to the constant fear of suits for libel or slander. (*Youmans v Smith*, 153 N.Y. 214, 219-20 [1897]). Further, courts have held that this absolute privilege "can extend to preliminary . . . stages of the [judicial] process, particularly where compelling public interests are at stake." (*Rosenberg v MetLife, Inc.*, 8 N.Y.3d 359, 365 [2007].) Thus, Konner argues that since he acted as Mulberry's attorney and was defending his client from the demand for money at the Closing, the alleged statements he made are absolutely privileged because they were made prior to litigation.

However, under New York law, defamatory statements that are made prior to the commencement of a judicial proceeding are not shielded by an absolute privilege. (*See Epstein v Ruditz*, 153 A.D.2d 836, 837 [2d Dep't 1989]; *Uni-Service Risk Management, Inc. v N.Y.S. Ass'n of School Business Officials*, 62 A.D.2d 1093, 1094 [3d Dep't 1978].) If the court were to accept Konner's position, then the absolute privilege would attach to statements of parties made in the process of contractual or business relationships that were incidental, yet where litigation was

commenced afterwards. Thus, Konner's alleged statements are not subject to an absolute privilege defense.

ii. Qualified Privilege

Defendant Konner alternatively maintains that his alleged statements were protected by a qualified privilege. A communication is qualifiedly privileged if "it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned." (*Toker v Pollak*, 44 N.Y.2d 211, 219 [1978].) The qualified privilege defense can be raised "when a defendant's acts were for a proper purpose and exercised in a reasonable manner." (*Harris v Hirsh*, 161 A.D.2d 452, 453 [1st Dep't 1990].) This defense protects communications that a lawyer makes "in furtherance of her representation of her client." (*Simons v Katz*, 257 A.D.2d 402, 403 [1st Dep't 1999].) Here, it is undisputed that Konner "acted as Mulberry's attorney." (*Compl.* ¶ 6.) Plaintiffs assert that the allegedly defamatory statements occurred at the Closing and were made to avoid closing title. Thus, Defendant Konner argues that his statements were made "in furtherance of [his] representation of [his] client,"and are qualifiedly privileged.

Plaintiffs argue that Konner was not only Mulberry's attorney but also its Vice-President. Although the qualified privilege will protect statements made "in furtherance of [his] representation of [his] client," it will not protect intentionally defamatory statements that exceed the privilege's scope or where there is an improper purpose. (*See Schulman v Anderson Russell Kill & Olick, P.C.*, 117 Misc. 2d 162, 169 [Sup. Ct. N.Y. County 1982].) Here, Plaintiffs contend that Konner made slanderous *per se* statements about the Plaintiffs in an attempt to avoid the Closing, and that Konner made these statements in furtherance of a conspiracy to abort the Closing, rather than in furtherance of his representation of his client. However, mere

conclusory allegations that these alleged statements were made in an attempt to avoid closing are insufficient to overcome a motion to dismiss.

The qualified privilege serves to protect statements that one person makes to another regarding a subject in which they both have an interest. (*See Liberman v Gelstein*, 80 N.Y.2d 429, 437 [1992]; *Herlihy v Metropolitan Museum of Art*, 214 A.D.2d 250, 258-59 [1st Dep't 1995].) Konner asserts that the qualified privilege attaches to the alleged statements because they furthered a common interest. In addition, the common interest privilege has been held to protect a lawyer's communication on behalf of his client. (*See Blackman v Stagno*, 35 A.D.3d 776, 778 [2d Dep't 2006] (holding that a lawyer's letter written "in the discharge of [his] duties as [his client's counsel] was privileged.). Defendant asserts that each of the people at the Closing (Estate's executor and its attorneys, a title closer, the title insurer's vice president, and a manager of the property), where these defamatory statements were made, were there for a business purpose and each had an interest in whether title was insurable and whether the property could be sold.

However, it is well established in New York that qualified privilege is an affirmative defense, which must be pled and proven by the defendants. (*See Ostrowe v Lee*, 256 N.Y. 36, 41 [1931]; *Garcia v Puccio*, 17 A.D.3d 199, 201 [1st Dep't 2005]; *Acosta v Vataj*, 170 A.D.2d 348, 348 [1st Dep't 1991].) This affirmative defense must be raised in the Defendant's answer and thus the issue cannot be decided on a motion to dismiss. "Rather, defendants must plead the privilege as an affirmative defense and thereafter move for summary judgment on that defense, supporting the motion with competent evidence establishing a prima facie showing of qualified privilege. In the event that defendants make such a showing, the burden would then shift to plaintiff to demonstrate that [Defendant's] statements were uttered with malice, either under the

common law or constitutional standard." (*Wilcox v Newark Valley Central School District*, 2010 N.Y. Slip Op. 4916, *3-4 [3d Dep't 2010].)

Regardless of Defendant's pre-answer motion to dismiss being premature, a claim for defamation must be dismissed if the allegations of malice are only "conclusory," as is the case here. (*See Green v Combined Life Ins. Co. of New York*, 2010 N.Y. Slip. Op. 572 [1st Dep't 2010]). A plaintiff may defeat the qualified privilege by demonstrating that the defendant's statements were "uttered with malice, which includes either common-law malice (motivated by spite or ill will) or constitutional malice (statements made with a high degree of awareness of their falsity)." (*Hoesten v Best*, 34 A.D.3d 143, 157-58 [1st Dep't 2006].)

New York courts have held that a plaintiff "ha[s] *no obligation* to show evidentiary facts to support her allegations of malice on a motion to dismiss." (*Kotowski v Hadley*, 38 A.D.3d 499, 500 [2d Dep't 2007] citing, *inter alia*, *Scott v Cooper*, 215 A.D.2d 368 [2d Dep't 1995]; and *Terry v County of Orleans*, 72 A.D.2d 925, 927 [4th Dep't 1979] (emphasis added); *See also Pezhman v City of New York*, 29 A.D.3d 164, 169 [1st Dep't 2006] ("on a motion to dismiss, a plaintiff is not obligated to show evidentiary facts to support her allegations of malice"). However, a claim for defamation must be dismissed if the allegations of malice are only "conclusory." (*See Green v Combined Life Ins. Co. of New York*, 2010 N.Y. Slip. Op. 572 [1st Dep't 2010].) It is well-established in New York that a complaint must be dismissed if it "fails to plead evidentiary facts of malice sufficient to overcome the common interest qualified privilege protecting any defamatory statements." (*Lowinger v Jacques*, 204 A.D.2d 175, 176 [1st Dep't 1994] [emphasis added]; *see Ferguson v Sherman Square Realty Corp.*, 30 A.D.3d 288, 288 [1st Dep't 2006].) Thus, there is a critical distinction between what is required for a claim of defamation under a motion to dismiss as opposed to the complaint. For a motion to

dismiss for failure to state a cause of action under CPLR § 3211(a)(7), "the criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits." (*Scott v Cooper*, 215 A.D.2d 368, 369 [2d Dep't 1995]). However, the complaint "must [have] sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication." (*Liberman v Gelstein*, 80 N.Y.2d 429, 438 [1992].) Thus, the motion to dismiss must establish that the Plaintiffs have a cause of action for defamation; however, the complaint must plead the evidentiary facts of malice itself. Even if Plaintiffs are not obligated to show evidentiary facts to prove malice on a motion to dismiss, they are obligated to plead such facts in their complaint, which Plaintiffs have failed to do here.

Common-law malice can defeat the qualified privilege only if spite or ill will is "the one and only cause for the publication. Constitutional or 'actual' malice means publication 'with [a] high degree of awareness of [the publication's] probable falsity' or while 'the defendant in fact entertained serious doubts as to the truth of [the] publication.'" (*Konikoff v Prudential Ins. Co.*, 234 F.3d 92, 98-99 [2d Cir. 2000].) In properly pleading constitutional malice, plaintiff must allege that statements were made "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." (*New York Times Co. v Sullivan*, 376 U.S. 254, 279-80 [1964]).

The Complaint only alleges that the supposedly defamatory statements made against Weiss and Trenk were "maliciously conceived" and "known . . . to be false." (*Compl.* ¶¶ 24, 25, 55, 56.) The Complaint also alleges that the supposed slander of title and injurious falsehood claims were "accompanied by actual malice." (*Id.* ¶¶ 40, 47). These allegations are mere recitations of legal standards and are not particularized allegations of evidentiary facts. As to "common-law malice," the Complaint does not allege why his alleged statements were

motivated by any spite or ill will towards the Plaintiffs. As to "constitutional malice," the Complaint does not explain how the alleged statements were made with knowledge of falsity. The statement Konner made that "Weiss had not paid the appropriate estate tax" would have been true as of the closing. Thus, for these reasons the First, Third, Fourth and Fifth causes of action against Konner must be dismissed for failure to state a cause of action.

b. Causes of Action for Slander of Title and Injurious Falsehood Against Konner

For the reasons stated above, the Third and Fourth causes of action for slander of title and injurious falsehood are dismissed because the Plaintiff has failed to plead malice. However, these causes of action should be dismissed on additional grounds, *supra*, as well.

i. Slander of Title

The pleading requirements for a slander of title claim are: "(1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages." (*39 College Point Corp. v Transpac Capital Corp.*, 27 A.D.3d 454, 455 [2d Dep't 2007].) Defendant Konner does not argue that the Plaintiffs have not satisfied the second and third elements of the slander of title requirements; however, he claims that Plaintiffs have not pled any false statement "about" the property. Konner argues that the only statement he could have been alleged to say *about the property* is "that Weiss had not paid the estate tax" on it. Konner contends that the other statements allegedly made by himself were regarding Weiss and Trenk, and not about the property itself. In the converse, Plaintiffs argue that Konner's alleged statements falsely suggest that the estate tax had not been paid, thereby implying that the Property is subject to a lien, and that because Plaintiffs filed a fraudulent petition and committed perjury, the estate tax would not have been paid. However, the Complaint only refers to "defamatory statements . . . falsely casting doubt on the validity of the

title of the Property," but fails to say what these defamatory statements were. (*Compl.* ¶ 38.) Additionally, the Complaint attempts to create an injurious falsehood claim based on "defamatory statements at the December 19, 2008 closing, falsely casting doubt on the value of the property"; however, Plaintiffs again fail to say what these statements were. (*Compl.* ¶ 45.) This court finds that the Complaint does not set forth any false statements about the property, and thus Plaintiffs have not properly pled these causes of action.

CPLR § 3016(a) states that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." New York courts have strictly held that the allegedly defamatory words need to be set forth clearly and exactly. (*Rosenberg v HBO, Inc.*, 33 A.D.3d 550, 550 [1st Dep't 2006].) The complaint fails to state a cause of action if it merely paraphrases the words at issue. (*See BCRE 230 Riverside LLC v Fuchs*, 59 A.D.3d 282, 283 [1st Dep't 2009].) Konner argues that Plaintiffs have not set forth any "particular words complained of." In the converse, Plaintiffs aver that the complaint must be read in its totality. (*See Cohn v Lionel Corp.*, 21 N.Y.2d 559, 562 [1968].)

Plaintiffs further assert that they did in fact set forth the particular words complained of, i.e., that Konner alleged Weiss had "committed perjury" when he signed the petition under oath, that Weiss had signed a "fraudulent petition," that Weiss was "dishonest" and "untrustworthy," and that Weiss had not paid the appropriate estate tax. However, "'merely paraphrasing [the allegedly defamatory] statements' and failing to include the ***entire statement*** or publication requires dismissal of that cause of action." (*Massa Constr., Inc. v George M. Bunk, P.E., P.C.*, 2009 N.Y. Slip. Op. 9814 [4th Dep't 2009]; *See Dillon v City of New York*, 261 A.D.2d 34, 38 [1st Dep't 1999]; *Scalise v Herkimer, Fulton, Hamilton & Otsego County BOCES*, 16 A.D.3d

1059, 1060 [4th Dep't 2005] ("'merely paraphrasing the statements,' notwithstanding the use of quotation marks to suggest a quotation where none in fact exists, warrants dismissal of the defamation action."; *Keeler v Galaxy Communications LP*, 39 A.D.3d 1202, 1203 [4th Dep't 2007] ("The quoted language in the complaint, i.e., "porn door to door" and "peddling porn," are mere phrases and thus by implication cannot be the "exact words" in their entirety allegedly uttered by defendant. Rather, those phrases are only a portion of the particular defamatory words and thus are not in compliance with CPLR § 3016(a)."). Thus, this court finds that because the allegedly defamatory words are mere phrases and have not been particularly set forth, the Complaint is insufficient to sustain this claim.

In addition, Konner asserts that Plaintiffs cannot bring a cause of action for slander of title because they do not own the property. (*See White & Baxter, Inc. v Jade Square & Tower, Ltd.*, 62 A.D.2d 963 [1st Dep't 1978].) Plaintiffs sold the Property in 2009 to Aghajun Holdings L.L.C. In the *White & Baxter* case, the plaintiff did not own the property *at the time of the facts giving rise to the complaint*. However, in the case at hand, the Plaintiffs *did* own the Property at the time these statements were made. Thus, Konner's argument that Plaintiffs lack standing to maintain a cause of action for slander of title falls short. However, for the reasons set forth above, Plaintiffs have failed to state a slander of title claim.

ii. Injurious Falsehood

Defendant Konner argues that the injurious falsehood claim should be dismissed because it is duplicative of the slander of title claim. If an injurious falsehood claim is not distinguishable from a slander of title claim, then it must be dismissed as duplicative. (*See Stern v Burkle*, 2008 NY Slip Op 51183U [N.Y. Sup. Ct 2008].) However, if a cause of action for defamation is viable, then so is the claim for injurious falsehood. (*See Roche v Claverack*

Cooperative Ins., 59 A.D.3d 914, 917-18 [3d Dep't 2009] (denying motion for summary judgment on causes of action for defamation and injurious falsehood arising out of the same statements and resulting in the same damages).)

Furthermore, the Second Department states:

> The tort of trade libel or injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's *business* of kind calculated to prevent *others* from dealing with the business or otherwise interfering with its relations with *others*, to its detriment. The communication must play a material and substantial part in inducing *others* not to *deal* with the plaintiff, with the result that special damages, in the form of *lost dealings*, are incurred.

(*Waste Distillation Tech., Inc. v Blasland & Bouck Engineers, P.C.*, 136 A.D.2d 633, 634 [2d Dep't 1988] (italics added) (internal citations omitted).) The Complaint does not allege that the Estate plaintiffs were engaged in any business or trade, or that they were damaged, except for loss from a sale of property. The Complaint makes no mention of any other buyer. Thus, Konner's alleged statement had no effect on anyone other than Mulberry, since "at all times relevant to the Complaint," he "acted as Mulberry's attorney and was a Vice-President of Mulberry." (*Compl.* ¶ 6.) Accordingly, this Court finds that the Plaintiffs' injurious falsehood claim fails.

c. Cause of Action Against First American

Plaintiffs contend that Defendant First American is liable for tortious interference with contract. At oral argument held on May 6, 2010, this court granted First American's motion to dismiss the complaint against it (Tr. 5/6/10 31:20).

d. Punitive Damages Against Konner[1]

---

[1] Plaintiff also sought Punitive Damages against First American. However, because this court has dismissed the only cause of action against First American, the claim for punitive

New York permits punitive damages awards in defamation suits upon a showing of actual malice. (*See Frechette v Special Magazines, Inc.*, 285 A.D. 174 [3d Dep't 1956]; *Celle v Filipino Reporter Enters.*, 209 F.3d 163 [2d Cir. 2000].) Plaintiffs argue that they have properly pled punitive damages against Konner. However, New York courts reserve punitive damages for cases involving "such wanton dishonesty as to imply a criminal indifference to civil obligations." (*164 Mulberry Street Corp. v Columbia Univ.*, 4 A.D.3d 49, 60 [1st Dep't 2004].) For cases that lack this element of culpability, or where the public was not the victim of the tort alleged, the First Department has dismissed punitive damages claims. (*Id.*; *See Gamiel v Curtis & Reiss-Curtis, P.C.*, 16 A.D.3d 140, 141 [1st Dep't 2005].) Furthermore, as discussed above, the court finds that Plaintiffs have failed to properly plead malice, and thus, Konner's motion to dismiss for punitive damages is granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion to dismiss is granted and the Clerk of the court is directed to enter judgment accordingly.

Dated: August 24, 2010

ENTER:

HON. RICHARD E. LOWE, III

RICHARD E. LOWE, III

---

damages must necessarily be dismissed as well.

SEQ 6

AT IAS Part __ of the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on July __, 2010

F/S

PRESENT:

HON. 9/2/10

Justice.

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

ORDER TO SHOW CAUSE FOR REARGUMENT AND A STAY

Assigned Justice
(Francis A. Nicolai)

UPON the annexed affirmation of Leonard Benowich, dated July 20, 2010, and the exhibits annexed thereto, and upon all proceedings heretofore had herein,

LET Plaintiff or its counsel show cause before this Court, at the County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., on July/August __, 2010, at 9:30 a.m., or as soon thereafter as counsel can be heard, why an order should not be made and entered:

a. Pursuant to CPLR §2221(d), granting Defendant The Nature Conservancy ("TNC") reargument (and to a limited extent, renewal) of its motion to

1

dismiss the Amended Complaint and of Plaintiff's motion for leave to amend, and upon such reargument and renewal, dismissing the Amended Complaint and granting TNC's motion in all respects;

b. Tolling and staying the time for TNC to answer the Amended Complaint pending determination of this motion; and

c. Granting Defendant TNC such other and further relief as this Court may deem just and proper.

Sufficient cause appearing therefor,

NOW, on motion of **BENOWICH LAW, LLP**, counsel for Defendant TNC, it is hereby

ORDERED, that pending the hearing and determination of this motion, the time for Defendant TNC to answer or otherwise respond to the Amended Complaint be and it hereby is tolled and stayed; and it is further

ORDERED, that service of a copy of this Order, together with the papers upon which it is based, upon:

(A) Counsel for Plaintiff, Julius W. Cohn, Esq., Cohn & Spector, 200 East Post Road, White Plains, New York 10601-49591; and

(B) Counsel for Defendants Noel and Joann Donohoe, Lois Rosen, Esq., Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, 120 Bloomingdale Road, White Plains, New York 10605; and

(C) Counsel for Defendants Robert and Teri Burke, Janine Mastellone, Esq., Wilson Elser Moskowitz Edelman & Dicker, LLP, 3 Gannett Drive, White Plains, New York 10604-3407;

by facsimile, e-mail, hand, FedEx or other overnight courier on or before July __, 2010 shall be deemed good and sufficient service; and it is further

ORDERED, that any papers in opposition to this motion shall be filed with this Court, and served so as to be received by counsel, not later than July/August __, 2010; and it is further

ORDERED, that oral argument is required.

ENTER:

_____

, J.S.C.

Certification Pursuant to
Rule 130-1.1-a(b) of the
Rules of the Chief Administrator

Leonard Benowich
Benowich Law, LLP
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\Reargument\osc.wpd

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

AFFIRMATION IN SUPPORT OF MOTION FOR REARGUMENT

LEONARD BENOWICH, an attorney admitted to practice in the Courts of this State, affirms the following under penalty of perjury:

I. Introduction and Summary of Relief Requested

1. I am a member of Benowich Law, LLP, counsel of record for Defendant, The Nature Conservancy ("TNC"), a charitable organization whose mission "is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the land and waters they need to survive."[1]

2. Unless otherwise indicated, I have personal knowledge of the facts and circumstances set forth herein and submit this affidavit in support of TNC's motion for:

(a) reargument and renewal of TNC's motion to dismiss the Amended Complaint herein (and of Plaintiff's motion for leave to amend), which motion

[1] http://www.nature.org/aboutus

2

was denied by this Court's Decision and Order dated June 21, 2010 and entered June 25, 2010 ("Order");[2] and

(b) an order staying and tolling the time for TNC to answer the Amended Complaint pending determination of this motion. (Plaintiff's counsel has graciously extended the time for TNC and the other Defendant to answer the Amended Complaint until July 27, 2010.)

3. Plaintiff has already acknowledged that the allegations in its Amended Complaint (annexed as Ex. E to Exhibit 4 hereto) are not sufficient or particular. Indeed, in the Reply Memorandum submitted on its motion for leave to amend Plaintiff cavalierly wrote that "the specific allegations as to each defendant can be sought via a demand for a bill of particulars." (*See* Ex. 8, at 4)

4. Because the Amended Complaint fails to state any facts to support any cause of action, and because Plaintiff acknowledges this defect, this Court should stay TNC's time to answer pending the determination of this motion.

II. Summary of Argument

5. This Court should grant reargument and on reargument, should dismiss the Amended Complaint for at least the following reasons:

(a) This Court misapprehended and/or misapplied the standard for determining TNC's motion to dismiss; the Court was overly-deferential to the Amended Complaint;

---

[2] A copy of the Order is annexed as **Exhibit 1**.

(b) Plaintiff failed to demonstrate that it "has" a cause of action for *prima facie* tort, based, as it is, solely on TNC's procurement of the Preliminary Injunction - *Seven Springs I*; such conduct is not only privileged, but it is cloaked with a presumption of good and probable cause, given the court order issuing that injunction, which presumption is not overcome by Plaintiff's naked, conclusory allegations;

(c) There is no well-pleaded allegation of any special damages - a death knell to the Amended Complaint on any theory;

(d) The Court should not have sustained a cause of action for slander of title because Plaintiff expressly disavowed asserting such a claim (*see* Ex. 8, at 10-11) (which Plaintiff acknowledges would be time-barred by the one-year statute of limitations in any event); and

(e) Plaintiff has no cause of action that can be maintained in this case. Plaintiffs claim for damages, arising solely from the issuance and effect of the Preliminary Injunction Order in *Seven Springs I*, must be brought in that action, and none of the claims in the Amended Complaint can be asserted in this action. The Court in *Seven Springs I* alone has the power to determine whether that injunction was wrongful and whether (and if so to what extent) Plaintiff has been damaged as a result.

6. The following materials (submitted on the previous motions) are submitted on this motion:

Exhibit 2: TNC's Motion to Dismiss, the Affirmation of Leonard Benowich dated November 16, 2009 and the exhibits annexed thereto (1-6);

Exhibit 3: TNC's Memorandum of Law in support of its motion to dismiss dated November 16, 2009;

Exhibit 4: Plaintiff's Notice of Cross-Motion, the Affidavits of Donald J. Trump and Alfred Donellan, both sworn to January 21, 2010 and the exhibits annexed thereto (A-K);

Exhibit 5: Plaintiff's Memorandum of Law in opposition to TNC's motion to dismiss and in support of its cross-motion dated January 22, 2010;

Exhibit 6: Reply Affirmation of Leonard Benowich, dated February 19, 2010 and the exhibits annexed thereto (7-9);

Exhibit 7: TNC's Reply Memorandum of Law dated February 19, 2010;

Exhibit 8: Plaintiff's Reply Memorandum of Law on its cross-motion for leave to amend, dated March 5, 2010.

III. Background

7. This Court is familiar with the facts of this case. The Court will recall that Plaintiff previously commenced *Seven Springs, LLC v. The Nature Conservancy, et al.*, Index No. 9130/06 ("*Seven Springs I*"), in which it seeks a declaratory judgment that it has the rights to use certain land - including lands owned by Defendant TNC - as a road for the benefit of a contemplated residential development.

8. This Court acknowledged in the Order that the Court in *Seven Springs I* had entered a Preliminary Injunction restraining Plaintiff from making certain use of a portion of the land in question in that action - land owned by TNC. In its Order, this Court also acknowledged that *Seven Springs I* has been effectively "dormant."

9. The Amended Complaint in this case seeks damages for actions that TNC undertook in *Seven Springs I*. Specifically, as Plaintiff's counsel stated in paragraph 27 of his affidavit in support of Plaintiff's motion for leave to amend:

> . . .the instant action simply seeks to assert Plaintiff's rights to damages against the Defendants, should it be determined that the Defendants have wrongfully prevented Plaintiff from using, and exercising its rights with respect to the Easement Area. [Emphasis added.]

Of course, there has been no such determination.

10. Plaintiff's counsel also acknowledged that this case seeks damages for TNC's having sought and obtained the Preliminary Injunction in *Seven Springs I*:

> The instant action is based on Plaintiff's claim to the Easement over Oregon Road and for money damages based on Defendants' intentional acts in interfering with Plaintiff's property rights and use of the Easement. Such actions include, but are not limited to, Defendants action in seeking injunctive relief against the Plaintiff [in *Seven Springs I*], and precluding Plaintiff from exercising its full rights to ingress and egress over the Easement.

Id., ¶30. Settled law - including cases cited by Plaintiff in its memoranda (*see* Ex. 5 and 8) - establish that this case is legally insufficient and improper, and at the very least premature: in the absence of any evidence - not just an allegation, but evidence - that the Preliminary Injunction Order was sought and procured by means of fraud or misrepresentation,[3] Plaintiff's sole remedy is *Seven Springs I*, for damages against the bond or undertaking given as a condition of the

---

[3] *I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206 (1st Dep't 2005); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.*, 168 A.D.2d 238 (1st Dep't 1990).

Preliminary Injunction Order.[4] Any damages Plaintiff has sustained or may sustain by reason of the Preliminary Injunction must first be determined and fixed in *Seven Springs I*.[5]

11. Although Plaintiff's counsel states that the offensive conduct being challenged in this case includes but is not limited to TNC's procurement of the Preliminary Injunction in *Seven Springs I*, neither the Amended Complaint nor Trump's Affidavit identifies any other conduct.

12. Moreover, the Preliminary Injunction Order in *Seven Springs I* gives rise to a presumption of probable cause, and that presumption is not overcome by the subsequent reversal of the order (which of course has not occurred, as Plaintiff failed to perfect its appeal from the Preliminary Injunction Order), and it is not overcome by Plaintiff's mere, naked pleading, in conclusory fashion, that TNC was solely motivated by disinterested malevolence or malice when it sought the Preliminary Injunction.[6]

13. In its Order, this Court granted Plaintiff's motion for leave to amend, and denied TNC's motion (and those of the other defendants) to dismiss, because it found that Plaintiff "has alleged that disinterested malevolence was the sole motivation for defendants' conduct and has alleged specific and measurable loss to the value of its property and its development." Order at 6.

14. We respectfully submit that this Court misapprehended or misapplied the proper standard applicable to TNC's motion to dismiss - especially given that Plaintiff submitted

---

[4] *Id.; 2339 Empire Management, LLC v. 2329 Nostrand Realty, LLC*, 71 A.D.3d 998 (2nd Dep't 2010).

[5] CPLR 6315.

[6] *I.G. Second Generation Partners, L.P., supra* ("Plaintiffs have failed to allege any facts from which it might be inferred that the prior decision in defendants' favor in the underlying action was obtained by fraud or misrepresentation and have thus failed to overcome the presumption of probable cause").

evidentiary material in support of its proposed pleading, which obligates this Court to determine that Plaintiff "has" a cause of action for *prima facie* tort.

15. This Court could not simply accept the conclusory allegation of "disinterested malevolence" as true - especially given (a) the presumption of "probable cause" that the Preliminary Injunction Order itself confers, and (b) the absence of any facts in the Amended Complaint "from which it might be inferred that the [Preliminary Injunction Order in *Seven Springs I*] was obtained by fraud or misrepresentation."[7]

IV. This Motion Should Be Granted

16. Plaintiff's motion for leave to amend should have been denied, and TNC's motion to dismiss should have been granted in all respects.

17. ***First***, we respectfully submit that this Court misapprehended or misapplied the proper standard on this motion to dismiss: because Plaintiff submitted evidentiary material in support of its proposed pleading,[8] this Court was required to determine that Plaintiff "has" a cause of action, not simply that it may have stated one.[9] Nevertheless, this Court concluded only that Plaintiff "stated" a cause of action for *prima facie tort* and/or slander of title. Order, at 6.[10]

---

[7] *I.G. Second Generation Partners, L.P., supra.*

[8] In the form of an affidavit by Plaintiff's principal, Donald J. Trump ("Trump"), and other documents.

[9] *Meyer v. Guinta*, 262 A.D.2d 463, 692 N.Y.S.2d 159 (2nd Dep't 1999).

[10] Plaintiff never contended that its Amended Complaint stated a claim for slander of title, not in opposition to any of the motions to dismiss and not even on its motion for leave to amend. *See e.g.* Ex. 8, at 10.

18. ***Second***, as a matter of law, Plaintiff neither states, nor has, a cause of action for *prima facie* tort unless it can establish that TNC (a) did any act that was not privileged,[11] or (b) was motivated solely by disinterested malevolence when TNC sought the Preliminary Injunction in *Seven Springs I*. Plaintiff does not allege that TNC did anything - other than seek and obtain the Preliminary injunction - and its bare, naked, conclusory allegation to this effect (*see e.g.* Amd. Cplt. ¶¶ 31, 40, 41) is legally insufficient to support such an inference in this case not only because of the standard applicable on this motion to dismiss, but also because, given the disfavored nature of a claim for *prima facie* tort, a pleading is required to allege facts which establish or from which TNC's purported "disinterested malevolence" can be inferred.[12] No such showing was made - nor could it be made - on the record of this case, precisely because when TNC sought and obtained the Preliminary Injunction in *Seven Springs I* it was motivated not by any malevolence but, as Supreme Court noted, by a legitimate desire to protect TNC's own

---

[11] Actions taken and statements made in litigation are absolutely privileged. *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359 (2007); *Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 209 (1983); *Martirano v. Frost*, 25 N.Y.2d 505 (1969); *Wiener v. Weintraub*, 22 N.Y.2d 330 (1968); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163 (1st Dep't 2007) ("the principle underlying the absolute privilege for judicial proceedings is that 'the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to the litigation,' which freedom 'tends to promote an intelligent administration of justice'"); *Sinrod v. Stone*, 20 A.D.3d 560 (2nd Dep't 2005); *Martinson v. Blau*, 292 A.D.2d 234 (1st Dep't 2002) (affirming dismissal of *prima facie* tort claim that defendant gave false testimony as a witness in a New Jersey court proceeding); *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.2d 136 (2nd Dep't 1994).

[12] *See e.g. Simaee v. Levi*, 22 A.D.3d 559 (2nd Dep't 2005) (pleading must "allege facts indicating that the defendants' actions were motivated by disinterested malevolence"); *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc.*, 5 A.D.3d 352 (2nd Dep't 2004 ("plaintiff alleged facts from which it can be inferred"); *EECP Centers of America, Inc. v. Vasomedical, Inc.*, 265 A.D.2d 372 (2nd Dep't 1999) (even in a case where all well-pleaded allegations were deemed to be true, counterclaim which "fails to allege any facts to indicate that the sole motivation for the appellant's actions was disinterested malevolence" was dismissed).

property (a nature preserve) and a legitimate need to prevent that property from being used by Plaintiff in such a way that would or might jeopardize TNC's continued ownership of the property.[13] Supreme Court found that TNC was entitled to the Preliminary Injunction precisely because it did - and does - have a very real interest in preserving its ownership of the land in question, and its use as a nature preserve - a sanctuary:

> As far as irreparable harm, its very difficult to limit the way in which the property would be used if the property is opened for the use of Seven Springs, its agents, servants, employees, one cannot guarantee that it will be used in a way that does not cause irreparable harm. . . .To allow traffic on that road at this point in time would irreparably damage or have the effect of causing irreparable harm both to the physical property, the land itself and to the nature of the Conservancy. *There also is a question as to whether or not the opening of the road would create traffic or a use that would in such a way cause the Conservancy to lose its property. If the land must be maintained as a Conservancy and the Court were not at this point in a position to grant the injunction and the road were used by folks at the invitation or permission of Seven Springs to go in there and to do anything other than simply hike and enjoy the preservation, one could argue that the nature and quality of the Conservancy had been changed and although it hasn't been referred to as a reverter, might cause the Conservancy to lose the property. That would certainly cause irreparable harm*

---

[13] The agreement which contains the terms of the conveyance of the TNC Parcel to TNC, provides that if "TNC shall at any time fail to continue to maintain all or any part of the [Nature Preserve] as a natural preserve or in a way which will conserve its essential natural character," TNC will have to re-convey the property back to the grantor. *See* Ex. 7 to Exhibit 7 annexed hereto.

and as such I'm making a finding that there would be irreparable harm by opening up the street.

Transcript of Proceedings, April 14, 2008, at 113-115, emphasis added).[14] Supreme Court's issuance of the Preliminary Injunction Order gives rise to a presumption that TNC had probable cause to request and to obtain that Preliminary Injunction Order. Plaintiff must overcome that presumption - even at the pleading stage - and in order to do so Plaintiff would have to allege facts "from which it might be inferred that the [Preliminary Injunction Order in *Seven Springs I*] was obtained by fraud or misrepresentation" and Plaintiff having failed to do so has "thus failed to overcome the presumption of probable cause." *Id.* The existence of another motive on the part of TNC when it sought the Preliminary Injunction Order, other than the purported disinterested malevolence alleged in conclusory fashion by Plaintiff - such as TNC's protection of its use and ownership of its own property - precludes Plaintiff's claim for *prima facie* tort,[15] which, as the Court of Appeals has held,"requires well-pleaded allegations of "a malicious [motive] unmixed with any other and exclusively directed to injury and damage of another."[16]

---

[14] This transcript was annexed to the Burke Defendants' motion to dismiss, which was considered together with TNC's motion to dismiss. TNC did not annex the transcript to its motion to dismiss, in the interest of avoiding submitting a multiplicity of large documents to the Court. TNC seeks leave to renew for the limited purpose of placing excerpts from this Transcript (annexed hereto as **Exhibit 9**) before the Court on this motion.

[15] *See e.g. Beardsley v Kilmer*, 236 NY 80 (1923); *Meridian Capital Partners, Inc. v. Fifth Ave. 58/59 Acquisition Co. LP*, 60 A.D.3d 434 (1st Dep't 2009) (existence of another interest or motive precludes *prima facie* tort claim); *Empire One Telecommunications, Inc. v. Verizon New York, Inc.*, 26 Misc. 3d 541 (Sup. Ct. Kings Co. 2009) (allegation by plaintiff competitor that Verizon intentionally manipulated call records so that long distance calls appear as local calls fails to state a claim for *prima facie* tort because plaintiff's accusations are logically explained by Verizon's self-interest in depriving plaintiff of a business opportunity in the hope that competition may be diminished).

[16] *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 333 (1983).

19. ***Third***, this Court improperly credited and sustained Plaintiff's purported allegation of "special damages." Although the Amended Complaint seeks "special damages" of (a) $5 million for its inability to use its purported easement; (b) $50 million for the diminution in value of the Seven Springs Parcel; and (c) $5 million for Plaintiff's inability to access the Seven Springs Parcel from the south over Oregon Road (Amd Cplt., ¶50), these round-numbered figures are all general damages; as a matter of law they are not special damages.[17]

20. ***Fourth***, we respectfully submit that this Court improperly concluded that the Amended Complaint even states a cause of action for slander of title: Plaintiff asserted no such claim in its one-count Amended Complaint, and Plaintiff even rejected TNC's argument that the Amended Complaint sought to assert such a claim.[18] Given Plaintiff's position that it does not assert a claim for slander of title (which, as plaintiff correctly recognized would be barred by the 1-year statute of limitations), we respectfully submit that it was error for this Court to find that the Amended Complaint "states" such a claim.

21. Moreover, in any event, the Amended Complaint fails to state a cause of action for slander of title. To do so, Plaintiff would have to allege facts demonstrating: (1) a communication falsely casting doubt on the validity of the complainant's title, (2) reasonably

---

[17] *Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435, 441 (1960); *Pitcock v. Kasowitz, Benson, Torres & Friedman LLP*, 2010 WL 2400434 (1st Dep't June 17, 2010) (rejecting boilerplate allegations of special damages as legally insufficient); *Carrea v. Imagimed, LLC*, 2010 WL 2309433 (2nd Dep't June 8, 2010) (same); *Mancuso v. Allergy Associates of Rochester*, 70 A.D.3d 1499 (4th Dep't 2010 (same); *Emergency Enclosures, Inc. v. National Fire Adjustment Co., Inc.*, 68 A.D.3d 1658 (4th Dep't 2009); *Vigoda v. DCA Productions Plus Inc.*, 293 A.D.2d 265 (1st Dep't 2002); *DiSanto v. Forsyth*, 258 A.D.2d 497 (2nd Dep't 1999).

[18] *See* Ex. 8, at 10.

calculated to cause harm, and (3) resulting in special damages.[19] The Amended Complaint does not allege or even identify any false statement or communication, and there is nothing else alleged in the Amended Complaint. Paragraph 28 of the Amended Complaint alleges only that, "upon information and belief, Defendants made statements impugning" Plaintiff's title to the Seven Springs Parcel and the Easement.[20] This allegation does not identify the language of the statement(s) (as required by CPLR 3016(a)), it does not allege that the statement(s) are false, and it does not even attempt to identify which defendant made any statement(s), who made what statement(s), when the statement(s) was made, where, or even to whom. Finally, a claim for slander of title is subject to a one-year statute of limitations.[21] The Preliminary Injunction Order was entered in April 2008 - much more than one-year before this action was commenced. TNC's application in *Seven Springs I* for a preliminary injunction is, as a matter of law, not actionable as a slander of title, because the filing of such an application is privileged and the contents of such application are not (nor are they alleged to be) false.[22] Accordingly, there is no basis on which this Court could properly conclude that Plaintiff had stated - much less that it has - a cause of action for slander of title.

---

[19] *Fink v. Shawangunk Conservancy*, 15 A.D.3d 754 (3rd Dep't 2005).

[20] Significantly, there is no evidentiary basis for this allegation. Trump's affidavit - which is offered purportedly as the affidavit of a party with personal knowledge, does not aver that TNC or any of the Defendants made any such statements; Trump avers only that Defendants took a "position" in *Seven Springs I.*

[21] *39 College Point Corp. v. Transpac Capital Corp.*, 27 A.D.3d 454 (2nd Dep't 2006); *Hanbidge v. Hunt*, 183 A.D.2d 700 (2nd Dep't 1992). Plaintiff denies that it seeks damages for injury to reputation. Ex. 5, at 9-10; Ex. 8, at 10-11.

[22] *East Patchogue Contr'g Co. v. Magesty Sec. Corp.*, 266 A.D.2d 257 (2nd Dep't 1999).

22. ***Fifth***, Plaintiff has no independent cause of action in this case for damages resulting from the issuance of the Preliminary Injunction Order in *Seven Springs I.* Any application by Plaintiff for damages arising from the issuance of the Preliminary Injunction (a) would be limited to the amount of the undertaking given by TNC in *Seven Springs I*,[23] and would have to be determined in *Seven Springs I. Id.* Only then would Plaintiff have any right to commence an action to recover the damages so determined in *Seven Springs I.*[24]

23. For the foregoing reasons, and for the reasons set forth in the accompanying memorandum or law, I respectfully submit that TNC's motion should be granted in all respects.

24. No prior application has been made for this relief to this or any other court.

Dated: July 20, 2010

Leonard Benowich

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\Reargument\LB-Aff.wpd

---

[23] *Bonded Concrete, Inc. v. Town of Saugerties*, 42 A.D.3d 852 (3rd Dep't 2007).

[24] CPLR 6315.

SUPREME COURT - STATE - NEW YORK
WESTCHESTER COUNTY

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON 6/25 2010
WESTCHESTER
COUNTY CLERK

PRESENT: HON. FRANCIS A. NICOLAI
Justice

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No.: 21162/09
Motion Date: 3/19/10

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

DECISION

Defendants.

----------X

The following papers numbered 1 to 60 read on this motion.

	PAPERS NUMBERED
Notice of Motion/Affirmation/Exhibits 1-6/Memorandum of Law, TNC	1-9
Notice of Motion/Affirmation/Exhibits A-H/Memorandum of Law, Burke	10-20
Notice of Motion/Affirmation/Exhibits A-C/Memorandum of Law, Donohoe	21-26
Notice of Cross Motion/Affidavit/Exhibits A-K/Affidavit/ Memorandum of Law, Plaintiff	27-41
Reply/Opposition Affirmation/Exhibits 7-9/Memorandum of Law, TNC	42-46
Reply /Opposition Affirmation/Exhibits 1-2/Memorandum of Law, Burke	47-50
Reply/Opposition Affirmation/Exhibits A-G/Memorandum of Law, Donohoe	51-59
Reply Memorandum of Law, Plaintiff	60

Upon the foregoing papers, it is ORDERED that the motions by defendants to dismiss plaintiff's complaint and the cross motion of plaintiff for an order granting plaintiff leave to serve and file an amended complaint, are decided as follows.

On September 22, 2009, Seven Springs, LLC commenced this action against the named defendants seeking to recover money damages from defendants for defendants' actions in denying and precluding plaintiff from exercising its rights to an easement, which provides access to plaintiff's property over a road known as Oregon Road in the Town of North Castle, New York.

Plaintiff's complaint alleges the following single cause of action. Plaintiff is a New York Limited Liability Company, which owns 213 acres of real property ("the parcel") in the Towns of New Castle, North Castle and Bedford, Westchester County. At some time prior to 1973, Oregon Road, abutted by plaintiff's parcel, became a public highway by virtue of its having been used as a public highway for a period of ten years. In or about 1990, the Town of North Castle closed a portion of Oregon Road, pursuant to Highway Law §205, as the road was no longer used for public travel. The closed portion of the road ends at a legally opened public street that has been improved and paved. At some point, the Town of North Castle erected a barrier gate and/or metal guardrail ("gate") obstructing and impeding access to or from Oregon Road to the south by persons in vehicles, coming from plaintiff's parcel. Plaintiff's development of its parcel requires a secondary access to the parcel. Defendants have improperly taken the position that plaintiff has no right to access the parcel from the south over Oregon Road and have willfully deprived plaintiff of its right to develop its parcel; damages are continuing.

The complaint alleges further that defendants, The Nature Conservancy ("TNC"), Robert Burke and Teri Burke ("Burkes") and Noel B. Donohoe and Joann Donohoe ("Donohoes") have no valid basis, in law or fact, to maintain a gate or any other obstruction or barrier over Oregon Road, obstructing plaintiff's access to its parcel over Oregon Road. Defendants' actions have diminished the financial value of the parcel warranting compensative and punitive damages.

Defendants TNC, the Burkes and the Donohoes have moved to dismiss plaintiff's complaint on the grounds that the complaint fails to state a cause of action. Subsequent to the making of defendants' motions, plaintiff has cross moved for leave to amend the complaint, annexing a proposed amended complaint.

Litigation History

On May 15, 2006, Seven Springs, LLC commenced an action in this Court, inter alia, against TNC, the Burkes and the Donohoes under Index No. 9130/06, seeking declaratory judgment and injunctive relief, inter alia, a determination that plaintiff has an easement over the portion of Oregon Road south of the TNC parcel, which was not closed to the public.

In that action, defendants moved to dismiss plaintiff's complaint contending that plaintiff had no implied private easement over the relevant portion of Oregon Road and that any easement was extinguished when the relevant portion of Oregon Road ceased to be a town highway pursuant to Highway Law § 205(i). The Court, LaCava, J., granted defendants' motion. The Appellate Division, Second Department reversed, finding that plaintiff sufficiently stated a cause of action based upon an implied private easement arising in January, 1973 when a parcel of land bounded by a road and used at the time as a public highway was conveyed to plaintiffs' predecessor in interest. Additionally, defendants failed to establish as a matter of law that the private easement was abandoned or extinguished by adverse possession. The Appellate Division further found that the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements as Highway Law 205 does not provide for compensation to the owners of any private easements, which would be extinguished. Seven Springs, LLC v. Nature Conservancy, et al., 48 AD 3d, 545.

In the same action, the Court, R. Bellantoni, J., by decision and order dated April 19, 2008, granted TNC's motion for a preliminary injunction enjoining during the pendency of said action, plaintiff, its agents, employees and contractors, and all persons having knowledge of the order from .... "entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve("Nature Preserve") with any vehicle, equipment or machinery, and for any purpose other than to walk or hike upon same (provided, however, that surveyors employed or retained by plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by hand by one person), and performing any work upon any land owned by TNC, including the portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees, roadway grading, excavation; paving or preparing a roadway for paving, rock and/or debris removal)" .... The Court directed TNC to file a $100,000. undertaking.

The injunction is currently in place and there has been no judicial determination as to plaintiff's alleged right of ingress or egress to the subject premises.

On or about March 14, 2008, plaintiff commenced an action in this Court entitled Seven Springs, LLC v. The Town of North Castle, Index No. 5484/08, which was settled by stipulation in February, 2009. Therein plaintiff sought quiet title to Oregon Road and claimed the right to utilize said road and defendant claimed that it had properly closed the road, effectively precluding any intended use of the road by plaintiff or any others.

Plaintiff's Cross Motion

Plaintiff has moved for leave to serve an amended complaint. In accord with CPLR 3025(b) that such leave shall be freely given, plaintiff's cross motion is granted. Plaintiff's amended complaint in the form annexed to plaintiff's motion papers as Exhibit A is deemed served. The allegations of plaintiff's amended complaint have been addressed in defendants' reply papers and considered by the Court.

Plaintiff's amended complaint reiterates many of the allegations of plaintiff's complaint. Recounting that the Town of Bedford Planning Board required that the plaintiff have a secondary access to the subject parcel, the amended complaint alleges that the only viable secondary access to the parcel, and the only means by which access can be had to any public highway, street, road or avenue from the parcel to the south, is via the road known as Oregon Road. The Town of Bedford Planning Board's refusal to permit development of the parcel would not have occurred but for defendants' actions.

Within a single cause of action and not separately stated and numbered, CPLR 3014, plaintiff reiterates its prima facie tort allegations and additionally alleges that, that defendant made statements impugning plaintiff's title to the parcel and the easement, asserting that plaintiff has no right, title or interest to the easement. The statements were commonly and naturally interpreted to be disparaging, were communicated to third parties, including Town Boards, and were intentional, reckless, negligent or malicious, as well as false and known by defendants to be false and harmful to plaintiff. Defendants' actions were effected by dishonest, unfair and/or improper means, committed without reasonable justification and/or were otherwise motivated solely by malice and ill-will to plaintiff as they intended to, and actually did, cause injury to plaintiff by preventing plaintiff from exercising its property rights over the easement area, accessing the parcel over Oregon Road, preventing plaintiff's development of the parcel and exercising its full use and enjoyment of the easement and the parcel. Disinterested malevolence is the sole motivation for defendant's actions and it is causing plaintiff continuing damages.

The amended complaint cites the Appellate Division decision, supra, alleging that by reason thereof it has been judicially determined that the Town of North Castle never extinguished the easement pursuant to Highway Law 205. Nor do defendants have any right, title and interest in and to Oregon road or the easement area.

Plaintiff seeks damages of not less than $60,000,0000.; $5,000,000. for plaintiff's inability to use its easement, $5,000,000. for plaintiff's inability to access its parcel from the south at Oregon Road and $50,000,000. for diminution in value of plaintiff's parcel.

Defendant, TNC replies that plaintiff's amended complaint should be dismissed initially because the amended complaint does not allege that TNC or the other defendants did anything actionable, sounding in a claim for prima facie tort. TNC's actions in defending itself in the 2006 action and obtaining a preliminary injunction are privileged and cannot underpin a prima facie tort claim. The amended complaint essentially seeks to attack the preliminary injunction, the proper remedy for which is an action on the undertaking. Nor has plaintiff alleged particular special damages. Additionally, the prima facie tort claim is barred by the one year statute of limitations and alleges no basis for punitive damages against TNC, which merely defended the actions against it and did not engage in conduct in the nature of moral turpitude.

The Burke defendants reply notes that plaintiff did not pursue its appellate remedy with respect to the preliminary injunction in the 2006 action and the amended complaint, in lieu of the appeal, is untimely. The Burke's opposition to plaintiff's 2006 action was not motivated only by disinterested malevolence; the preliminary injunction properly issued. The amended complaint lacks specific factual allegations of illegal actions as to liability and special damages, and indeed, falls within the parameters of a SLAPP suit, Civil Rights Law 76-A(i) (a). The proper action to contest the propriety is an action for damages under the designated undertaking. Nor has plaintiff properly pleaded special damages, nor alleged egregious tortious conduct warranting punitive damages. Plaintiff has alleged no claim which has a substantial bases in law or fact.

The Donohoe defendants reply citing the doctrine of collateral estoppel in that the amended complaint alleges issues previously considered by Bellantoni, J. with respect to the issuance of the preliminary injunction in the 2006 action, which was not appealed and is now being invoked as the reason for plaintiff's alleged damages. Plaintiff may proceed against the preliminary injunction undertaking, when, as and if it is eventually determined that the preliminary injunction should not have been issued.

Plaintiff acknowledges that its instant action simply seeks to assert plaintiffs rights to damages against defendants should it be determined that the defendant have wrongfully prevented plaintiff from using and exercising its rights with respect to the easement. The Court notes the preliminary injunction issued in favor of defendants and that the prior action in which the preliminary injunction issued is effectively dormant, supra.

On a motion to dismiss pursuant to CPLR 3211, a court must accept as true the facts as alleged within the four corners of the complaint and accord the plaintiff the benefit of every possible favorable inference to determine whether the allegations fit within any cognizable legal theory. See, Leon v. Martinez, 84 NY2d 83, 87-88, Guggenheimer v. Ginzburg, 43 NY2d 268, 275; Rovello v. Orofino Realty Co., 40 NY2d 633, 634. "When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleadings has a cause of action, not whether she has stated one." Meyer v. Guinta, 262 AD2d 436.

The Court cannot determine as a matter of law that plaintiff has failed to state a cause of action for prima facie tort and/or slander of title. Plaintiff has alleged that disinterested malevolence was the sole motivation for defendants' conduct and has alleged specific and measurable loss to the value of its property and its development. See, Friehofer v. Hearst Corp., 65 NY 2d 135; Epifari v. Johnson, 65 Ad 3d 224. Additionally, plaintiff has sufficiently stated a cause of action for slander of title, having alleged the that defendants made communications falsely casting doubt as to the validity of plaintiff's title, reasonably calculated to cause harm and resulting in special damages. See, 39 College Point Corp. v. Transpec Capital Corp., 27 AD 3d 454.

Defendants' motions are denied.

Defendants shall serve their respective answers within ten (10) days of the service of a copy of this order with notice of entry. CPLR 3211(f).

This action is referred to the Preliminary Conference Part for the scheduling of a preliminary conference in due course.

The foregoing constitutes the Decision and Order of this Court.

DATED: White Plains, New York
June 21, 2010

ENTER,

HON. FRANCIS A. NICOLAI, J.S.C.

TO: DELBELLO, DONNELLAN, WEINGARTEN, WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorneys for Defendants, Robert and Teri Burke
3 Gannett Drive
White Plains, New York 10604-3407

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER
Attorneys for Noel B. Donohoe and Joann Donohoe
120 Bloomingdale Road, Suite 100
White Plains, New York 10605

BENOWICH LAW LLP
Attorney for TNC
1025 Westchester Avenue
White Plains, New York 10604

Preliminary Conference Part

2

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

NOTICE OF MOTION TO DISMISS COMPLAINT

PLEASE TAKE NOTICE, that upon the annexed affirmation of Leonard Benowich, dated November 16, 2009, and the exhibits annexed thereto, the undersigned will move this Court, at the County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., at a Part to be determined, on December 31, 2009, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order:

a. Pursuant to CPLR §§3211(a)(1) and (7), dismissing the Complaint, and each and every cause of action asserted therein, for failure to state a cause of action; and

b. Granting defendant such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, should be served so as to be received at the offices of the undersigned not less than seven (7) days prior to the return date of this motion.

Dated: November 16, 2009

BENOWICH LAW, LLP

By:
Leonard Benowich
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

TO: DELBELLO DONNELLAN WEINGARTEN
TARTAGLIA WISE & WIERDEKEHR, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
Attorneys for Defendants Noel B. and Joann Donohoe

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
3 Gannett Drive
White Plains, New York 10604-3407
Attorneys for Defendants Robert and Teri Burke

C:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\nom.wpd

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

LEONARD BENOWICH, an attorney admitted to practice in the Courts of this State, affirms the following under penalty of perjury:

1. I am a member of Benowich Law, LLP, counsel of record for defendant The Nature Conservancy ("TNC").

2. Unless otherwise indicated, I have personal knowledge of the facts and circumstances set forth herein and submit this affidavit in support of TNC's motion to dismiss the Complaint.

3. A true copy of the Complaint in this action is annexed as **Exhibit 1.**

4. A true copy of the Amended Complaint in *Seven Springs, LLC v. The Nature Conservancy, et al.*, Index No. 9130/06 ("*Seven Springs I*"), is annexed as **Exhibit 2.**

5. A true copy of the Preliminary Injunction Order ("PI Order") entered in *Seven Springs I* is annexed as **Exhibit 3.**

6. A true copy of the Complaint in *Seven Springs, LLC v. The Town of North Castle*, Index No. 5484/08 ("*Seven Springs II*"), is annexed as **Exhibit 4.**

7. A true copy of the Stipulation of Settlement dated February 2009, between Seven Springs, LLC and Town of North Castle, is annexed as **Exhibit 5**.

8. Excerpts from the transcript of proceedings held in *Seven Springs I* on April 4, 2008, are annexed as **Exhibit 6**.

9. For the foregoing reasons, and for the reasons set forth in the accompanying memorandum or law, I respectfully submit that the Complaint should be dismissed in all respects.

Dated: November 16, 2009

Leonard Benowich

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\lb-aff.wpd

1

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09
Date Filed: 9/22/09

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial. The basis of venue is the Defendants reside or have a place of business in, and the cause of action arose in, the County of Westchester.

Dated: White Plains, New York
September 22, 2009

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

1290511
014350(1-001

TO: THE NATURE CONSERVANCY
570 Seventh Avenue
New York, New York 10018

ROBERT BURKE
2 Oregon Hollow Road
Armonk, New York 10504

TERI BURKE
2 Oregon Hollow Road
Armonk, New York 10504

NOEL B. DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

JOANN DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09
Date Filed: 9/22/09

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its complaint against defendants, The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joanne Donohoe, alleges, upon information and belief, as follows:

1. Plaintiff, Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and has a place of business located in the Town of North Castle, Westchester County, New York.

3. Upon information and belief, Defendants Robert Burke and Teri Burke (collectively referred to herein as "Burke") are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

4. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe (collectively referred to herein as "Donohoe") are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

5. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

6. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

7. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

8. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

9. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

10. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

11. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

12. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of The Nature Conservancy (the "Nature Conservancy Property").

13. The Nature Conservancy Property and the Seven Springs Parcel were part of certain lands acquired over time by Meyer.

14. The Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

15. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

16. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

17. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

18. By reason of the foregoing and the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior

deeds thereto, and the facts herein set forth, Plaintiff has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified and highlighted (the "Easement" or "Easement Area") on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access. Annexed hereto as Exhibit "A", and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986.

19. At some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used as a public highway for a period of 10 years.

20. In or about 1990 the Town Board of the Town of North Castle purportedly closed a portion of Oregon Road pursuant to Highway Law § 205 as it was no longer used for public travel.

21. The said portion of Oregon Road referred to herein that was purportedly closed and that is referred to on Exhibit "A" "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

22. Upon information and belief, The Town of North Castle caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate and/or metal guide rail (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles and depriving

Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

23. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of The Town of North Castle and to the Planning Board of the Town of Bedford.

24. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel.

25. That the Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road.

26. That the Defendants continue to unlawfully and wrongfully deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel.

27. Upon information and belief, said Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact.

28. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendants and will suffer continuing damages.

29. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 48 AD3d 545).

30. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that the Town of North Castle never extinguished the Easement pursuant to Highway Law § 205.

31. On or about June 12, 2006 title to the property, which is adjacent to the easterly boundary line of the Burke and Donohoe properties, referred to above, to the center line of Oregon Road, was transferred from Realis Associates to Seven Springs by deed dated June 12, 2006 and recorded in the Westchester County Clerk's office on March 17, 2008 in Control Number 480640315. The deed from Realis Associates to Seven Springs specifically provides, among other things, that "the premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in liber 10576 page 243, and as set forth in deed from Realis Associates to Noel B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 8, 1994 in liber 10929 page 35".

32. By reason of the foregoing, the Town of North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe have no valid basis,

in law or fact, to maintain the Gate or any other obstruction and/or barrier on or over Oregon Road, or prevent, or attempt to prevent, Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road.

33. Based upon the foregoing, Defendants Burke and Donohoe have no right, title or interest in, or to, Oregon Road and/or the Easement Area.

34. By reason of the foregoing, the Defendants have no fee interest in, or right of use over, that portion of the said allegedly closed portion of Oregon Road as described above, or the Easement Area, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road or the Easement Area.

35. As a result of the actions of Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

36. By virtue of the foregoing Plaintiff has been damaged in an amount to be determined at trial but not less than $30,000,000.00.

37. By virtue of Defendants' unlawful, improper and intentional acts, Plaintiff should be awarded punitive damages in an amount to be determined at trial but not less than $30,000,000.00.

WHEREFORE, Plaintiff demands judgment:

(a) That Plaintiff have Judgment for damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, individually and

severally, an amount to be determined at trial but not less than $30,000,000.00, with interest thereon and attorneys fees, for the injuries suffered as herein alleged.

(b) That Plaintiff have Judgment for punitive damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe in an amount to be determined at trial but not less than the amount of $30,000,000.00, with interest thereon.

(c) That the Plaintiff have such other, further and different relief as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action.

Dated: White Plains, New York
September 22, 2009

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 9130/06

AMENDED COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its amended complaint against defendants, The Nature Conservancy, Realis Associates, The Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and having a principal place of business at 570 Seventh Avenue, New York, New York, 10018.

3. Upon information and belief, Defendant, Realis Associates ("Realis"), is a New York Partnership having a principal place of business at 356 Manville Road, Pleasantville, New York.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 9130/06

AMENDED COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its amended complaint against defendants, The Nature Conservancy, Realis Associates, The Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and having a principal place of business at 570 Seventh Avenue, New York, New York, 10018.

3. Upon information and belief, Defendant, Realis Associates ("Realis"), is a New York Partnership having a principal place of business at 356 Manville Road, Pleasantville, New York.

4. Upon information and belief, Defendant, The Town of North Castle, is a governmental subdivision of The State of New York, which has been organized and exists under and pursuant to the laws of the State of New York, and is located in Westchester County.

5. Upon information and belief, Defendants Robert Burke and Teri Burke are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

6. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

7. This action is brought pursuant to Article 15 of the Real Property Action and Proceedings Law to compel the determination of claims to certain real property herein described and known as Oregon Road located in the County of Westchester.

8. Annexed hereto as **Exhibit "A"**, and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986. The portion of Oregon Road which is the subject of this action, as the same is shown on the said Maps, has been highlighted.

9. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

10. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

11. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

12. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

13. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

14. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

15. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

16. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of Defendant, The Nature Conservancy (the "Nature Conservancy Property").

17. The Nature Conservancy Property and the Seven Springs Parcel was part of certain lands acquired over time by Meyer.

18. By virtue of the various deeds pursuant to which Meyer acquired title to said real property Meyer had acquired the entire bed of Oregon Road as show on **Exhibit "A"**.

19. Upon information and belief, the Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

20. Upon information and belief, the Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

21. At some point in time prior to 1973 Oregon Road became a public road by virtue of its having been used as a public highway for a period of 10 years.

22. Up until and including May, 1990 when the Town of North Castle allegedly "discontinued" the subject portion of Oregon Road said road was a public street.

23. Upon information and belief, the said portion of Oregon Road referred to herein, at paragraph 8 "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

24. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

25. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

26. By virtue of the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and the facts herein set forth, Plaintiff has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access.

27. That none of the Defendants has any fee interest in or right of user over that portion of the said portion of Oregon Road as described in paragraph 8 hereof, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road.

28. The Defendants and each of them claim, and it appears from the public record that it or they will claim an interest in, and/or the fee title of, the bed of said Oregon Road abutting its or their respective premises as hereinafter set forth, and/or a right to prevent Plaintiff's right of ingress and egress to and from the Seven Springs Parcel to the legally opened portion of Oregon Road.

29. Any estate or interest claimed, or which may be claimed by any Defendant in the premises described in paragraph 8 hereof is invalid and ineffective as against the estate and interest of the Plaintiff therein to a right-of-way and/or easement for ingress and egress over Oregon Road.

30. Any estate, right or interest which Defendant The Nature Conservancy ever had, claims or may claim in the Nature Conservancy Property, or any part thereof, including the estates and interest claimed or which may be claimed by it by virtue of the instruments and facts hereinbefore set forth are ineffective and invalid as against the title and interest of Seven

Springs, LLC, its successors in interest, grantees or transferees in and to an easement for ingress and egress over the Nature Conservancy Property.

31. By reason of the foregoing, and the above-referenced deeds and the rights set forth therein, Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and there is a valid and enforceable easement and/or right of way for ingress and egress for pedestrian and vehicular access over Oregon Road to the south, including over lands which may be owned by The Nature Conservancy and others to the public portion of Oregon Road in favor of Plaintiff, its successors and assigns (the "Easement" or "Easement Area").

32. Upon information and belief there are no Defendants either known or unknown to Plaintiff not herein joined as a party and there is no Defendant who is or might be an infant, mentally retarded, mentally ill or an alcohol abuser.

33. Any judgment granted herein will not affect any person or persons not in being or ascertained at the commencement of this action, who by any contingency contained in a devise or grant or otherwise, could afterward become entitled to a beneficial estate or interest in the aforesaid premises, and every person in being who would have been entitled to such estate or interest, if such event had happened immediately before the commencement of the action is named as a party hereto.

34. No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim of the Plaintiff as set forth herein.

35. None of the Defendants or the parcels owned by them is or will be adversely affected by the relief herein sought.

36. The Defendant, Town of North Castle, is joined herein as a party Defendant by, reason of, among other things, Oregon Road is located in the Town of North Castle, and said municipality purported to close and/or discontinue the portion of Oregon Road which is the subject of this action.

37. The Defendant, Realis Associates, is joined herein as a party Defendant by virtue of having been the developer of the subdivision known as "Oregon Trails" under filed map number 22547, a portion of which abuts the westerly side of Oregon Road.

38. Defendants, Robert Burke and Teri Burke, acquired title to real property known as 2 Oregon Hollow Road, Armonk, New York pursuant to deed dated April 29, 1993 and recorded May 12, 1993 in liber 10576 page 243 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 2 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

39. Defendants, Noel B. Donohoe and Joann Donohoe, acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York pursuant to deed dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 1 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

40. Plaintiff has no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

41. Plaintiff repeats and reiterates each and every allegation contained in paragraphs 1 through 40 above as if the same were more fully set forth at length herein.

42. Defendant Town of North Castle caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate (the "Gate") thereby partially blocking and obstructing direct access to or from Oregon Road to the south by persons in vehicles and depriving Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

43. That the Gate is an unlawful encroachment and obstruction upon the Plaintiff's Easement as aforesaid and has caused and will continue to cause damage to the Plaintiff by reason of Plaintiff's inability to have direct access to the Seven Springs Parcel unimpeded from the south.

44. That by reason of the Gate as aforesaid, the Plaintiff has been and will in the future be deprived of the full use and enjoyment of the Seven Springs Parcel and Plaintiff has thereby suffered and will in the future suffer damages thereby.

45. That the Plaintiff has notified Defendant North Castle that the Gate obstructs direct access to the Seven Springs Parcel from the south, has demanded that Defendant North Castle remove the Gate, and the Defendant has failed to remove the same.

46. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendant and will suffer continuing damages.

47. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 2008 NY Slip Op. 01327).

48. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that Defendant North Castle never extinguished the Easement pursuant to Highway Law § 205.

49. It has been acknowledged in prior Court proceedings by the Town of North Castle that, upon the closing of Oregon Road for public purposes, title reverted to Rockefeller University (Plaintiff's predecessor in interest) upon the closure.

50. By reason of the foregoing, North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and no basis in law or fact to maintain the Gate on or over Oregon Road, or prevent or attempt to prevent Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road.

51. As a result of Defendant's actions Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven

Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

52. That unless the relief be granted to Plaintiff, as hereinafter prayed for, the Plaintiff will suffer irreparable damages and injuries.

53. That Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment:

(1) That the Defendants and each of them and any and every person claiming through or under them and each of them be barred from any and all claim to an estate or interest in the property described in the complaint;

(2) Declaring that there is a valid and enforceable easement and/or right of way of no less than 50 feet in width for ingress and egress for pedestrian and vehicular traffic over Oregon Road to and from The Seven Springs Parcel to the south to the section of Oregon Road more particularly identified in **Exhibit "A"** annexed hereto, including over lands which may be owned by the Nature Conservancy and others, in favor of Plaintiff, its successors and/or assigns.

(3) Declaring that Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts the Seven Springs Parcel on its westerly side.

(4) Declaring that Plaintiff, its successors and assigns also have the right to an easement and/or right of way of no less than 50 feet in width for ingress and egress, and for pedestrian and vehicular access over Oregon Road;

(5) Enjoining Defendants from interfering with and obstructing Plaintiff's right-of-way and Plaintiff's right of access to Plaintiffs' property as aforesaid.

(6) That the Defendants be restrained by injunction or otherwise from maintaining any obstructions, barriers, gates, or the like, on, or across Oregon Road which obstructs or blocks the use by Plaintiff, its invitees and utility and other vehicles from their lawful rights to pass over the land to have ingress and egress over Oregon Road to the Seven Springs Parcel.

(7) That Defendant, Town of North Castle, be directed to remove the Gate and all obstructions and/or barriers placed and/or maintained by it, on, or across Oregon Road which obstructs the use of Plaintiff, its invitees and utility and other vehicles from their lawful rights to pass over the land and to have ingress and egress over Oregon Road to the Seven Springs Parcel.

(8) That the Plaintiff have such other, further and different relief in the premises as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action, such costs to be against such Defendants as may defend this action.

Dated: White Plains, New York
April 3, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

3

Exhibit 3

AT the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on April 14, 2008

PRESENT:

HON:

RORY J. BELLANTONI,

Acting Justice.

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No. 9130/06

ORDER GRANTING PRELIMINARY INJUNCTION

Defendant The Nature Conservancy ("TNC") having moved this Court, by order to show cause dated March 18, 2008, for a temporary restraining order and preliminary injunction ("Motion"), and this matter having come on to be heard before the Court on March 18, 2008 and on April 4, 2008, and the Court having considered the following papers in support of and in opposition to the Motion, all with due proof of service thereof: (1) the Order to Show Cause dated March 18, 2008, supported by the Affirmation of Leonard Benowich, Esq., dated March 13, 2008, the Affidavit of Amy Fenno, sworn to March 11, 2008, and the Affidavit of Jamie Norris, sworn to March 13, 2008, together with Exhibits 1-18 annexed thereto, and a

memorandum of law dated March 13, 2008, in support of the Motion; (2) the affidavit of Alfred Donnellan, Esq., sworn to March 17, 2008, and Exhibits A-E annexed thereto (on behalf of Plaintiff Seven Springs, LLC), and a memorandum of law dated March 17, 2008, in opposition to the Motion; (3) the Affidavit of Alfred Donnellan, Esq., sworn to March 26, 2008, and Exhibits A-G thereto (on behalf of Plaintiff Seven Springs, LLC) and a memorandum of law dated March 26, 2008, in opposition to the Motion; (4) the Reply Affirmation of Leonard Benowich, dated April 2, 2008, and Exhibits 19-22 annexed thereto, and a reply memorandum of law dated April 2, 2008, in support of the Motion; (5) the affirmation of John B. Kirkpatrick, Esq., sworn to April 2, 2008 (on behalf of defendants Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe), in support of the Motion; and (6) the affirmation of Gerald D. Reilly, Esq., dated April 2, 2008 (on behalf of defendant The Town of North Castle), in support of the Motion; and the parties, by their respective counsel, having been heard on March 18, 2008 in support of and in opposition to TNC's application for a temporary restraining order; and the Court having issued a temporary restraining order on March 18, 2008, and having directed that the parties appear on April 4, 2008 for oral argument of that portion of the Motion which sought a preliminary injunction; and the parties, by their respective counsel, having appeared before this Court for oral argument with respect thereto; and the Court, after hearing the arguments of counsel and upon due deliberation and consideration of the foregoing, having rendered its decision on the record of the proceedings held on April 4, 2008;

NOW, on Motion of BENOWICH LAW, LLP, counsel of record for defendant TNC, it is hereby

ORDERED, that TNC's Motion for a preliminary injunction is granted; and it is further

ORDERED, that during the pendency of this action, Plaintiff, its agents, employees and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing, be and they hereby are preliminarily enjoined from:

(a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and

(b) performing any work upon any land owned by TNC, including that portion of Oregon Road which is lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal); and it is further

ORDERED, that within ten (10) days of service of a copy of this order with notice of entry, TNC shall give and file an undertaking in the amount of One Hundred Thousand Dollars ($100,000).

ENTER:

Rory J. Bellantoni, A.J.S.C.

C:\Main Files\TNC\SEVEN SPRINGS\Litigation\TRO\PI ORDER.wpd

Certificate of Service by First Class Mail

LEONARD BENOWICH, an attorney duly admitted to practice in this Court, hereby affirms, under the penalty of perjury, that on April 15, 2008, I served the foregoing **Notice of Filing Undertaking - CPLR 6312** and **Notice of Entry** upon the following counsel:

DelBello Donnellan Weingarten, Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

Stephens Baroni Reilly & Lewis, LLP
75 Main Street
White Plains, New York 10601
Attorneys for Defendant Town of North Castle

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
120 Bloomingdale Road
White Plains, New York 10605
Attorneys for Defendants Burke and Donohoe

by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the party and/or parties listed above.

Dated: White Plains, New York
April 15, 2008

Leonard Benowich

4

Exhibit 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE TOWN OF NORTH CASTLE,

Defendant.

Index No. 05484-08
Date Filed: 3/14/08

SUMMONS

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial. The basis of venue is the Defendant is situated in the County of Westchester.

Dated: White Plains, New York
March 14, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: THE TOWN OF NORTH CASTLE
15 Bedford Road
Armonk, New York 10504

126060
014150-001

Poor Quality

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE TOWN OF NORTH CASTLE,

Defendant.

Index No. 05484-08
Date Filed: 3/14/08

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its complaint against defendant, The Town of North Castle, alleges, upon information and belief, as follows:

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2 The Town of North Castle is a governmental subdivision of The State of New York, which has been organized and exists under and pursuant to the laws of the State of New York, and is located in Westchester County.

3. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94 17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94 18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

4. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester

County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel

5. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

6. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

7. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

8. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

9. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

10 Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of The Nature Conservancy (the "Nature Conservancy Property").

11. The Nature Conservancy Property and the Seven Springs Parcel was part of certain lands acquired over time by Meyer.

12. The Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

13. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

14. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

15 The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

16. By reason of the foregoing and the December 22, 1995 Deed recorded in liber 11525 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and the facts herein set forth, Plaintiff has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified and highlighted (the "Easement" or "Easement Area") on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access. Annexed hereto as Exhibit "A", and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986.

17 At some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used as a public highway for a period of 10 years.

18. In or about 1990 the Town Board of the Town of North Castle purportedly closed a portion of Oregon Road pursuant to Highway Law § 205 as it was no longer used for public travel.

19. The said portion of Oregon Road referred to herein that was purportedly closed and that is referred to on Exhibit "A" "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

20. That Defendant Town of North Castle has no fee interest in or right of user over that portion of the said allegedly closed portion of Oregon Road as described above, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road.

21. Defendant caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles and depriving Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

22. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of Defendant and to the Planning Board of the Town of Bedford.

23. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel.

24. That Defendant has taken, and continues to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road.

25. That the Gate is an unlawful encroachment and obstruction upon the Plaintiff's Easement as aforesaid and has caused and will continue to cause damage to the Plaintiff by reason of Plaintiff's inability to have direct access to the Seven Springs Parcel unimpeded from the south.

26. That by reason of the Gate as aforesaid, the Plaintiff has been and will in the future be deprived of the full use and enjoyment of the Seven Springs Parcel and Plaintiff has thereby suffered and will in the future suffer damages thereby.

27. That the Plaintiff has notified the Defendant that the Gate obstructs direct access to the Seven Springs Parcel from the south, has demanded that Defendant remove the Gate, and the Defendant has failed to remove the same. when?

28. That Defendant, through its elected officials, has in the past unlawfully, wrongfully and improperly collaborated with, and continues to unlawfully, wrongfully and improperly collaborate with, private parties in a joint effort to deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel.

29. Upon information and belief, said Defendant's acts are willful, without reasonable or probable cause and are without basis in law or fact.

30. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendant and will suffer continuing damages.

31. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 2008 NY Slip Op. 01327).

32. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that Defendant never extinguished the Easement pursuant to Highway Law § 205.

33. It has been acknowledged in prior Court proceedings by the Town of North Castle that, upon the closing of Oregon Road for public purposes, title reverted to Rockefeller University (Plaintiff's predecessor in interest) upon the closure.

34. By reason of the foregoing, North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and no basis in law or fact to maintain the Gate on or over Oregon Road, or prevent or attempt to prevent Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road

35. As a result of Defendant's actions Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven

Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

36. By virtue of the foregoing Plaintiff has been damaged in an amount to be determined at trial but not less than $300,000,000.00.

37. By virtue of Defendant's unlawful, improper and intentional acts, Plaintiff should be awarded punitive damages in an amount to be determined at trial but not less than $300,000,000.00.

WHEREFORE, Plaintiff demands judgment:

(a) That Plaintiff have Judgment for damages against Defendant an amount to be determined at trial but not less than $300,000,000.00, with interest thereon and attorneys fees, for the injuries suffered as herein alleged

(b) That Plaintiff have Judgment for punitive damages against Defendant in an amount to be determined at trial but not less than the amount of $300,000,000.00, with interest thereon.

(c) That the Plaintiff have such other, further and different relief as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action.

Dated: White Plains, New York
March 14, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

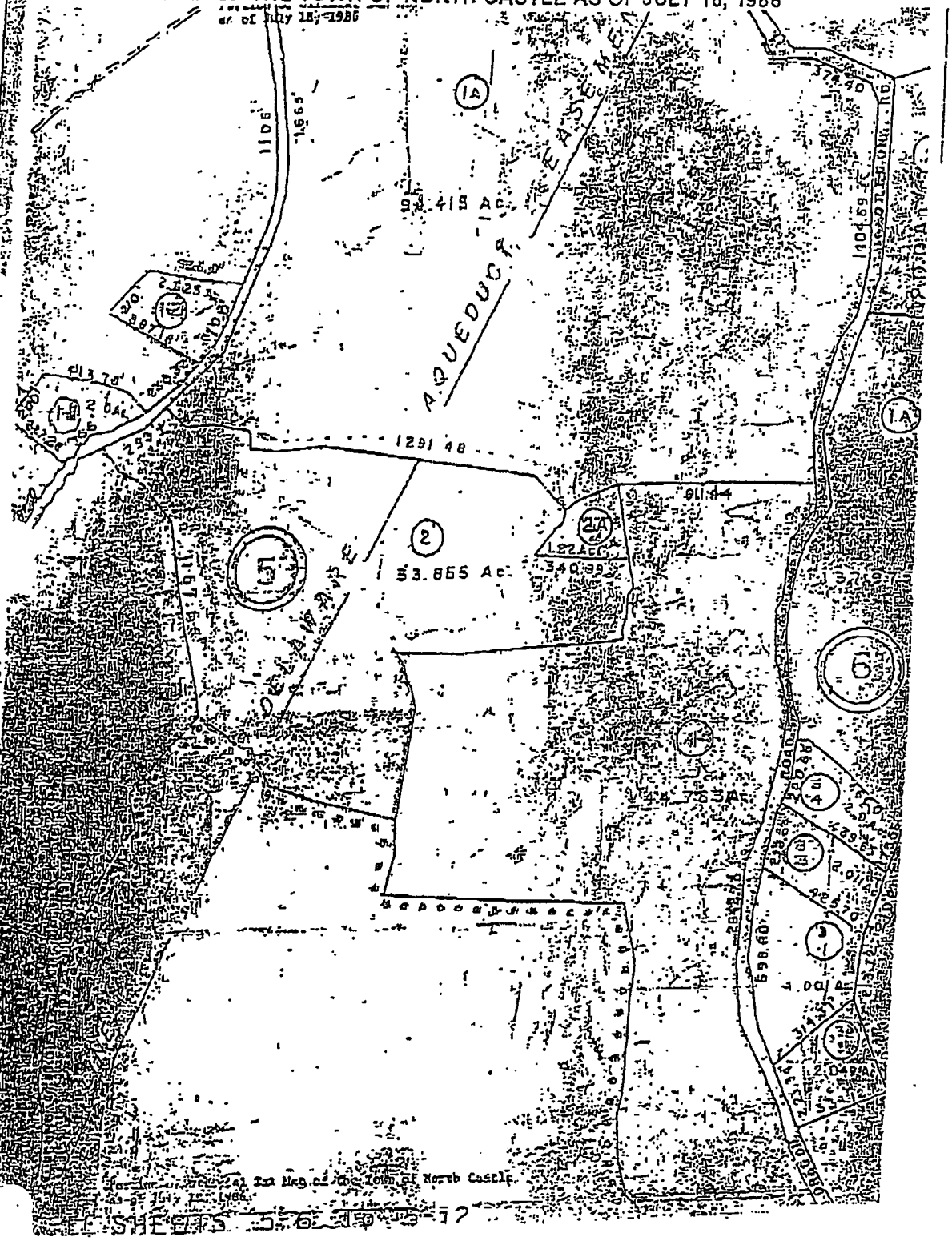
By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

1240671
914-3506-001

EXHIBIT A

Portion of official Map of the Town of North Castle
adopted by the Town Board on October 23, 1997

EXHIBIT A TO COMPLAINT -
PORTION OF THE OFFICIAL MAP OF THE TOWN OF NORTH CASTLE ADOPTED BY THE TOWN BOARD ON OCTOBER 23, 1997 AND PORTION OF THE OFFICIAL TAX MAP OF THE TOWN OF NORTH CASTLE AS OF JULY 16, 1986



Poor Quality

5

Exhibit 5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

STIPULATION OF SETTLEMENT

Index No.: 9130/2006

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE TOWN OF NORTH CASTLE,

Defendant.

----------X

STIPULATION OF SETTLEMENT

Index No.: 5484/2008

WHEREAS, Plaintiff Seven Springs, LLC ("Plaintiff") has commenced the above-captioned actions against the Town of North Castle ("North Castle") and others (collectively with North Castle, "Defendants"), in relation to a dispute over ownership and easement rights to Oregon Road, which spans between the Towns of North Castle and New Castle ("Oregon Road");

WHEREAS, in and by the first action, Index No. 9130/06 (the "Declaratory Judgment Action"), Plaintiff sought quiet title to Oregon Road and claimed a right to utilize this road, and the Town of North Castle claimed that it had properly closed this road, effectively precluding any intended use of the road by the Plaintiff or any others;

WHEREAS, the other Defendants similarly contested Plaintiff's rights to Oregon Road;

WHEREAS, in and by the second action against Defendant North Castle, Index No. 5484/2008 (the "Damages Action") Plaintiff sought compensatory and punitive damages associated with an allegedly illegal interference with alleged property rights;

WHEREAS, during the past three years, the parties hereto have been engaged in lengthy, protracted and costly litigation over the issues raised in the Complaints herein; and

WHEREAS, in an effort to resolve the disputes and claims between Plaintiff and Defendant North Castle, the parties hereto have reached an agreement which compromises and settles both actions as they relate to Defendant North Castle.

IT IS NOW THEREFORE, STIPULATED AND AGREED, by and between Plaintiff and Defendant North Castle as follows:

I. DECLARATION AND FINDINGS:

That after lengthy negotiations and deliberation, the parties hereto declare and find that:

A. It is in their best interests and in the best interests of the people of the Town of North Castle that the within actions be settled and discontinued on the terms and conditions hereinafter set forth.

B. Each of the parties hereto has the power and authority to enter into this Stipulation and upon the full and final execution thereof by the Supervisor of the Town of North Castle, on behalf of Defendant North Castle and the Town Board, and the respective attorneys for each said person, entity and party, this Stipulation shall be submitted to the Honorable Rory J. Bellantoni, Justice of the Supreme Court of the State of New York, for approval, and shall thereafter constitute an Order in the Declaratory Judgment Action (Index No. 9130/2006).

II. PLAINTIFF'S ACTIONS IN FURTHERANCE OF THIS STIPULATION:

A. Plaintiff hereby withdraws in its entirety, discontinues, and dismisses with prejudice the Damages Action bearing Index No. 5484/2008.

B. Plaintiff further discontinues and dismisses with prejudice, as against Defendant North Castle only, the Declaratory Judgment Action bearing Index No. 9130/2006.

C. Plaintiff further releases Defendant North Castle of any and all actions, claims, causes of action, whether known or unknown, suspected or unsuspected, contingent or non-contingent, in law or in equity, based on state, local, federal, statutory or common law or any other law, rule or regulation, seeking compensatory, punitive or equitable relief, multiple damages or attorneys fees, based on Defendant North Castle's closing of Oregon Road as a public highway, the erection of a gate at Pole 40, or any other factual allegation as alleged in the Complaints in the Damages and Declaratory Judgment Actions.

D. Plaintiff will prepare and submit a revised proposal for the Seven Springs development project in the North Castle area, which will incorporate elements agreeable to, and in the mutual interests of, both the Plaintiff and Defendant North Castle and which application is expected to reasonably conform to the Code of the Town of North Castle.

E. During the course of review of said application, Plaintiff will undertake reasonable efforts in cooperation with Defendant North Castle to sustain a dialog with the Town of Bedford toward the goal of unifying Plaintiff's property by connecting the Bedford private road with the North Castle private road.

III. DEFENDANT NORTH CASTLE'S ACTIONS IN FURTHERANCE OF THIS STIPULATION:

A. Defendant North Castle agrees that it will not contest Plaintiff's position that it has easement rights over Oregon Road as shown in its title report.

B. Defendant North Castle will support the use of Oregon Road as a gated private road providing sole access to Plaintiff's North Castle property in connection with a revised subdivision application to be filed by Plaintiff with the North Castle Planning Board.

C. Defendant North Castle will provide reasonable cooperation to Plaintiff in connection with the on-going litigation against the remaining Defendants, including during the discovery process currently in progress.

D. Defendant North Castle, by and through Supervisor Reese Berman, will participate with Plaintiff in the preparation of, and will jointly with Plaintiff issue, a mutually acceptable press release announcing this settlement.

E. Defendant North Castle releases Plaintiff of any and all actions, claims, causes of action, whether known or unknown, suspected or unsuspected, contingent or non-contingent, in law or in equity, based on state, local, federal, statutory or common law or any other law, rule or regulation, seeking compensatory, punitive or equitable relief, multiple damages or attorneys fees, in connection with the Plaintiff's Damages Action bearing Index No. 5484/2008 and Plaintiff's Declaratory Judgment Action bearing Index No. 9130/2006.

F. Once a Lead Agency has been designated for the purposes of SEQR review, Defendant North Castle will recommend to such Lead Agency that in accordance with SEQRA §617(8)(a), public scoping is not required for the revised subdivision application and that the public scoping document from the prior proposal for subdivision be utilized insofar as applicable to the property in North Castle.

G. Defendant North Castle will also recommend to the Lead Agency that all of Plaintiff's work product done in pursuit of earlier applications of Plaintiff's North Castle property shall be incorporated therein, as appropriate, so as to avoid duplication of work or repetition of work in the new Draft Environmental Impact Statement.

IV. BOTH PARTIES UNDERSTANDINGS WITH RESPECT TO THIS STIPULATION:

A. If the North Castle Planning Board is designated Lead Agency as required by SEQRA, North Castle will thoroughly and carefully, and in accordance with its statutory obligations, review Plaintiff's submission of a revised subdivision application and any additional approvals required in connection with the proposed development of the site in order to determine whether the proposed development of the site as therein provided for will have a significant impact upon the environment. It is specifically understood and agreed by and between the parties to this Stipulation that the subdivision application as herein contemplated is subject to and conditioned upon completion of all of the requirements of SEQRA, none of the issues of which have been predetermined by North Castle.

B. It is understood that North Castle shall carry out the SEQRA review process in the spirit of §617.3(h) of SEQRA, which calls for "minimum procedural and administrative delay" and further specifies that agencies must expedite all SEQR proceedings in the interest of prompt review."

C. In an effort to speed the completion of the review process, avoid confusion and resolve issues in the shortest period of time, North Castle will allow and encourage the Plaintiff, as Project Sponsor, to meet directly with the Town Planner, the Town Engineers and such other experts and/or consultants utilized by North Castle, as often as the need therefore may appear.

V. MISCELLANEOUS:

A. The Plaintiff and Defendant North Castle agree that they are entering into this Stipulation in a spirit of cooperation, candor and for the achievement of common beneficial interests, and will process the forthcoming application in that spirit.

B. The Supreme Court of the State of New York, County of Westchester by the Honorable Rory J. Bellantoni or such other Justices as may from time to time be designated, shall continue to exercise jurisdiction over this action for the purposes of periodic review to determine the progress of the within settlement and to specifically enforce those provisions of this Stipulation which are capable of specific enforcement to the extent permitted by law and of making such other or further orders or judgments as it finds appropriate under the circumstances existing at the time of such application.

C. Both parties shall bear their own attorneys' fees, costs and expenses.

D. This Stipulation may be executed in counterparts and photocopied signatures shall be treated as originals.

DELBELLO, DONNELLAN, WEINGARTEN, WISE & WIEDERKEHR, LLP

By: Alfred E. Donnellan., Esq.

Attorneys for Plaintiff

1 North Lexington Avenue
White Plains, New York 10601
(914) 682-0200

February 26, 2009

THE TRUMP ORGANIZATION AND SEVEN SPRINGS, LLC

By: Hal Goldman

Vice President for Development
February 25, 2009

STEPHENS, BARONI, REILLY & LEWIS, LLP

By: Roland A. Baroni, Jr., Esq.

Attorneys for Defendant North Castle

175 Main Street, Suite 800
White Plains, New York 10601
(914) 761-0300

February 25, 2009

TOWN OF NORTH CASTLE

By: Reese Berman

Town Supervisor,
Town of North Castle
February 25, 2009

This Stipulation of Settlement is **SO ORDERED** at White Plains, New York this _____ day of _____, 2009.

_____
Hon. Rory J. Bellantoni, J.S.C.

6

Exhibit 6

NEW YORK STATE SUPREME COURT
COUNTY OF WESTCHESTER : PART RJ

SEVEN SPRINGS, LLC,,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

INDEX NO. 9130/06

Westchester County Courthouse
White Plains, N.Y. 10601
APRIL 4, 2008

B E F O R E:

HON. RORY J. BELLANTONI,
Acting Justice of the Supreme Court

SUSAN M. LANZETTA
Official Court Reporter

creation and it's certainly a case to be relied on in trying to determine whether an implied easement exists. It's not dispositive. I believe the defendants have showed a likelihood of success on the merits at this time. Very difficult in these type of cases because a resolution of the facts may ultimately be in favor of the complainant, Seven springs. But at this point in time it appears that the defendants are likely to success on the merits given the only argument I've seen put before the Court is that Holloway stands for the proposition that an implied easement was created given the line of case law that's developed and many different kind of easements that exist noting that the Court discussed implied easements are not favored. This is an old case, I agree just because it's from 1893 doesn't mean it's not valid. Certainly case law has developed since and with the development of the case law comes

3

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No. 21162/09

----------x

MEMORANDUM OF LAW IN SUPPORT OF THE NATURE CONSERVANCY'S MOTION TO DISMISS COMPLAINT

Preliminary Statement

Defendant The Nature Conservancy ("TNC") respectfully submits this memorandum in support of its motion to dismiss the Complaint.

The Complaint should be dismissed because it fails to state a cause of action known to or cognizable under New York law.

The Complaint alleges only that TNC (and the other defendants) have taken the "position" in another action that Plaintiff (also the plaintiff in that other action) does not have the easement rights over Oregon Road which Plaintiff claims to have. The Complaint in this action (Exhibit 1) alleges nothing other than that the Defendants in this action have defended themselves in a prior, and still pending, declaratory judgment action.

This is the second action that Plaintiff has commenced against these Defendants, but it is the third action commenced by Plaintiff concerning Oregon Road. In the first action, *Seven Springs, LLC v. The Nature Conservancy, et al.*, Index No. 9130/06 ("*Seven Springs I*"), Seven Springs seeks a declaration that it has an easement over a portion of Oregon Road in the Town of North Castle, including over land that is owned by TNC.

This action contains no substantive allegations that are not asserted in *Seven Springs I*, and it alleges nothing more than that TNC and the other defendants have taken certain "positions" to defend themselves in *Seven Springs I*. The Complaint does not allege that TNC (or any of the other defendants) have done anything, or that they have failed to do anything, they are somehow required to do.

Accordingly, the Complaint should be dismissed because it fails to state a cause of action known to New York law or, indeed, any body of law.

Background Facts

Seven Springs I

In May 2006, Plaintiff commenced *Seven Springs I*, seeking a declaration that it has an easement over a portion of so-called Oregon Road in North Castle, including an easement over lands owned entirely by TNC. (Exhibit 2)

Seven Springs I involves competing claims to the use of a road, commonly called Oregon Road. Seven Springs owns lands which lie, essentially, to the east of Oregon Road, and TNC owns lands - in a sort of "L"-shape - which lie to the west of Oregon Road, and, on the southerly side of Seven Springs's land, also on the east of Oregon Road. There is no dispute that, in *Seven*

Springs I, Seven Springs seeks a declaratory judgment, at least in part, that it has an easement over lands owned entirely by TNC.

TNC acquired its lands by deed dated May 1973, from the Eugene and Agnes B. Meyer Foundation ("Meyer Foundation"). TNC maintains its lands (the "TNC Parcel") as a nature preserve, as required by the Meyer Foundation. That portion of Oregon Road which abuts and lies within the TNC Parcel is, and has been, used as a hiking/nature trail since at least 1973.

Seven Springs acquired its lands by deed dated December 1995 from Rockefeller University. Seven Springs claims that the land it owns and which is involved in *Seven Springs I* (and in this case) is the same land as was conveyed by the Meyer Foundation to Yale University, and which ultimately was acquired by Seven Springs in 1995 (the "Seven Springs Parcel").

Even before Seven Springs had acquired the Seven Springs Parcel, however, in 1990, the Town of North Castle (the "Town") installed a gate which blocked and prevented vehicular access onto Oregon Road at its southerly terminus, where the unpaved portion of Oregon Road (which is the subject of this case) meets the northerly terminus of the paved portion of Oregon Road.

By order entered November 3, 2006, Justice LaCava granted the defendants' motion to dismiss the complaint in *Seven Springs I*. Seven Springs appealed that dismissal and, by order dated February 2008, the Appellate Division, Second Department, reversed and reinstated that complaint, stating only that Seven Springs had stated a cause of action "based upon an implied private easement arising in January 1973 when the [Meyer] Foundation conveyed to the plaintiff's predecessor in interest a parcel of land bounded by a road owned by the Foundation

and used at the time as a public highway." *Seven Springs, LLC v. Nature Conservancy*, 48 A.D.3d 545, 855 N.Y.S.2d 547 (2nd Dep't 2008).

Following the Second Department's decision, however, Seven Springs began to act as if it had won *Seven Springs I*, on the merits. Supreme Court subsequently disabused Seven Springs of that erroneous notion.

Shortly after *Seven Springs I* was returned to Supreme Court, TNC sought and obtained a preliminary injunction ("PI Order") (Exhibit 3) which enjoins Seven Springs from acting - and from making use of Oregon Road (including that portion owned by TNC) - as if the declaratory judgment it seeks in *Seven Springs I* had already been granted. The Court enjoined Seven Springs, and all persons having notice of that PI Order, from:

> (a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and
>
> (b) performing any work upon any land owned by TNC, including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal);

Seven Springs filed a notice of appeal, but it never perfected its appeal from that PI Order.

Seven Springs II

At about the same time as TNC filed the motion which resulted in the Preliminary Injunction Order ("PI Order"), Seven Springs commenced a second action, solely against the Town. *Seven Springs, LLC v. The Town of North Castle*, Index No. 5484/08 ("*Seven Springs II*").

The complaint in *Seven Springs II* (Exhibit 4) was substantially the same as the amended complaint in *Seven Springs I* - with one major difference: in *Seven Springs II*, Seven Springs sought $300 million in compensatory damages, and $300 million in punitive damages from the Town.

It is apparent that Seven Springs commenced *Seven Springs II* in order to pressure the Town to abandon its defense of *Seven Springs I* and to encourage the Town to pressure TNC to abandon its defense of *Seven Springs I* and to give Seven Springs what it wants: free use of Oregon Road for "secondary" vehicular access to a proposed (but not approved) development of multi-million-dollar luxury homes.

In the late winter/early spring of 2009, Seven Springs finally got what it wanted from the Town: the Town's acquiescence in Seven Springs's proposed development plan in exchange for discontinuance of *Seven Springs II* and discontinuance of the claims it had asserted against the Town in *Seven Springs I*. (Exhibit 5)

Seven Springs III

When TNC refused to settle with Seven Springs, Seven Springs commenced this action - *Seven Springs III.* The Complaint in this action is almost a carbon copy of the complaint Seven Springs filed against the Town in *Seven Springs II,* with one major difference: the Complaint now seeks damages of only $60 million - $30 million in compensatory damages (Cplt, ¶36), and $30 million in punitive damages (Cplt, ¶37) - down from the combined $600 million in damages Seven Springs had sought from the Town in *Seven Springs II.* (*Compare* Exhibits 1 and 4)

The Complaint in this action does not allege that TNC (or, indeed, any of the Defendants) did anything other than defend themselves in *Seven Springs I*; and it certainly does not allege that TNC or any other Defendant did anything more than "take[] the position" that Plaintiff does not have the rights to use Oregon Road which it seeks to have declared in its favor.

The Complaint does not allege - because it cannot allege - that Defendants have done anything other than to "take" a "position" and defend themselves in *Seven Springs I.* Rather, the Complaint alleges only that:

- "the Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road" (Cplt, ¶25); and
- "the Defendants continue to unlawfully and wrongfully deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder delay and /or preclude the development of the Seven Springs Parcel." (Cplt, ¶26)

The only "act" that can be implied from the Complaint - and it must be implied because it is not alleged in the Complaint - is that TNC and the other defendants herein have defended

themselves in *Seven Springs I*, and have refused to give Seven Springs what it wants before it has established its rights thereto in Court.

And, despite the fact that the Complaint fails to allege an actual "act" undertaken or committed by any of the Defendants in this case, Plaintiff nevertheless alleges that such "acts" are willful and malicious and justify an award of punitive damages.

Finally, this action is meritless if for no other reason than that the Court in *Seven Springs I* has not issued a declaratory judgment decreeing that Seven Springs has the rights it seeks in that action. The Complaint in this case has no basis in law, and this action has no purpose other than to punish Defendants for defending *Seven Springs I*, and for maintaining the TNC Parcel as a nature preserve as the grantor - the Meyer Foundation - required it to do.

Argument

THE COMPLAINT DOES NOT ASSERT A CAUSE OF ACTION KNOWN TO OR COGNIZABLE UNDER NEW YORK LAW

This Court must dismiss a complaint where, as here, it does not assert a cause of action known to or cognizable under New York law. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Even assuming the truth of all facts asserted in the Complaint, *id.; Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592 (1980); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314 (1976), Plaintiff has not asserted - and it does not have - a cause of action known to or recognizable under New York law. *East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, ___ A.D.3d ___, 884 N.Y.S.2d 94 (2nd Dep't 2009), *citing Steve*

Elliot, LLC v. Teplitsky, 59 A.D.3d 523, 524, 873 N.Y.S.2d 672 (2nd Dep't 2009); *Fishberger v. Voss*, 51 A.D.3d 627, 628, 858 N.Y.S.2d 257 (2nd Dep't 2008).

Where, as here, the facts as alleged do not fit within any cognizable legal theory, the cause of action must be dismissed. *Oszustowicz v. Admiral Ins. Brokerage Corp.*, 49 A.D.3d 515, 853 N.Y.S.2d 584 (2nd Dep't 2008).

The Complaint in this action alleges nothing more than that Plaintiff sued Defendants in *Seven Springs I*, claiming to have rights in and to Oregon Road and seeking a declaratory judgment as to the parties' rights, and that Defendants have defended themselves in that declaratory judgment action. The Complaint fails to state a cause of action known to or cognizable under New York Law.

1. There is no Contract-based Claim

There is - and can be - no allegation that TNC or any of the Defendants owed or breached any contractual duty to Plaintiff. Under New York law, a complaint for breach of contract must allege (1) the existence of a valid contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages. *Noise In Attic Productions, Inc. v. London Records*, 10 A.D.3d 303, 782 N.Y.S.2d 1 (1st Dep't 2004); *Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2nd Dep't 1986); *accord J & L American Enterprises, Ltd. v. DSA Direct, LLC*, 10 Misc. 3d 1076(A), 814 N.Y.S.2d 890 (Sup. Ct., N.Y. Co. 2006); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2nd Cir. 1994). The Complaint alleges no contract and no contractual (or even *quasi*-contractual) duty owed to Plaintiff.

2. There is no Tort-based Claim

There is - and can be - no allegation that any of the Defendants owed or breached any other non-contractual duty to Plaintiff.

Tort duties arise out of a relation, they do not exist in a vacuum. Where, as here, the "acts" purportedly complained of in the Complaint revolve around the "position[s]" taken by TNC and the other Defendants in their defense of *Seven Springs I*, the relationship that must be examined is that of adverse parties in a litigation. There is nothing in New York law which requires that defendants in a lawsuit must refrain from taking positions in that lawsuit which, if sustained by the Court, would result in the dismissal or denial of that plaintiff's claim.

Because a finding of liability in tort must be based on a breach of duty, the threshold question in this case is whether the alleged tortfeasor (TNC and the Defendants) owed a duty of care to Plaintiff in the context of their defense of *Seven Springs I*. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002); *Darby v. Compagnie National Air France*, 96 N.Y.2d 343, 728 N.Y.S.2d 731 (2001).

The answer is "no."

"The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court. *Sanchez v. State of New York*, 99 N.Y.2d 247, 252, 754 N.Y.S.2d 621 (2002); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585, 611 N.Y.S.2d 817 (1994); *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 357 (1997).

Although Plaintiff commenced *Seven Springs I*, it has not yet obtained the declaratory judgment which is the ultimate relief requested therein.[1] Moreover, when the Court granted TNC's motion for the PI Order, the Court expressly stated that: "I believe the defendants have show[n] a likelihood of success on the merits at this time." (Exhibit 6)

Accordingly, at this moment, Plaintiff simply does not have the rights to use Oregon Road which the Complaint alleges the Town of Bedford requires Plaintiff to have in order for Plaintiff even to be able to pursue its proposed development. (Cplt, ¶24)

3. Plaintiff has no Cause of Action based on any "Position" Taken by any Defendant in its Defense of *Seven Springs I*

A plaintiff, such as Seven Springs, has no independent cause of action against a defendant for defending itself in another ongoing action. A party has every right to defend itself in litigation.

Significantly, TNC's defense of *Seven Springs I* is more than justified: the Court in that case found that TNC - not Seven Springs - is likely to prevail and issued the PI Order.

The Complaint simply does not allege that TNC or the other Defendants in this action have done anything other than take a "position" in *Seven Springs I.*

In any event, actions taken and statements made in litigation are absolutely privileged, *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); *Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 209, 464 N.Y.S.2d 424 (1983); *Wiener v. Weintraub*, 22 N.Y.2d 330,

---

[1] Thus, if Plaintiff were to try to craft a novel cause of action for, say, "malicious defense of action," along the lines of the cause of action for "malicious prosecution," Plaintiff would still have to show that the prior action, *Seven Springs I*, had been terminated in its favor. *See e.g. Felske v. Bernstein*, 173 A.D.2d 677, 570 N.Y.S.2d 331 (2nd Dep't 1991), *quoting Berman v. Silver, Forrester & Schisano*, 156 A.D.2d 624, 625, 549 N.Y.S.2d 125 (2nd Dep't 1989); *Oceanside Enterprises, Inc. v. Capobianco*, 146 A.D.2d 685, 537 N.Y.S.2d 190 (2nd Dep't 1989).

292 N.Y.S.2d 667 (1968); *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.23d 136, 615 N.Y.S.2d 410 (2nd Dep't 1994); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 828 N.Y.S.2d 315 (1st Dep't 2007) ("the principle underlying the absolute privilege for judicial proceedings is that 'the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to the litigation,' which freedom 'tends to promote an intelligent administration of justice'"); *Sinrod v. Stone*, 20 A.D.3d 560, 799 N.Y.S.2d 273 (2nd Dep't 2005), and they are not subject to collateral review in another plenary action.

Moreover, the Complaint itself demonstrates that it is not the "position" TNC has taken - or, indeed, anything else TNC has done or may have done - which is the proximate cause of any delay or interference with Plaintiff's purported development plan. The Complaint alleges that the Town of Bedford "has required, *among other things*, that Plaintiff have secondary access to the Seven Springs Parcel." *Id.* (emphasis added). The Complaint alleges that the Town of Bedford has required not just "secondary access" to the Seven Springs parcel but also "other things." *Id.*

Significantly, the Complaint does not even allege that such "secondary access" must be over Oregon Road and over TNC's land.

Without a judicial declaration that it has the rights over Oregon Road which it seeks in *Seven Springs I*, or which, the Complaint alleges, the Town of Bedford has required, "among other things," Plaintiff simply cannot contend that it has been damaged in any way whatsoever by any "position" TNC has taken in *Seven Springs I*.

4. The Complaint Contains no Basis for Claiming Punitive Damages

The Complaint contains a gratuitous, but unsupported, allegation that Defendants' unidentified "acts" are "unlawful, improper and intentional." (Cplt, ¶37) But the Compliant does not even allege that any of the Defendants actually did anything - malicious or otherwise.

Although Plaintiff alleges that TNC and the other defendants have acted maliciously or with malice, there is no factual allegation - well-pleaded or otherwise - that any of the Defendants has done anything that is or could remotely be considered as malicious. *See e.g. East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, ___ A.D.3d ___, 884 N.Y.S.2d 94 (2nd Dep't 2009).

Plaintiff's request for punitive damages in this case is meritless. "Punitive damages are only available for claims involving a gross and wanton fraud or wrong perpetrated upon the public at large." *Garrity v. Lyle*, 40 N.Y.2d 354, 357-58, 386 N.Y.S.2d 831 (1976); *see also Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 N.Y.2d 603, 612 N.Y.S.2d 339 (1994); *Aronis v. TLC Vision Centers, Inc.*, 49 A.D.3d 576, 853 N.Y.S.2d 621 (2nd Dep't 2008) ("[p]unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives").

The award of punitive damages must advance a strong public policy of the State by deterring its future violation. *Randi A.J. v. Long Island Surgi-Center*, 46 A.D.3d 74, 842 N.Y.S.2d 558 (2nd Dep't 2007). Indeed, as the Court of Appeals has often said, a principal goal of punitive or exemplary damages is to "deter future reprehensible conduct" by the wrongdoer

"and others similarly situated." *Id., quoting Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 479, 489, 836 N.Y.S.2d 509 (2007).

In this case, Plaintiff seeks recovery for a purely private wrong.

Conclusion

TNC's motion should be granted. The Complaint should be dismissed in all respects.

Dated: November 16, 2009

BENOWICH LAW, LLP

By: _____
Leonard Benowich
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

C:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\dismiss-memo.wpd

4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Index No. 21162/09

Plaintiff,

-against-

NOTICE OF CROSS-MOTION

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

S I R S :

PLEASE TAKE NOTICE, that upon the Affidavit of Alfred E. Donnellan, Esq., sworn to the 21st day of January, 2010, the Affidavit of Donald J. Trump, sworn to January 21, 2010, and Exhibits annexed thereto, and, the accompanying Memorandum of Law, the undersigned will cross-move this Court before the Honorable **William J. Giacomo** at the Supreme Court of the State of New York, County of WESTCHESTER located at the WESTCHESTER County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York on the **8th day of February, 2010 at 9:30 a.m.** of that day or as soon thereafter as counsel can be heard for an Order pursuant to Sections 305 and 3025(b) of the Civil Practice Law and Rules for leave to issue, file and serve the Amended Complaint in the form annexed hereto as **Exhibit "A"**, and for such other, further and different relief as to the Court may seem just and proper.

Pursuant to CPLR § 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least seven days before the return date of this motion.

Dated: White Plains, New York
January 22, 2010

Yours, etc.

BRADLEY D. WANK, ESQ.
DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorney for Plaintiff
1 North Lexington Avenue, 11th Fl.
White Plains, New York 10601
(914) 681-0200

TO:

Benowich Law, LLP
Attorneys for Defendant The Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants
Noel B. Donohoe and Joann Donohoe
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
Attorneys for Defendant Robert Burke and Teri Burke
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

Donellan Aff.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS COMPLAINT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

ALFRED E. DONNELLAN, ESQ., being duly sworn hereby deposes and says:

1. I am an attorney at law, duly licensed to practice before all of the courts in the State of New York, and a member of the law firm of Delbello Donnellan Weingarten Wise & Wiederkehr, LLC, attorneys of record for Seven Springs, LLC ("Seven Springs"), the Plaintiff in the above-entitled action, and as such I am fully familiar with all of the facts and circumstances as set forth herein.

2. This Affidavit, the Affidavit of Donald J. Trump sworn to January 21, 2010 (the "Trump Aff.") and the accompanying Memorandum of Law are submitted in opposition to the following: (a) Notice of Motion to Dismiss Complaint dated November 16, 2009 submitted on behalf of Defendant The Nature Conservatory ("TNC"), and supporting affirmation of Leonard Benowich, Esq., dated November 16, 2009 (the "Benowich Aff."), which seek an order pursuant to CPLR §3211(a)(1) and (7) dismissing the Complaint in the instant action, (b) Notice of Motion dated December 11, 2009 submitted on behalf of Defendants Noel B. Donohoe and

Joann Donohoe (the "Donohoe Defendants") with supporting Affirmation of Lois B. Rosen dated December 11, 2009 (the "Rosen Aff.") which seeks to dismiss the Complaint pursuant to CPLR §§3211(a)(7) and 3211(g), and (c) Notice of Motion dated December 2, 2009 submitted on behalf of Defendants Robert Burke and Terri Burke (the "Burke Defendants") with supporting Affirmation of Janine A. Mastellone dated December 2, 2009 (the Mastellone Aff.") which seeks to dismiss the Complaint pursuant to CPLR §§3211(a)(1), (7) and 3211(g), and in support of Plaintiff's instant cross-motion for an Order pursuant to CPLR Sections 305 and 3025(b) amending Plaintiff's Complaint, and granting Plaintiff leave to serve and file an Amended Complaint in the form annexed hereto as **Exhibit "A"**.

3. It is respectfully submitted that the Defendants' motions should be denied in their entirety because the Complaint, as amended, states a valid cause of action for damages based on the Defendants' tortious conduct, this action is timely, this is not an action involving public petition and participation as defined by CPLR §76-(a)(1)(a) and CPLR §3211(g) does not apply. Plaintiff's cross-motion should be granted because, as more particularly set forth below, Plaintiff has a valid cause of action against the Defendants and the Defendants are not prejudiced by the requested relief in Plaintiff's cross-motion.

PROCEDURAL BACKGROUND

4. This action seeks monetary damages against the Defendants based upon their affirmative actions in depriving the Plaintiff of its right to an Easement that provides access to its property over the road commonly known as Oregon Road in the Town of North Castle, New York. This action was commenced on September 22, 2009 by the filing of a Summons and Complaint in the Supreme Court, Westchester County. (A copy of the Summons and Complaint is annexed hereto as **Exhibit "B"**.)

5. For the Court's convenience a brief procedural background follows. Seven Springs, LLC commenced an action in 2006 seeking, inter alia, a determination that Plaintiff has an easement (the "Easement") over Oregon Road, located in North Castle, New York to and from property owned by Plaintiff, to the south to the section of Oregon Road more particularly identified in Exhibit "A" annexed to the Complaint (the "2006 Action"). (A copy of the Complaint in the 2006 Action is annexed hereto as **Exhibit "C"**.)

6. TNC, the Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe moved, in June, 2006, for an Order pursuant to CPLR §3211(a)(1)(5) and (7) to dismiss the Complaint in the 2006 action. The Defendants sought to dismiss the Complaint on various grounds including that Plaintiff does not have an implied private easement over Oregon Road, Plaintiff's Complaint is barred by the statute of limitations, North Castle's alleged discontinuance of Oregon Road pursuant to Highway Law §205 extinguished all public and private easements in Oregon Road, that Rockefeller University allegedly abandoned the easement, and the easement has been extinguished.

7. The Supreme Court (LaCava, J.) granted the Defendants' motions by Order dated November 3, 2006.

8. The November 3, 2006 Order was reversed by Order of the Appellate Division, Second Department dated February 13, 2008. See Seven Springs, LLC v. Nature Conservancy, et al., 48 AD3d 545, 855 NYS2d 547. (A copy of the February 13, 2008 Order is annexed hereto as **Exhibit "D"**).

9. Issue was joined in the 2006 Action by TNC, North Castle and Burke and Donohoe on or about March 10, 2008 by service of Answers on behalf of each of the Defendants.

10. An Amended Complaint was filed and served on behalf of the Plaintiff in the 2006 Action on April 3, 2008. (A copy of the Amended Complaint in the 2006 Action is annexed hereto as **Exhibit "E"**). The Amended Complaint seeks the identical relief requested in the Complaint, and additional relief that "the Defendants be restrained by injunction or otherwise from maintaining any obstructions, barriers, gates, or the like, on, or across Oregon Road which obstructs or blocks the use by Plaintiff, its invitees and utility and other vehicles from their lawful rights to pass over the land to have ingress and egress over Oregon Road to the Seven Springs Parcel". (See Amended Complaint, page 11.)

11. Each of the Defendants served Answers to the Amended Complaint in April, 2008. Written discovery has been exchanged in the 2006 action. Depositions have not been held in the 2006 Action.

12. On or about March 14, 2008 the Plaintiff in this action commenced a separate action in the Supreme Court of the State of New York, County of Westchester entitled Seven Springs, LLC v. The Town of North Castle, Index No.: 5489/08 (the "2008 Action"). The action sought monetary damages against The Town of North Castle by reason of North Castle's actions in depriving Plaintiff of the full use of the Easement Area. The action against North Castle was settled in February, 2009. The settlement between Seven Springs and The Town of North Castle provides, among other things, that "North Castle agrees that it will not contest Plaintiff's position that it has easement rights over Oregon Road (Stipulation of Settlement, par. III A). (Copies of the Complaint and Stipulation of Settlement in the 2008 action against The Town of North Castle are annexed to TNC's motion papers as Exhibits "4" and "5", respectively.)

13. On or about April 14, 2008 an Order was issued by the Honorable Rory J. Bellantoni granting a motion by TNC, which was joined in by Defendants Burke and Donohoe,

for a preliminary injunction restraining Plaintiff from "(a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same..., and (b) performing any work upon any land owned by TNC, including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action..." (A copy of the April 14, 2008 Order is annexed to TNC's motion papers as Exhibit "3".) (A copy of the Reply Affirmation in support of motion for preliminary injunction of John B. Kirkpatrick dated April 2, 2008 submitted on behalf of the Burke and Donohoe Defendants is annexed hereto as **Exhibit "F"**.)

FACTUAL BACKGROUND

14. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

15. In the interests of judicial economy, the Court is respectfully referred to the Decision and Order of the Appellate Division, Second Department, dated February 13, 2008 (the "Decision") which aptly summarizes the relevant facts in the underlying 2006 Action, and this case. A copy of the Decision is annexed hereto as **Exhibit "D"**. The Decision provides, in pertinent part:

> [Seven Springs] and [TNC] own abutting parcels of land that, prior to 1973, were both owned by the Eugene and Agnes E. Meyer Foundation (hereinafter the Foundation). The large parcel owned by the Foundation included the land lying under and on either side of Oregon Road. Oregon Road apparently became a town

highway at some point in time by virtue of its having been used by the public as a highway for a period of 10 years (*See* Highway Law § 189).

In January 1973 the Foundation conveyed the parcel now owned by [Seven Springs], a portion of land lying east and north of Oregon Road, to Yale University. This parcel was subsequently conveyed to [Seven Springs] in 1995. In May 1973 the Foundation conveyed another portion of its land to the [TNC]. Part of the [TNC's] parcel lies on the west side of Oregon Road directly across that road from [Seven Springs'] parcel, and part of [TNC's] parcel lies under and around Oregon Road south of the [Seven Springs'] parcel.

In 1990 the Town Board of the Town of North Castle caused a "Certificate of Discontinuance" to be filed in the town clerk's office purporting to "close" a portion of Oregon Road as it was no longer used for public travel.

[Seven Springs] commenced this action in 2006, seeking, inter alia, a determination that it has an easement over the portion of Oregon Road referred to in the "Certificate of Discontinuance" and owned in fee by [TNC] so that it can access a portion of Oregon Road south of [TNC's] parcel that was not closed to the public....

Contrary to the [TNC's] contention, the [Seven Springs] sufficiently stated a cause of action based upon an implied private easement arising in January 1973 when the [Eugene and Agnes E. Meyer Foundation] conveyed to [Seven Springs'] predecessor in interest a parcel of land bounded by a road owned by the Foundation and used at the time as a public highway (*see Holloway v. Southmayd,* 139 N.Y. 390, 401-407, 34 N.E. 1047; *see also Glennon v. Mayo,* 221 A.D.2d 504, 505, 633 N.Y.S.2d 400).

Seven Springs, LLC v. Nature Conservancy, supra.

16. The Easement claimed by Seven Springs along Oregon Road is identified in Exhibit A to the Complaint in this action, a copy of which is annexed hereto as **Exhibit "B"**. The portion of Oregon Road to which Seven Springs claims an easement is highlighted in yellow.

17. Upon information and belief, Defendants, Robert Burke and Teri Burke ("Burke"), are the title holders to Lot 2 in the Oregon Trails subdivision, which property abuts Oregon Road. Upon information and belief, Burke acquired title to real property known as 2

Oregon Hollow Road. Armonk. New York pursuant to deed dated April 29, 1993 and recorded May 12, 1993 in liber 10576 page 243. (A copy of the Burke's deed is annexed hereto as **Exhibit "G"**). A review of the Burke's deed reveals that it does not purport to grant any portion of the fee title in or to Oregon Road or a right of use thereover.

18. Upon information and belief, Defendants, Noel B. Donohoe and Joann Donohoe ("Donohoe"), are the title holders to Lot 1 in the Oregon Trails subdivision, which property abuts Oregon Road. Donohoe acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York pursuant to deed dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35. (A copy of the Donohoe's deed is annexed hereto as **Exhibit "H"**). A review of the Donohoe's deed reveals that it does not purport to grant any portion of the fee title in or to Oregon Road or a right of use thereover.

19. On or about June 12, 2006 title to certain property in the Easement Area and covering a portion of Oregon Road, which is adjacent to the easterly boundary line of the Burke and Donohoe properties was conveyed from Realis Associates to Plaintiff. (A copy of the June 12, 2006 Deed is annexed hereto as **Exhibit "I"**.) The area conveyed by Realis to Seven Springs consists of an approximately .1761 acre parcel. Annexed hereto as **Exhibit "J"** is a copy of a survey prepared by Donnelly Land Surveying, P.C. dated August 9, 2005, which was updated on September 2, 2009 to reflect the .1761 acre parcel conveyed to Seven Springs. The .1761 acre parcel has been highlighted for the convenience of the Court. The deed from Realis Associates to Seven Springs specifically provides, among other things, that "the premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in liber 10576 page 243, and as set forth in deed from Realis Associates to Noel

B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 8, 1994 in liber 10929 page 35".

ARGUMENT

20. As the foregoing demonstrates, the Appellate Division has held that Seven Springs has stated a valid cause of action for an implied easement on and over Oregon Road.

21. It is understood that the Appellate Division's Decision was not a determination on the merits of Seven Springs' claims. However, the Decision established, at a minimum, that Seven Springs has stated a valid cause of action based upon an implied private easement over Oregon Road, and there has been no determination (judicial or otherwise) to the contrary.

22. While an injunction is currently in place with respect to the use of Oregon Road, the granting of the injunction does not constitute the law of the case or an adjudication on the merits.

23. Furthermore, as set forth above, it is undisputed that TNC and the other Defendants have taken affirmative action, by for example, obtaining preliminary injunctive relief and precluding Plaintiff from accessing the Seven Springs Parcel over the Easement Area.

24. Defendants' actions in precluding Plaintiff from accessing the Easement Area are particularly egregious in light of the fact that Plaintiff has title to the property in the Easement Area adjacent to the Burke and Donohoe properties. As set forth above (at par. 19) on or about June 12, 2006, title to certain property in the Easement Area and covering a portion of Oregon Road, which is adjacent to the easterly boundary line of the Burke and Donohoe properties was conveyed to Plaintiff.

25. Moreover, the Burke and Donohoe Deeds (**Exhibits "G"** and "H" annexed hereto) do not purport to grant any portion of the fee title, or any rights, in or to Oregon Road.

Accordingly, the Burke and Donohoe Defendants have no standing to deny Plaintiff's right to the Easement.

26. Based on the foregoing, and the fact that the Town of North Castle no longer has any claim with respect to the Easement Area, it is respectfully submitted that the Defendants, and in particular the Burke and Donohoe Defendants, have no basis in law or fact to advance any claim, exclude Plaintiff from the Easement Area, or to prevent, or attempt to prevent, Plaintiff from having unobstructed access over the Easement Area. (See Complaint, paragraphs 38 and 39, **Exhibit "B"** annexed hereto, and Settlement Agreement, **Exhibit "5"** annexed to TNC's motion papers.)

27. Consequently, the instant action simply seeks to assert Plaintiff's rights to damages against the Defendants, should it be determined that the Defendants have wrongfully prevented Plaintiff from using, and exercising its rights with respect to, the Easement Area. Plaintiff's claim in this action is consistent with both the original Complaint in the 2006 Action and the Amended Complaint in the 2006 Action. In both actions the Complaint alleges that "No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim as set forth herein". (See Complaint in 2006 Action, **Exhibit "C"** annexed hereto, par. 33 and Amended Complaint in 2006 Action, **Exhibit "E"** annexed hereto, par. 34.)

28. The Defendants' motions to dismiss raise various issues regarding the adequacy of the Complaint in this action. In order to clarify Plaintiff's position and address the Defendants' assertions, the Plaintiff is seeking, in the instant cross-motion, leave to amend the Complaint in this action.

29. CPLR § 3025(b) provides that "leave to amend a pleading may be given at any time and that such leave shall be freely given upon such terms as may be just". The amendment will insure that all relevant issues between the parties are fully litigated and placed before the Court for determination. This action was commenced in September, 2009 and there has been no discovery in this action. Consequently, none of the Defendants would be prejudiced by the relief requested.

30. The instant action is based on Plaintiff's claim to the Easement over Oregon Road and for monetary damages based upon Defendants' intentional acts in interfering with Plaintiff's property rights and use of the Easement. Such actions include, but are not limited to, Defendants action in seeking injunctive relief against the Plaintiff, and precluding Plaintiff from exercising its full rights to ingress and egress over the Easement. If it is determined in the 2006 Action that Plaintiff has a valid Easement, and the Defendants have improperly prevented Plaintiff from using this Easement, Plaintiff will have been prevented from exercising a valuable property right and will have sustained monetary damages. Contrary to the assertions in the Defendants' moving papers Plaintiff is not precluded from asserting its right to damages until the court renders a final determination as to the rights of the parties with respect to the Easement. If this were the case a party would be precluded from asserting a right to damages until liability is found. There is no support for such a proposition.

31. It is alleged in the Complaint in this action, that in order to develop the entire Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel. Furthermore, such access can only be from the south. As the Complaint, Amended

Complaint and Trump Aff. indicate, the only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via Oregon Road.

32. The actions taken by the Defendants have prevented Plaintiff from developing its property and, as a result, have caused Plaintiff significant monetary damages.

33. The proposed Amended Complaint alleges, among other things, Plaintiff's right to the Easement area, that the Defendants have prevented Plaintiff from accessing the Seven Springs Parcel over Oregon Road, that the Defendants continue to unlawfully, improperly and wrongfully deprive Plaintiff of its right to access the Seven Springs Parcel and to hinder, delay and/or preclude development of the Seven Springs Parcel, that disinterested malevolence was, and is, the sole motivation for the Defendants' conduct, and special damages.

34. It is asserted in TNC's Memorandum of Law (at page 11) that "the Complaint does not allege that 'secondary access' must be over Oregon Road". There is no requirement that Plaintiff allege that secondary access must be over Oregon Road to state a cause of action against the Defendants. The Defendants are precluding Plaintiff from exercising its property rights over the Easement Area. By precluding the Plaintiff from exercising its property rights over the Easement Area Plaintiff is being denied a valuable property right and is being damaged on a continuous basis. Notwithstanding the foregoing, the Complaint and Amended Complaint allege that "the only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road". Furthermore, the only viable secondary access to the Seven Springs Parcel is from the south. Accordingly, as a practical matter, access to the Seven Springs Parcel from the south must be over Oregon Road. By precluding Plaintiff from accessing the Seven Springs Parcel over Oregon Road the

Defendants are preventing Plaintiff from using the only access route available to Plaintiff based upon its claimed Easement rights.

35. Moreover, Defendants' actions in precluding Plaintiff from exercising its property rights over the Easement Area are causing damage to Plaintiff without regard to Plaintiff's development of the Seven Springs' Parcel. Plaintiff has stated a valid cause of action to an implied Easement over Oregon Road. As more particularly set forth in the Trump Aff. and the proposed Amended Complaint, the Seven Springs Parcel contains, among other things, a manor house that is located in North Castle that is approximately 90 years old. The house is the private dwelling of Donald Trump and family.

36. As a result of the Defendants' actions, Plaintiff, Plaintiff's visitors, tradespeople, emergency vehicles and the residents of the manor house are inconvenienced and deprived of the benefit of the Easement, and, more particularly are required to travel significantly greater distances to the north to access the Seven Springs Parcel.

37. In the event that it is determined that Plaintiff has the right to ingress and egress over Oregon Road and the Easement Area the Defendants actions will have directly prevented Plaintiff from exercising its property rights, thereby directly resulting in monetary damage to Plaintiff.

38. As more particularly set forth in the accompanying Memorandum of Law, the Defendants can be held liable for monetary damages under these circumstances.

39. The assertion by the Donohoe and Burke Defendants that this action should be dismissed on the ground that it is a Strategic Lawsuit Against Public Participation (SLAPP) suit is without merit. As more particularly set forth in the accompanying Memorandum of Law, this action does not fall within the parameters of the applicable statute because Plaintiff's underlying

claims, as more particularly set forth in the 2006 Action, involve a dispute between private parties to the Easement Area, and as there is not current application pending to develop the property, Plaintiff is not a "public applicant or permitee" under the statute.

40. It is asserted in the Defendants' motion papers that Seven Springs "is not looking to prevail on the merits". (Donohoe Memorandum of Law, page 9.) This assertion is simply false. The 2006 Action involves Plaintiff's right to an easement over Oregon Road. Plaintiff's primary motive has been, and continues to be, to establish its rights to the Easement Area as set forth in the 2006 Action. This action simply seeks to assert Plaintiff's right to monetary damages as a result of the Defendants' actions, and as set forth in the 2006 Action.

41. Finally, it is alleged in the Burke Defendants' motion papers that this action should be dismissed on statute of limitations grounds. This assertion is likewise without merit. As set forth above, this case seeks monetary damages as a result of Defendants' continuing actions in precluding Plaintiff's use of the Easement Area, which have resulted in economic injury to Plaintiff. The Defendants continued action in depriving Plaintiff of its right to the Easement Area gives rise to continuous causes of action against the Defendants.

42. Moreover, as more particularly set forth in the accompanying Memorandum of Law, CPLR §203(f) provides that for limitations purposes a claim in an amended pleading will be deemed to relate back to the time the claim in the original pleading was interposed as long as the original one gives notice of the transaction or occurrence out of which the claim in the amended pleading arises. As set forth above, Plaintiff's claim in this action is consistent with the claims asserted by Plaintiff in the Complaint and Amended Complaint in the 2006 Action. In both actions the Complaint alleges that "No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim as set forth herein". (See

Complaint, par. 33 and Amended Complaint, par. 34.) The 2006 Action clearly gives notice of the transactions and occurrences out of which the claims in this action arise. Accordingly, this action is timely.

43. Finally, the Amended Complaint sufficiently pleads a claim for punitive damages against the Defendants based upon their willful and intentional conduct in preventing Plaintiff from exercising its property rights.

44. The accompanying Memorandum of Law more particularly addresses the legal issues in opposition to the Defendants' motions and in support of the cross-motion.

WHEREFORE, it is respectfully requested that the Defendants' motions be denied in their entirety, and that Plaintiff's cross-motion be granted in its entirety, together with costs and disbursements, and such other and further relief as this Court may deem appropriate.

ALFRED E. DONNELLAN

Sworn to before me this
25 day of January, 2010

Notary Public
MICHAEL JON SCHWARZ
Notary Public, State of New York
No. 02SC6147032
Qualified in Putnam County
Commission Expires May 30, 2010

Trump Aff.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No. 21162/09

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

----------X

STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

DONALD J. TRUMP, being duly sworn hereby deposes and says:

1. I own directly and indirectly 100% of the member interests in Seven Springs, LLC, Plaintiff (hereinafter sometimes referred to as "Plaintiff") in the above entitled action. I have reviewed the books and records kept by Plaintiff in the regular course of business and as such I am fully familiar with the facts and circumstances set forth herein.

2. This affidavit, the Affidavit of Alfred E. Donnellan sworn to January 21, 2010 (the "Donnellan Aff") and the accompanying Memorandum of Law are respectfully submitted on behalf of the Plaintiff in opposition to the following: (a) Notice of Motion to Dismiss Complaint dated November 16, 2009 submitted on behalf of Defendant The Nature Conservatory ("TNC"), and supporting affirmation of Leonard Benowich, Esq., dated November 16, 2009 (the "Benowich Aff."), which seek an order pursuant to CPLR §3211(a)(1) and (7) dismissing the Complaint in the instant action, (b) Notice of Motion

dated December 11, 2009 submitted on behalf of Defendants Noel B. Donohoe and Joann Donohoe with supporting Affirmation of Lois B. Rosen dated December 11, 2009 (the "Rosen Aff.") which seeks to dismiss the Complaint pursuant to CPLR §§3211(a)(7) and 3211(g), and (c) Notice of Motion dated December 2, 2009 submitted on behalf of Defendants Robert Burke and Terri Burke with supporting Affirmation of Janine A. Mastellone dated December 2, 2009 (the Mastellone Aff.") which seeks to dismiss the Complaint pursuant to CPLR §§3211(a)(1), (7) and 3211(g), and in support of Plaintiff's instant cross-motion for an Order pursuant to CPLR Sections 305 and 3025(b) amending Plaintiff's Complaint, and granting Plaintiff leave to serve and file an Amended Complaint in the form annexed hereto as **Exhibit "A"**.

3. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

4. This action seeks monetary damages against the Defendants by reason of the Defendants' actions in preventing, and/or precluding, the Plaintiff from accessing the Seven Springs Parcel over the road commonly known as Oregon Road in the Town of North Castle, New York.

5. The Seven Springs Parcel contains, among other things, a manor house that is approximately 90 years old. The house is located in North Castle, and is the private dwelling of myself and my family.

6. Defendants' motions to dismiss should be denied and Plaintiff's cross-motion should be granted because Plaintiff has stated a valid cause of action in the Amended Complaint, and the defenses asserted in Defendants' motions are without merit.

7. Annexed hereto as **Exhibit "J"**, and made a part hereof, is a copy of a survey prepared by Donnelly Land Surveying, P.C. dated August 9, 2005, which was updated on September 2, 2009. The Survey depicts the area that is the subject of this action. The portion of Oregon Road which is the subject of this action, as the same is shown on the said Survey, has been highlighted (the Easement" or "Easement Area"). The section of Oregon Road that is the subject of this action is unimproved vacant land.

8. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel. (A copy of the deed is annexed hereto as **Exhibit "K"**).

9. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

10. It is Plaintiff's position in this case, as more particularly set forth in the Complaint, that based upon the deeds in Seven Springs' chain of title and Nature Conservancy's chain of title, the legal descriptions contained in the deeds, the conveyancing language which refers to the center line of Oregon Road, as well as the

inclusion in the deeds of the appurtenance clause "Together with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof", Seven Springs has fee title in and to the one-half portion of Oregon Road, as the road abuts the Seven Springs Parcel on its westerly side. Furthermore, as a result of the legal descriptions contained in the deeds into Meyer, specifically the references in the deeds to the properties being bounded by Oregon Road, Seven Springs and Nature Conservancy, Seven Springs has a non-exclusive private easement as it abuts its property as well as over The Nature Conservancy Property and others to the public portion of Oregon Road to the south.

11. Upon information and belief, Defendants, Robert Burke and Teri Burke ("Burke"), are the title holders to Lot 2 in the Oregon Trails subdivision, which property abuts Oregon Road. Upon information and belief, Burke acquired title to real property known as 2 Oregon Hollow Road, Armonk, New York pursuant to deed dated April 29, 1993 and recorded May 12, 1993 in liber 10576 page 243. (A copy of the Burke's deed is annexed hereto as **Exhibit "G"**). A review of the Burke's deed reveals that it does not purport to grant any portion of the fee title in or to Oregon Road or a right of user thereover.

12. Upon information and belief, Defendants, Noel B. Donohoe and Joann Donohoe ("Donohoe"), are the title holders to Lot 1 in the Oregon Trails subdivision, which property abuts Oregon Road. Donohoe acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York pursuant to deed dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35. (A copy of the Donohoe's deed is annexed hereto as **Exhibit "H"**). A review of the Donohoe's deed reveals that it does

not purport to grant any portion of the fee title in or to Oregon Road or a right of user thereover.

13. On or about June 12, 2006 title to certain property in the Easement Area and covering a portion of Oregon Road which was owned by Realis Associates, and which is adjacent to the Burke and Donohoe properties, referred to above, was conveyed to Seven Springs. A copy of the June 12, 2006 deed from Realis Associates to Seven Springs is annexed hereto as **Exhibit "I"**. The area conveyed by Realis to Seven Springs consists of an approximately .1761 acre parcel. The .1761 acre parcel has been highlighted on Exhibit "J" for the Court's convenience. The deed from Realis Associates to Seven Springs specifically provides that "the premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in liber 10576 page 243, and as set forth in deed from Realis Associates to Noel B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 8, 1994 in liber 10929 page 35". Based upon the above, Defendants Burke and Donohoe clearly have no rights to the subject portion of Oregon Road.

14. On or about March 14, 2008 Seven Springs, LLC commenced a separate action in the Supreme Court of the State of New York, County of Westchester entitled Seven Springs, LLC v. The Town of North Castle, Index No.: 5489/08 (the "2008 Action"). The action sought monetary damages against The Town of North Castle by reason of North Castle's actions in depriving Plaintiff of the full use of the Easement Area. The action against North Castle was settled in February, 2009. The settlement

between Seven Springs and The Town of North Castle provides, among other things, that "North Castle agrees that it will not contest Plaintiff's position that it has easement rights over Oregon Road (Stipulation of Settlement, par. III A). (Copies of the Complaint and Stipulation of Settlement in the 2008 action against The Town of North Castle are annexed to TNC's motion papers as Exhibits "4" and "5", respectively.)

15. Based on the foregoing, and the fact that the Town of North Castle no longer has any claim with respect to the Easement Area, the Defendants, and in particular the Burke and Donohoe Defendants, have no basis in law or fact to advance any claim, exclude Plaintiff from the Easement Area, or to prevent, or attempt to prevent, Plaintiff from having unobstructed access over the Easement Area.

16. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of The Town of North Castle and to the Planning Board of the Town of Bedford.

17. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

18. The Town of Bedford Planning Board's refusal to permit development of the entire Seven Springs Parcel would not have occurred but for the Defendants' actions.

19. The Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road, and have sought and obtained preliminary injunctive relief prohibiting Plaintiff from exercising its rights over Oregon Road.

20. The Defendants continue to unlawfully, intentionally and wrongfully deprive Plaintiff of its right to access the Easement and the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel by a system of conduct on their part, which intends to harm Plaintiff. As a result of the foregoing, Plaintiff has no current application pending to develop the portion of the Seven Springs Parcel located in North Castle.

21. In addition, as a result of the Defendants' actions, Plaintiff, Plaintiff's visitors, tradespeople, vehicles and the residents of the manor house are inconvenienced and deprived of the benefit of the Easement, and, more particularly are required to travel significantly greater distances to the north to access the Seven Springs Parcel. Moreover, fire and emergency vehicles are unable to obtain direct access to the Seven Springs' Parcel from the south, and are required to access the Seven Springs Parcel from the north in Bedford, thereby causing significantly increased response time in the case of an emergency.

22. Upon information and belief, the Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence was and is the sole motivation for Defendants' actions.

23. As a result of the actions of Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, Plaintiff has been, and will in

the future be, deprived of the full use and enjoyment of the Easement and Seven Springs Parcel, and the value of the Seven Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer money damages.

24. By reason of the foregoing Plaintiff has sustained actual and special damages in an amount to be determined at trial but not less than $60,000,000.00, as follows:

(a) Plaintiff's inability to use the Easement - $5,000,000.00

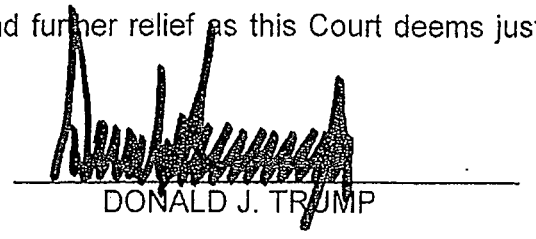
(b) Diminution in value of the Seven Springs Parcel - $50,000,000.00

(c) Plaintiff's inability to access the Seven Springs Parcel over Oregon Road - $5,000,000.00

25. I have examined all the matters set forth in the Complaint and proposed Amended Complaint in the within action, and find same true to my knowledge, except as to the matters therein stated to be alleged upon information and belief, or as otherwise set forth in this Affidavit, and that as to those matters I believe them to be true.

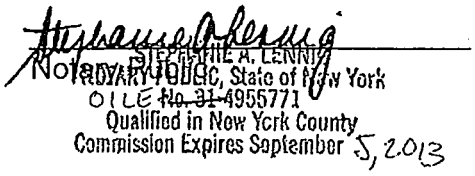
26. The accompanying Memorandum of Law and the Donnellan Aff. more particularly address the legal issues in opposition to the Defendants' motions and in support of Plaintiff's cross-motion.

WHEREFORE, it is respectfully requested that the Defendants' motions be denied in their entirety, and that Plaintiff's cross-motion be granted, together with costs and disbursements, and such other and further relief as this Court deems just, proper and equitable.



DONALD J. TRUMP

Sworn to before me this
21st day of January, 2010



Notary Public
STEPHANIE A. LENNIE
NOTARY PUBLIC, State of New York
01LE No. 01-4955771
Qualified in New York County
Commission Expires September 5, 2013

A

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 9130/06

AMENDED ANSWER AND COUNTERCLAIM OF THE NATURE CONSERVANCY

Defendant The Nature Conservancy ("TNC"), by its attorneys, Benowich Law, LLP, as and for its answer to the Complaint and its Counterclaim against Plaintiff, alleges as follows:

As to the First Cause of Action

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Admits the allegations contained in paragraph 2 of the Complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint.

7. Denies each and every allegation contained in paragraph 7 of the Complaint, except admits that plaintiff purports to bring this action pursuant to Article 15 of the Real Property Actions and Proceedings Law.

8. Denies each an every allegation contained in paragraph 8 of the Complaint, and refers the Court to the document referred to therein for its contents.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the Complaint, and refers the Court to the deed referred to therein for its contents.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Complaint, and refer the Court to the deed referred to therein for its contents.

12. Denies each and every allegation contained in paragraph 12 of the Complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint, and refer the Court to the deed referred to therein for its contents.

14. Denies each and every allegation contained in paragraph 14 of the Complaint.

15. Admits the allegations contained in paragraph 15 of the Complaint, upon information and belief.

16. Denies each and every allegation contained in paragraph 16 of the Complaint.

17. Denies each and every allegation contained in paragraph 17 of the Complaint, except admit that the lands owned by TNC - referred to in the Complaint as the "Nature Conservancy Property" - were owned at one time by Eugene Meyer, Jr. ("Meyer")

18. Admits the allegations contained in paragraph 18 of the Complaint.

19. Admits the allegations contained in paragraph 19 of the Complaint.

20. Denies each and every allegation contained in paragraph 20 of the Complaint, and refers the Court to the deed referred to therein for its contents.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint.

22. Admits the allegations contained in paragraph 22 of the Complaint.

23. Denies each and every allegation contained in paragraph 23 of the Complaint, and refers the Court to the deed referred to therein for its contents.

24. Denies each and every allegation contained in paragraph 24 of the Complaint.

25. Denies each and every allegation contained in paragraph 25 of the Complaint.

26. Denies each and every allegation contained in paragraph 26 of the Complaint.

27. Denies each and every allegation contained in paragraph 27 of the Complaint, except admits that TNC does claim that Plaintiff has none of the rights or interests which it asks this Court to declare in its favor.

28. Denies each and every allegation contained in paragraph 28 of the Complaint.

29. Denies each and every allegation contained in paragraph 29 of the Complaint.

30. Denies each and every allegation contained in paragraph 30 of the Complaint.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Complaint.

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 of the Complaint.

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the Complaint.

34. Denies each and every allegation contained in paragraph 34 of the Complaint.

35. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 of the Complaint.

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 of the Complaint.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the Complaint.

38. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38 of the Complaint.

39. Denies each and every allegation contained in paragraph 39 of the Complaint.

As to the Second Cause of Action

40. Defendant repeats and realleges each and every responsive pleading set forth above in paragraphs 1 through 39.

41. Denies each and every allegation contained in paragraph 41 of the Complaint, except admits that, as a matter of record, in or about May 1990, defendant Town of North Castle duly acted, in accordance with New York Law, to close a portion of Oregon Road, at the point

designated as "Pole 40," because, among other reasons stated in the Certificate of Discontinuance, "the portion of the road being closed...is no longer used by the public for travel"and "the affected property owner, The Rockefeller University, has consented to the closing and has adequate ingress and egress to its property by alternative means."

42. Denies each and every allegation contained in paragraph 42 of the Complaint.

43. Denies each and every allegation contained in paragraph 43 of the Complaint.

First Affirmative Defense

The Complaint fails to state a cause of action.

Second Affirmative Defense

The Complaint is barred, in whole or in part, by the applicable statute of limitations.

Third Affirmative Defense

The Complaint is barred, in whole or in part, by the doctrines of waiver, laches and/or estoppel.

Fourth Affirmative Defense

The Complaint is barred, in whole or in part, by the applicable Statute of Frauds.

Fifth Affirmative Defense

The Complaint is barred, in whole or in part, because no easement or right-of-way was intended to be, nor was, conveyed to plaintiff or its predecessors-in-title, by any of the deeds referred to in the Complaint.

Sixth Affirmative Defense

The Complaint is barred, in whole or in part, because any easement or right-of-way claimed by plaintiff was extinguished, prior to the time plaintiff obtained title thereto, by

plaintiff's predecessor-in-title's abandonment, consent to the closing or discontinuance thereof and/or consent or acquiescence to the Town of North Castle's installation of a locked barrier or gate at "Pole 40."

Seventh Affirmative Defense

The Complaint is barred, in whole or in part, because any easement or right-of-way claimed by plaintiff was extinguished, prior to the time plaintiff obtained title thereto, by the merger of the dominant and servient estates into the ownership of Meyer.

Eighth Affirmative Defense

The Complaint is barred, in whole or in part, because any easement or right-of-way claimed by plaintiff was extinguished by adverse possession.

Ninth Affirmative Defense

The Complaint should be barred, in whole or in part, because plaintiff knew or should have known, at the time it acquired the so called Seven Springs Parcel that Oregon Road was closed, that no public road, street or way existed at that place and time and that no private easement was being conveyed.

Tenth Affirmative Defense

The Complaint is barred, in whole or in part, because the parcels of land that comprise the Seven Springs Parcel include one or more parcels of land that did not belong to, and were not acquired from, Meyer but which were acquired by plaintiff or its predecessor in title after any claimed easement was extinguished. No easement may be implied where, as here, its use will benefit additional, or after-acquired parcels.

Eleventh Affirmative Defense

The Complaint is barred, in whole or in part, because the parcels of land that comprise the Seven Springs Parcel have frontage on and access to a public highway to the northern portion of the Seven Springs Parcel.

Counterclaims

1. TNC is a not for profit corporation organized and existing under the laws of the District of Columbia.

2. Upon information and belief, Plaintiff Seven Springs, LLC ("Seven Springs") is a limited liability company organized and existing under the laws of the state of New York.

3. In May 1973 TNC acquired approximately 230 acres of land situate in the Towns of New Castle and North Castle, from the Eugene and Agnes E. Meyer Foundation ("Foundation"), pursuant to and as described in a deed dated May 25, 1973 and recorded on May 30, 1973 in the Westchester County Clerk's Office, in Liber 7127, Page 719.

4. The TNC Parcel, as conveyed to TNC by the Foundation, includes fee simple title to the lands over which Plaintiff asserted, for the first time in this action, an implied easement (the "Purported Easement Area").

5. The Foundation conveyed the TNC Parcel to TNC as a gift with the intention that TNC would maintain the TNC Parcel, and every part thereof, including the Purported Easement Area, as a nature preserve and sanctuary.

6. At all times relevant herein since May 1973, TNC has owned the TNC Parcel, including the Purported Easement Area, and has maintained such lands as a nature preserve and sanctuary.

7. At all times relevant since May 1973, TNC has permitted only limited use of the TNC Parcel, including of the Purported Easement Area, for the purposes of hiking and walking.

8. Signs posted at and about the TNC Parcel, including at the Purported Easement Area, state:

NATURE SANCTUARY

NO CAMPING HUNTING, TRAPPING FISHING FIRES OR PETS

NO REMOVAL OR DESTRUCTION OF PLANTS OR WILDLIFE

MOTOR VEHICLES PROHIBITED

9. In this action for the first time, Plaintiff has claimed an easement or right of way over the Purported Easement Area, which Plaintiff acknowledges is owned by TNC.

10. Upon information and belief, commencing in or about February or March 2008, without seeking or obtaining TNC's consent or permission, Plaintiff caused its employees or agents to enter and trespass upon the TNC Parcel and the Purported Easement Area for purposes and uses which are not permitted and which are inconsistent with TNC's rights in and to the TNC Parcel and the Purported Easement Area.

11. Upon information and belief, Plaintiff or its agents or employees have, among other things, entered upon the TNC Parcel and the Purported Easement Area with motor vehicles and removed vegetation from the TNC Parcel and/or the Purported Easement Area.

12. Plaintiff has no rights in, to, or over the Purported Easement Area, and it has no rights to enter upon the TNC Parcel or the Purported Easement Area with motor vehicles or to remove vegetation therefrom, or otherwise inconsistent with the aforesaid posted regulations.

13. Plaintiff has unlawfully trespassed upon the TNC Parcel and the Purported Easement Area, and has engaged in conduct and activities that are offensive to and inconsistent with TNC's use and maintenance of the TNC Parcel and the Purported Easement Area as a nature preserve and sanctuary.

14. Unless restrained and enjoined from doing so, Plaintiff will continue to enter upon, alter, and use the TNC Parcel in violation of the posted regulations, thereby irreparably harming, the natural state of the TNC Parcel, including but not limited to the Purported Easement Area.

15. TNC has no adequate remedy at law.

WHEREFORE, Defendant TNC demands judgment as follows:

A. A permanent injunction restraining and enjoining Plaintiff Seven Springs, its agents and employees, successors and assigns, from:

(1) entering upon the TNC Parcel, including but not limited to the Purported Easement Area with any motor vehicle, or for any purpose other than to walk or hike upon same; and

(2) performing any work (including but not limited to cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal) upon the TNC Parcel including but not limited to the Purported Easement Area; and

B. Such other and further relief as this Court shall deem just, proper and equitable, together with the costs and disbursements of this action.

Dated: March 28, 2008

BENOWICH LAW, LLP

By: _____
Leonard Benowich
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant
The Nature Conservancy

S:\Main Files\TNC\SEVEN SPRINGS\Litigation\Pleadings\Amended Answer and counterclaim-revd.wpd

B

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09
Date Filed: 9/22/09

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial. The basis of venue is the Defendants reside or have a place of business in, and the cause of action arose in, the County of Westchester.

Dated: White Plains, New York
September 22, 2009

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: THE NATURE CONSERVANCY
570 Seventh Avenue
New York, New York 10018

ROBERT BURKE
2 Oregon Hollow Road
Armonk, New York 10504

TERI BURKE
2 Oregon Hollow Road
Armonk, New York 10504

NOEL B. DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

JOANN DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09
Date Filed: 9/22/09

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its complaint against defendants, The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joanne Donohoe, alleges, upon information and belief, as follows:

1. Plaintiff, Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and has a place of business located in the Town of North Castle, Westchester County, New York.

3. Upon information and belief, Defendants Robert Burke and Teri Burke (collectively referred to herein as "Burke") are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

4. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe (collectively referred to herein as "Donohoe") are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

5. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

6. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

7. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

8. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

9. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

10. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

11. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

12. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of The Nature Conservancy (the "Nature Conservancy Property").

13. The Nature Conservancy Property and the Seven Springs Parcel were part of certain lands acquired over time by Meyer.

14. The Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

15. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

16. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

17. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

18. By reason of the foregoing and the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior

deeds thereto, and the facts herein set forth, Plaintiff has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified and highlighted (the "Easement" or "Easement Area") on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access. Annexed hereto as Exhibit "A", and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986.

19. At some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used as a public highway for a period of 10 years.

20. In or about 1990 the Town Board of the Town of North Castle purportedly closed a portion of Oregon Road pursuant to Highway Law § 205 as it was no longer used for public travel.

21. The said portion of Oregon Road referred to herein that was purportedly closed and that is referred to on Exhibit "A" "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

22. Upon information and belief, The Town of North Castle caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate and/or metal guide rail (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles and depriving

Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

23. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of The Town of North Castle and to the Planning Board of the Town of Bedford.

24. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel.

25. That the Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road.

26. That the Defendants continue to unlawfully and wrongfully deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel.

27. Upon information and belief, said Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact.

28. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendants and will suffer continuing damages.

29. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 48 AD3d 545).

30. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that the Town of North Castle never extinguished the Easement pursuant to Highway Law § 205.

31. On or about June 12, 2006 title to the property, which is adjacent to the easterly boundary line of the Burke and Donohoe properties, referred to above, to the center line of Oregon Road, was transferred from Realis Associates to Seven Springs by deed dated June 12, 2006 and recorded in the Westchester County Clerk's office on March 17, 2008 in Control Number 480640315. The deed from Realis Associates to Seven Springs specifically provides, among other things, that "the premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in liber 10576 page 243, and as set forth in deed from Realis Associates to Noel B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 8, 1994 in liber 10929 page 35".

32. By reason of the foregoing, the Town of North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe have no valid basis,

in law or fact, to maintain the Gate or any other obstruction and/or barrier on or over Oregon Road, or prevent, or attempt to prevent, Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road.

33. Based upon the foregoing, Defendants Burke and Donohoe have no right, title or interest in, or to, Oregon Road and/or the Easement Area.

34. By reason of the foregoing, the Defendants have no fee interest in, or right of use over, that portion of the said allegedly closed portion of Oregon Road as described above, or the Easement Area, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road or the Easement Area.

35. As a result of the actions of Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

36. By virtue of the foregoing Plaintiff has been damaged in an amount to be determined at trial but not less than $30,000,000.00.

37. By virtue of Defendants' unlawful, improper and intentional acts, Plaintiff should be awarded punitive damages in an amount to be determined at trial but not less than $30,000,000.00.

WHEREFORE, Plaintiff demands judgment:

(a) That Plaintiff have Judgment for damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, individually and

severally, an amount to be determined at trial but not less than $30,000,000.00, with interest thereon and attorneys fees, for the injuries suffered as herein alleged.

(b) That Plaintiff have Judgment for punitive damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe in an amount to be determined at trial but not less than the amount of $30,000,000.00, with interest thereon.

(c) That the Plaintiff have such other, further and different relief as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action.

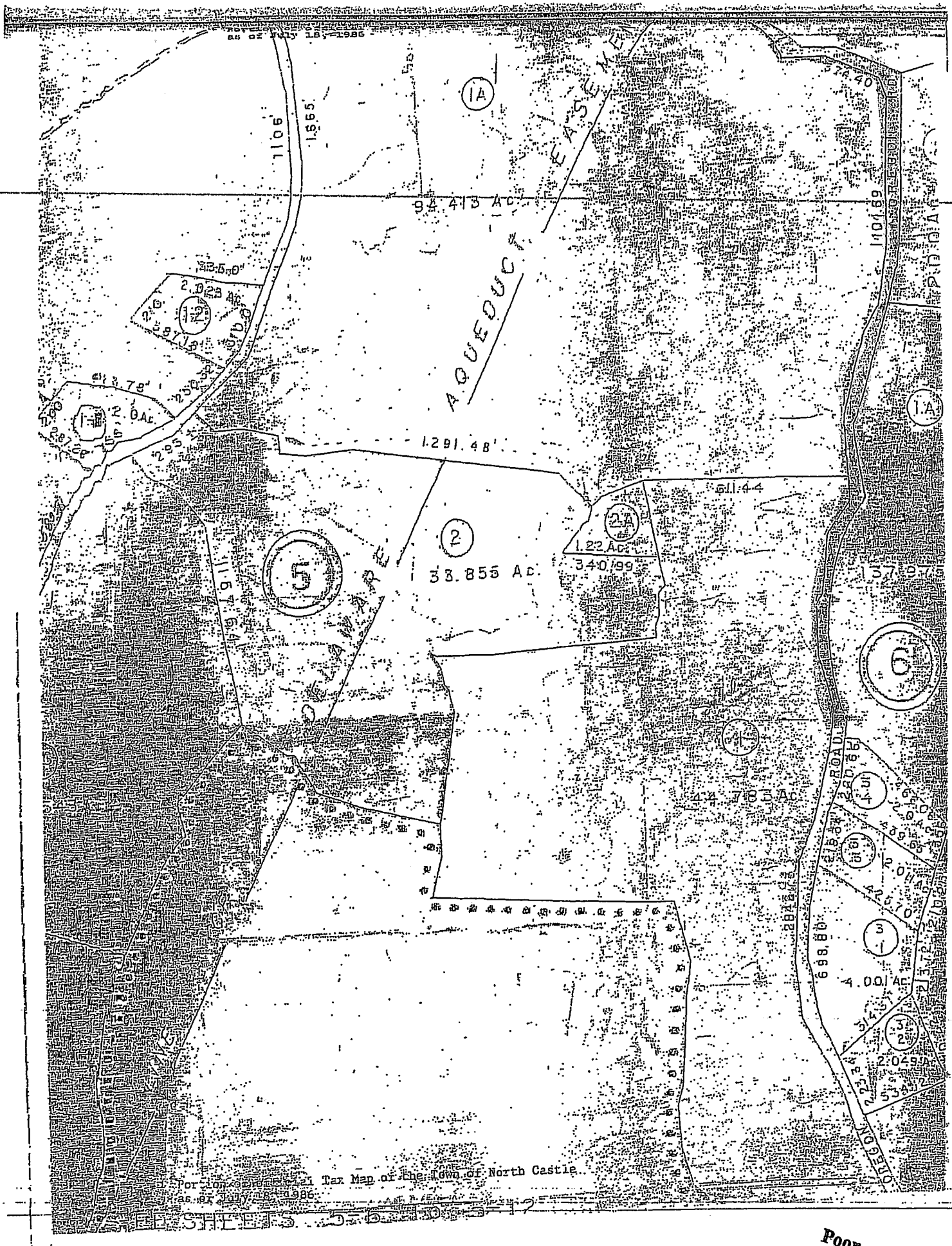
Dated: White Plains, New York
September 11, 2009

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

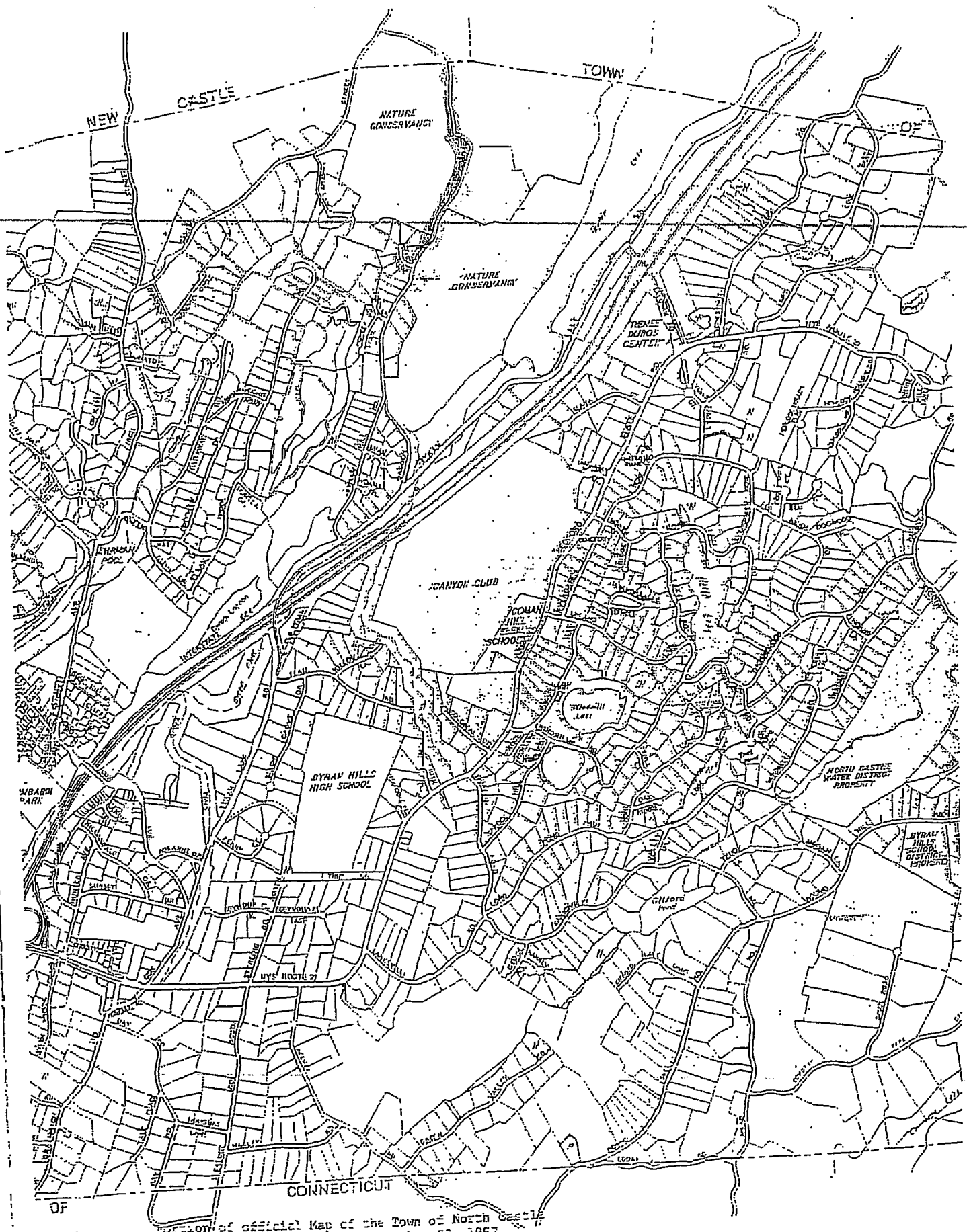
EXHIBIT A

Poor
Quality



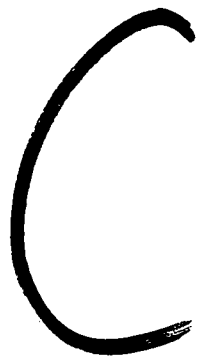
Portion of Official Tax Map of the Town of North Castle
as of July 18, 1986

Poor Quality



Portion of official Map of the Town of North Castle adopted by the Town Board on October 23, 1997

Poor Quality



117 #

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 9130/06
Date Filed: 5/15/06

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial pursuant to CPLR § 507. The basis of venue is the location of real property which is the subject of this action.

Dated: White Plains, New York
May 12, 2006

DELBELLO DONNELLAN WEINGARTEN
TARTAGLIA WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: THE NATURE CONSERVANCY
570 Seventh Avenue
New York, New York 10018

REALIS ASSOCIATES
356 Manville Road
Pleasantville, New York 10570

THE TOWN OF NORTH CASTLE
15 Bedford Road
Armonk, New York 10504

ROBERT BURKE
2 Oregon Hollow Road
Armonk, New York 10504

TERI BURKE
2 Oregon Hollow Road
Armonk, New York 10504

NOEL B. DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

JOANN DONOHOE
4 Oregon Hollow Road
Armonk, New York 10504

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No. 9130/06
Date Filed: 5/15/06

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN TARTAGLIA WISE & WIEDERKEHR, LLP, for its complaint against defendants, The Nature Conservancy, Realis Associates, The Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and having a principal place of business at 570 Seventh Avenue, New York, New York, 10018.

3. Upon information and belief, Defendant, Realis Associates ("Realis"), is a New York Partnership having a principal place of business at 356 Manville Road, Pleasantville, New York.

4. Upon information and belief, Defendant, The Town of North Castle, is a governmental subdivision of The State of New York, which has been organized and exists under and pursuant to the laws of the State of New York, and is located in Westchester County.

5. Upon information and belief, Defendants Robert Burke and Teri Burke are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

6. Upon information and belief, Defendants Noel B. Donohoe and Joann Donohoe are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

7. This action is brought pursuant to Article 15 of the Real Property Action and Proceedings Law to compel the determination of claims to certain real property herein described and known as Oregon Road located in the County of Westchester.

8. Annexed hereto as **Exhibit "A"**, and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986. The portion of Oregon Road which is the subject of this action, as the same is shown on the said Maps, has been highlighted.

9. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

10. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

11. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

12. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

13. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

14. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

15. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

16. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of Defendant, The Nature Conservancy (the "Nature Conservancy Property").

17. The Nature Conservancy Property and the Seven Springs Parcel was part of certain lands acquired over time by Meyer.

18. By virtue of the various deeds pursuant to which Meyer acquired title to said real property Meyer had acquired the entire bed of Oregon Road as show on **Exhibit "A"**.

19. Upon information and belief, the Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

20. Upon information and belief, the Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

21. Upon information and belief, since at least 1917 and up until and including May, 1990 when the Town of North Castle allegedly "discontinued" the subject portion of Oregon Road said road was a public street.

22. Upon information and belief, the said portion of Oregon Road referred to herein, at paragraph 8 "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

23. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

24. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

25. By virtue of the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and

the facts herein set forth, Plaintiff has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access.

26. That none of the Defendants has any fee interest in or right of user over that portion of the said portion of Oregon Road as described in paragraph 8 hereof, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road.

27. The Defendants and each of them claim, and it appears from the public record that it or they will claim an interest in, and/or the fee title of, the bed of said Oregon Road abutting its or their respective premises as hereinafter set forth, and/or a right to prevent Plaintiff's right of ingress and egress to and from the Seven Springs Parcel to the legally opened portion of Oregon Road.

28. Any estate or interest claimed, or which may be claimed by any Defendant in the premises described in paragraph 8 hereof is invalid and ineffective as against the estate and interest of the Plaintiff therein to a right-of-way and/or easement for ingress and egress over Oregon Road.

29. Any estate, right or interest which Defendant The Nature Conservancy ever had, claims or may claim in the Nature Conservancy Property, or any part thereof, including the estates and interest claimed or which may be claimed by it by virtue of the instruments and facts hereinbefore set forth are ineffective and invalid as against the title and interest of Seven Springs, LLC, its successors in interest, grantees or transferees in and to an easement for ingress and egress over the Nature Conservancy Property.

30. By reason of the foregoing, and the above-referenced deeds and the rights set forth therein, Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and there is a valid and enforceable easement and/or right of way for ingress and egress for pedestrian and vehicular access over Oregon Road to the south, including over lands owned by The Nature Conservancy and others to the public portion of Oregon Road in favor of Plaintiff, its successors and assigns.

31. Upon information and belief there are no Defendants either known or unknown to Plaintiff not herein joined as a party and there is no Defendant who is or might be an infant, mentally retarded, mentally ill or an alcohol abuser.

32. Any judgment granted herein will not affect any person or persons not in being or ascertained at the commencement of this action, who by any contingency contained in a devise or grant or otherwise, could afterward become entitled to a beneficial estate or interest in the aforesaid premises, and every person in being who would have been entitled to such estate or interest, if such event had happened immediately before the commencement of the action is named as a party hereto.

33. No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim of the Plaintiff as set forth herein.

34. None of the Defendants or the parcels owned by them is or will be adversely affected by the relief herein sought.

35. The Defendant, Town of North Castle, is joined herein as a party Defendant by, reason of, among other things, Oregon Road is located in the Town of North Castle, and said municipality purported to close and/or discontinue the portion of Oregon Road which is the subject of this action.

36. The Defendant, Realis Associates, is joined herein as a party Defendant by virtue of having been the developer of the subdivision known as "Oregon Trails" under filed map number 22547, a portion of which abuts the westerly side of Oregon Road.

37. Defendants, Robert Burke and Teri Burke, acquired title to real property known as 2 Oregon Hollow Road, Armonk, New York pursuant to deed dated April 29, 1993 and recorded May 12, 1993 in liber 10576 page 243 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 2 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

38. Defendants, Noel B. Donohoe and Joann Donohoe, acquired title to real property known as 4 Oregon Hollow Road, Armonk, New York pursuant to deed dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35 and are joined herein as party Defendants by virtue of their ownership of the title to Lot 1 in the Oregon Trails subdivision, which said property abuts Oregon Road. Upon information and belief the aforesaid deed does not purport to grant any portion of the fee title in or to said Oregon Road or a right of user thereover.

39. Plaintiff has no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

40. Plaintiff repeats and reiterates each and every allegation contained in paragraphs 1 through 39 above as if the same were more fully set forth at length herein.

41. That upon information and belief and in or about May, 1990, defendant Town of North Castle allegedly discontinued and caused to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, the barrier consisting of a gate thereby making the aforesaid

section of Oregon Road, as a roadway, impassable to or from Oregon Road to the south by persons in vehicles and depriving plaintiff, plaintiff's visitors, trades people and vehicles and the like their lawful right to pass over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

42. That unless the relief be granted to Plaintiff, as hereinafter prayed for, the Plaintiff will suffer irreparable damages and injuries.

43. That plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment:

(1) That the Defendants and each of them and any and every person claiming through or under them and each of them be barred from any and all claim to an estate or interest in the property described in the complaint;

(2) Declaring that there is a valid and enforceable easement and/or right of way of no less than 50 feet in width for ingress and egress for pedestrian and vehicular traffic over Oregon Road to and from The Seven Springs Parcel to the south to the section of Oregon Road more particularly identified in **Exhibit "A"** annexed hereto, including over lands owned by the Nature Conservancy and others, in favor of Plaintiff, its successors and/or assigns.

(3) Declaring that Seven Springs, LLC has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts the Seven Springs Parcel on its westerly side.

(4) Declaring that Plaintiff, its successors and assigns also have the right to an easement and/or right of way of no less than 50 feet in width for ingress and egress, and for pedestrian and vehicular access over Oregon Road;

(5) Enjoining Defendants from interfering with and obstructing Plaintiff's right-of-way and Plaintiff's right of access to Plaintiffs' property as aforesaid.

(6) That Defendant, Town of North Castle, be directed to remove all obstructions placed and/or maintained by it, on, or across Oregon Road which obstructs the use of Plaintiff, its invitees and utility and other vehicles from their lawful rights to pass over the land and to have ingress and egress over Oregon Road to the Seven Springs Parcel.

(7) That the Plaintiff have such other, further and different relief in the premises as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action, such costs to be against such Defendants as may defend this action.

Dated: White Plains, New York
May 12, 2006

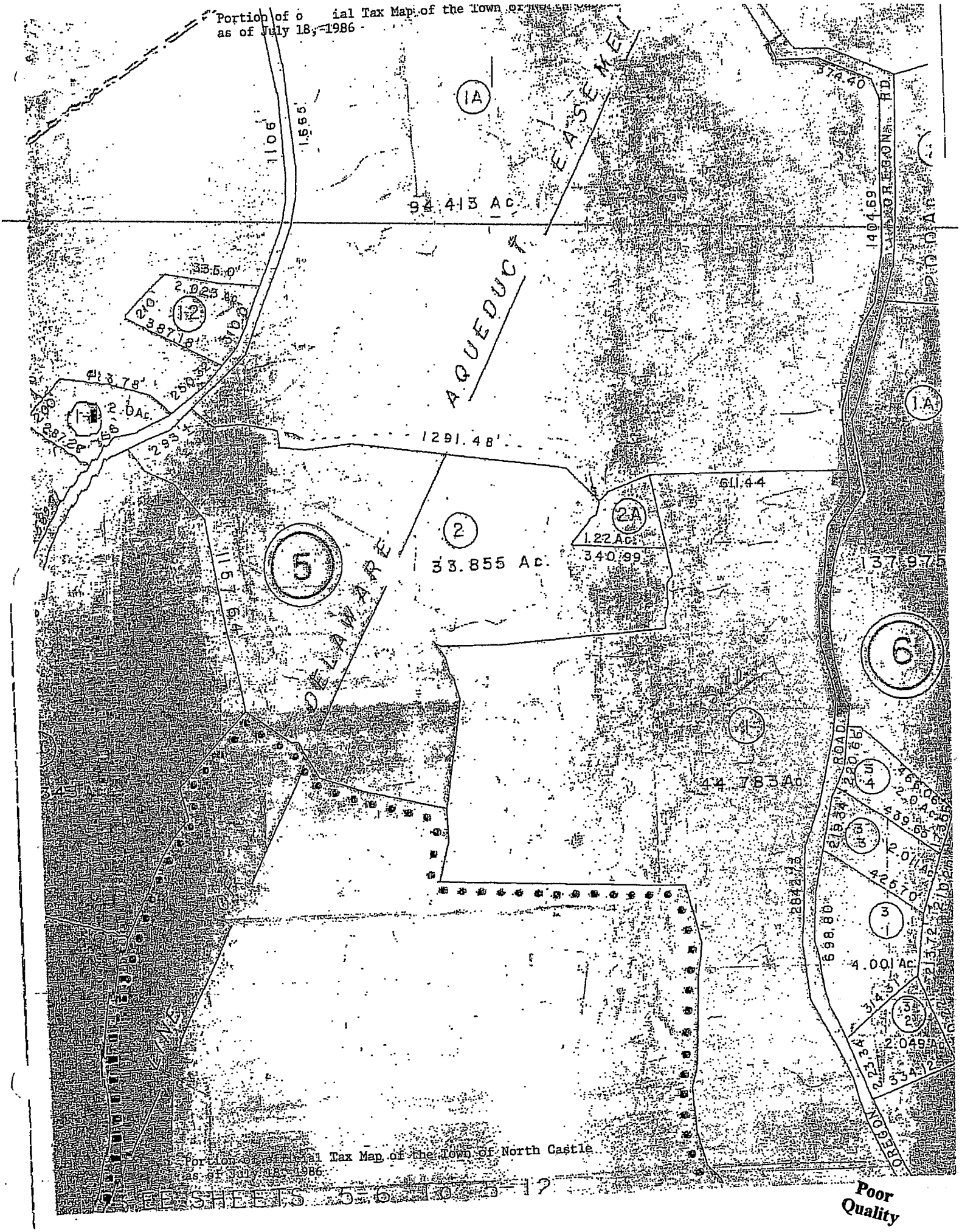
DELBELLO DONNELLAN WEINGARTEN
TARTAGLIA WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

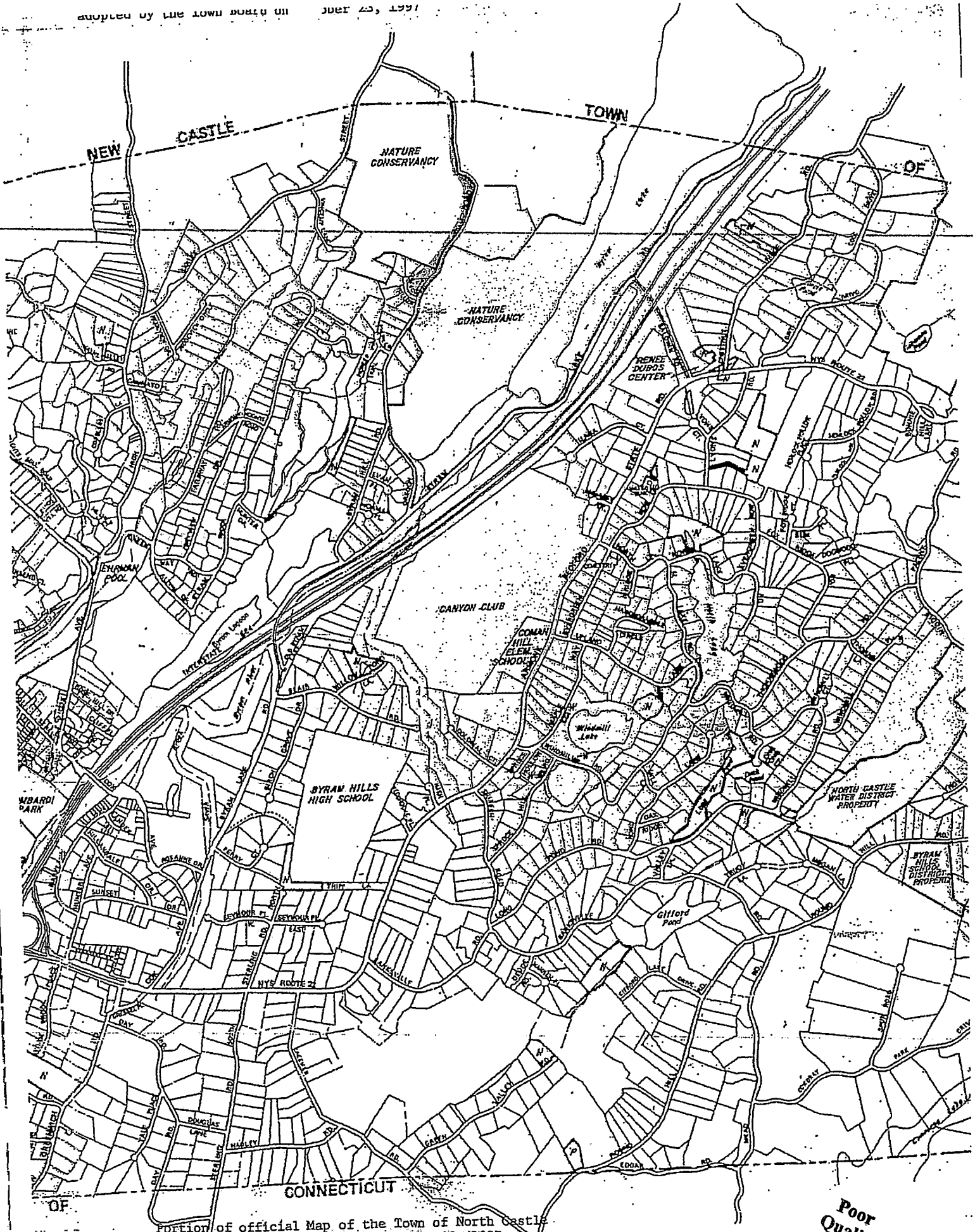
Poor Quality

EXHIBIT A

Poor
Quality


Portion of o ial Tax Map of the Town of
as of July 18, 1986
1A
94.413 Ac.
AQUEDUCT EASEMENT
1404.69
RD.
374.40
1106
1565
335.0'
2.025 Ac.
210
387.18
310.9
1378'
250.4'
290
2.0Ac.
287.04
356
293.4'
1291.48'
611.44
2A
1.22 Ac.
340.99
2
33.855 Ac.
5
DELAWARE
1161.64
6
44.783 Ac.
220.66
698.80
284.43
4.001 Ac.
314.31
2.049 Ac.
OREGON
Portion of the Official Tax Map of the Town of North Castle
as of July 18, 1986
SEE SHEETS 5 6 10 12
Poor Quality

adopted by the Town Board on October 23, 1997



Portion of official Map of the Town of North Castle
adopted by the Town Board on October 23, 1997

Poor Quality

D

Exhibit D

48 A.D.3d 545, 855 N.Y.S.2d 547, 2008 N.Y. Slip Op. 01327
(Cite as: 48 A.D.3d 545, 855 N.Y.S.2d 547)

C

Supreme Court, Appellate Division, Second Department, New York.

SEVEN SPRINGS, LLC, appellant
v.
NATURE CONSERVANCY, et al., respondents, et al., defendant.

Feb. 13, 2008.

Background: Plaintiff landowner brought action seeking, inter alia, a determination that it had an easement over a portion of town highway owned in fee by defendant landowner that town sought to "close" as it was no longer used for public travel. The Supreme Court, Westchester County, La Cava, J., granted defendants' motion to dismiss. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:
(1) plaintiff stated cause of action based upon an implied private easement, and
(2) town's abandonment of public highway did not serve to extinguish any private easements.

Reversed.

West Headnotes

[1] Easements 141 ⚿61(8)

141 Easements
141II Extent of Right, Use, and Obstruction
141k61 Actions for Establishment and Protection of Easements
141k61(8) k. Pleading. Most Cited Cases
Plaintiff landowner stated cause of action based upon an implied private easement by alleging that original owner conveyed to plaintiff's predecessor in interest a parcel of land bounded by a road owned by defendant and used at the time as a public highway. McKinney's Highway Law § 205.

[2] Easements 141 ⚿26(1)

141 Easements
141I Creation, Existence, and Termination
141k26 Termination in General
141k26(1) k. In General. Most Cited Cases

Highways 200 ⚿79.7

200 Highways
200IV Abandonment
200k79.7 k. Operation and Effect. Most Cited Cases
Town's abandonment of a public highway did not serve to extinguish any private easements held by plaintiff landowner with regard to the highway, as statute providing for such abandonment did not provide for compensation to the owners of any such easements that would be extinguished. McKinney's Highway Law § 205.

****548** DelBello Donnellan Weingarten Wise & Wiederkehr, White Plains, N.Y. (Alfred E. Donnellan, Bradley D. Wank, and Matthew S. Clifford of counsel), for appellant.

Roosevelt & Benowich, LLP, White Plains, N.Y. (Leonard Benowich of counsel), for respondent Nature Conservancy.

Stephens, Baroni, Reilly & Lewis, LLP, White Plains, N.Y. (Gerald D. Reilly and Kristen L. Holt of counsel), for respondent Town of North Castle.

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP, White Plains, N.Y. (Lois N. Rosen of counsel), for respondents Robert Burke, Teri Burke, Noel B. Donohoe, and Joann Donohoe.

ROBERT A. SPOLZINO, J.P., MARK C. DILLON , DANIEL D. ANGIOLILLO, and THOMAS A. DICKERSON, JJ.

***545** In an action pursuant to RPAPL article 15 to compel the determination of a claim to real prop-

Poor Quality

erty, the plaintiff appeals from an order of the Supreme Court, Westchester County (La Cava, J.), entered November 3, 2006, which granted the motion of the defendants Nature Conservancy and Town of North Castle and the separate motions of the defendants Robert Burke, Teri Burke, Noel B. Donohoe, and Joann Donohoe to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211.

ORDERED that the order is reversed, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and the motions to dismiss the complaint insofar as asserted against the respondents are denied.

The plaintiff and The Nature Conservancy (hereinafter the Conservancy) own abutting parcels of land that, prior to 1973, were both owned by the Eugene and Agnes E. Meyer Foundation (hereinafter the Foundation). The large parcel owned by the Foundation included the land lying under and on either side ***546** of Oregon Road. Oregon Road apparently became a town highway at some point in time by virtue of its having been used by the public as a highway for a period of 10 years (*see* Highway Law § 189).

In January 1973 the Foundation conveyed the parcel now owned by the plaintiff, a portion of land lying east and north of Oregon Road, to Yale University. This parcel was subsequently conveyed to the plaintiff in 1995. In May 1973 the Foundation conveyed another portion of its land to the Conservancy. Part of the Conservancy's parcel lies on the west side of Oregon Road directly across that road from the plaintiff's parcel, and part of the Conservancy's parcel lies under and around Oregon Road south of the plaintiff's parcel.

****549** In 1990 the Town Board of the Town of North Castle caused a "Certificate of Discontinuance" to be filed in the town clerk's office purporting to "close" a portion of Oregon Road as it was no longer used for public travel.

The plaintiff commenced this action in 2006, seeking, inter alia, a determination that it has an easement over the portion of Oregon Road referred to in the "Certificate of Discontinuance" and owned in fee by the Conservancy so that it can access a portion of Oregon Road south of the Conservancy parcel that was not closed to the public.

The respondents moved to dismiss the complaint insofar as asserted against them on the grounds, inter alia, that the plaintiff had no implied private easement over the relevant portion of Oregon Road, that any easement was extinguished when the relevant portion of Oregon Road ceased to be a town highway pursuant to Highway Law § 205(1), and that the plaintiff was precluded from challenging Oregon Road's status as an abandoned public highway by the one-year statute of limitations period of Highway Law § 205(2).

[1][2] Contrary to the respondents' contention, the plaintiff sufficiently stated a cause of action based upon an implied private easement arising in January 1973 when the Foundation conveyed to the plaintiff's predecessor in interest a parcel of land bounded by a road owned by the Foundation and used at the time as a public highway (*see Holloway v. Southmayd,* 139 N.Y. 390, 401-407, 34 N.E. 1047; *see also Glennon v. Mayo,* 221 A.D.2d 504, 505, 633 N.Y.S.2d 400). The abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished (*see Holloway v. Southmayd,* 139 N.Y. at 410, 34 N.E. 1047; *cf. Barber v. Woolf,* 216 N.Y. 7, 14-15, 109 N.E. 868; *Municipal Hous. Auth. for City of Yonkers v. Harlan,* 24 A.D.2d 633, 634, 262 N.Y.S.2d 161).

***547** While the respondents submitted evidence that any implied private easement was voluntarily abandoned by the plaintiff or its predecessor (*see Consolidated Rail Corp. v. MASP Equip. Corp.,* 67 N.Y.2d 35, 39-40, 499 N.Y.S.2d 647, 490 N.E.2d 514), the respondents failed to conclusively estab-

Poor Quality

lish this defense as a matter of law for the purposes of a motion to dismiss (*see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190). Similarly, the respondents failed to conclusively establish that they interfered with the plaintiff's use and enjoyment of the easement for the requisite period of time for the easement to be extinguished by adverse possession (*see Spiegel v. Ferraro*, 73 N.Y.2d 622, 625-626, 543 N.Y.S.2d 15, 541 N.E.2d 15; *McGinley v. Postel*, 37 A.D.3d 783, 784, 830 N.Y.S.2d 588).

The respondents' remaining contentions are without merit.

N.Y.A.D. 2 Dept.,2008.
Seven Springs, LLC v. Nature Conservancy
48 A.D.3d 545, 855 N.Y.S.2d 547, 2008 N.Y. Slip Op. 01327

END OF DOCUMENT

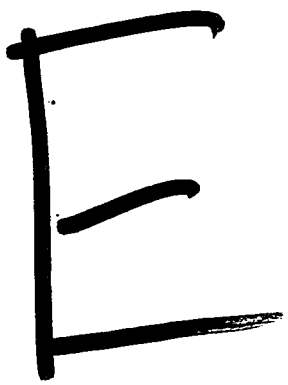


Exhibit E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

Index No. 21162/09
Date Filed:

AMENDED COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its amended complaint against defendants, The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joanne Donohoe, alleges, upon information and belief, as follows:

1. Plaintiff, Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2. Upon information and belief, Defendant, The Nature Conservancy is a District of Columbia Corporation authorized to do business in the State of New York, and has a place of business located in the Town of North Castle, Westchester County, New York.

3. Upon information and belief, Defendants Robert Burke and Teri Burke (collectively referred to herein as "Burke") are residents of the State of New York, residing at 2 Oregon Hollow Road, Armonk, New York.

4. Upon information and belief. Defendants Noel B. Donohoe and Joann Donohoe (collectively referred to herein as "Donohoe") are residents of the State of New York, residing at 4 Oregon Hollow Road, Armonk, New York.

5. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94.17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94.18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

6. The Seven Springs Parcel contains, among other things, a manor house that is approximately 90 years old. The house is the private dwelling of Donald Trump and family.

7. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel.

8. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

9. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

10. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

11. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

12. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

13. Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of The Nature Conservancy (the "Nature Conservancy Property").

14. The Nature Conservancy Property and the Seven Springs Parcel were part of certain lands acquired over time by Meyer.

15. The Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

16. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

17. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

18. The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

19. By reason of the foregoing and the December 22, 1995 Deed recorded in liber 11325 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and the facts herein set forth, Plaintiff has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified and highlighted (the "Easement" or "Easement Area") on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access. Annexed hereto as Exhibit "A", and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986.

20. At some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used as a public highway for a period of 10 years.

21. In or about 1990 the Town Board of the Town of North Castle purportedly closed a portion of Oregon Road pursuant to Highway Law § 205 as it was no longer used for public travel.

22. The said portion of Oregon Road referred to herein that was purportedly closed and that is referred to on Exhibit "A" "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

23. Upon information and belief. The Town of North Castle caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate and/or metal guide rail (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles and depriving Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

24. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of The Town of North Castle and to the Planning Board of the Town of Bedford.

25. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel. The only viable secondary access to the Seven Springs Parcel is from the south. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

26. The Town of Bedford Planning Board's refusal to permit development of the entire Seven Springs Parcel would not have occurred but for the Defendants' actions.

27. That the Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road.

28. Upon information and belief. Defendants made statements impugning Plaintiff's title to the Seven Springs Parcel and Easement, which statements in sum and substance asserted that Plaintiff has no right, title or interest to the Easement.

29. These statements were naturally and commonly to be interpreted as denying, disparaging, and casting doubt upon Plaintiff's title to the Easement, and was so understood.

30. Upon information and belief, Defendants caused said statements to be communicated and disseminated to third parties, including but not limited to, members of the Board of the Town of Bedford and members of the Board of the Town of North Castle.

31. Defendants intentionally, recklessly, or negligently, with malice, expressed or implied by law, wrongfully communicated the aforesaid statements that Plaintiff has no right, title or interest in, or to, the Easement.

32. The statements made and communicated by Defendants were and are false and untrue.

33. Upon information and belief, at the time the Defendants made and communicated said statements, Defendants had no reasonable cause to believe the statements were true, or Defendants knew the statements were false or demonstrated a reckless disregard for its truth.

34. Notwithstanding Defendants' knowledge of the falsity of the statements or reckless disregard for its truth, Defendants intentionally communicated the statements, even though Defendants knew, or should have known, that it would result in harm to Plaintiff's interest in the Seven Springs Parcel.

35. Defendants communicated the statements maliciously with the intention to injure Plaintiff.

36. That the Defendants have sought and obtained preliminary injunctive relief prohibiting Plaintiff from exercising its full rights to the Easement.

37. Plaintiff would have been able to develop the entire Seven Springs Parcel but for the Defendants' actions.

38. That the Defendants continue to unlawfully, intentionally and wrongfully deprive Plaintiff of its right to access the Easement and the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel by a system of conduct on their part, which intends to harm Plaintiff.

39. As a result of the Defendants' actions, Plaintiff, its visitors, tradespeople and the residents of the manor house are inconvenienced and deprived of the benefit of the Easement, and, more particularly are required to travel significantly greater distances to access the Seven Springs Parcel from the south.

40. Defendant's actions were (i) effected by dishonest, unfair and/or improper means; (ii) committed without reasonable justification; and/or (iii) were otherwise motivated solely by malice and ill-will to Plaintiff as they were intended to, and actually did, cause injury to Plaintiff by preventing Plaintiff from exercising its property rights over the Easement Area, by preventing Plaintiff from directly accessing the Seven Springs Parcel over Oregon Road, by preventing the development of the Seven Springs Parcel, and by preventing Plaintiff from exercising its full use and enjoyment of the Easement and Seven Springs Parcel.

41. Upon information and belief, said Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence is the sole motivation for Defendants' actions.

42. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendants and will suffer continuing damages.

43. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 48 AD3d 545).

44. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that the Town of North Castle never extinguished the Easement pursuant to Highway Law § 205.

45. On or about June 12, 2006 title to the property, which is adjacent to the easterly boundary line of the Burke and Donohoe properties, referred to above, to the center line of Oregon Road, was transferred from Realis Associates to Seven Springs by deed dated June 12, 2006 and recorded in the Westchester County Clerk's office on March 17, 2008 in Control Number 480640315. The deed from Realis Associates to Seven Springs specifically provides, among other things, that "the premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to

Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in liber 10576 page 243, and as set forth in deed from Realis Associates to Noel B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 8, 1994 in liber 10929 page 35".

46. By reason of the foregoing, the Town of North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe have no valid basis, in law or fact, to maintain the Gate or any other obstruction and/or barrier on or over Oregon Road, or prevent, or attempt to prevent, Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road.

47. Based upon the foregoing, Defendants Burke and Donohoe have no right, title or interest in, or to, Oregon Road and/or the Easement Area.

48. By reason of the foregoing, the Defendants have no fee interest in, or right of use over, that portion of the said allegedly closed portion of Oregon Road as described above, or the Easement Area, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road or the Easement Area.

49. As a result of the actions of Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Easement and Seven Springs Parcel, and the value

of the Seven Springs Parcel has been greatly diminished. and Plaintiff has suffered and will in the future suffer damages thereby.

50. By virtue of the foregoing Plaintiff has sustained actual and special damages in an amount to be determined at trial but not less than $60,000,000.00, to wit:

(a) Plaintiff's inability to use the Easement - $5,000,000.00

(b) Diminution in value of the Seven Springs Parcel - $50,000,000.00

(c) Plaintiff's inability to access the Seven Springs Parcel over Oregon Road - $5,000,000.00

51. By virtue of Defendants' unlawful, improper and intentional acts, Plaintiff should be awarded punitive damages in an amount to be determined at trial but not less than $30,000,000.00.

WHEREFORE, Plaintiff demands judgment:

(a) That Plaintiff have Judgment for damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, individually and severally, an amount to be determined at trial but not less than $60,000,000.00, with interest thereon and attorneys fees, for the injuries suffered as herein alleged.

(b) That Plaintiff have Judgment for punitive damages against Defendants The Nature Conservancy, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe in an amount to be determined at trial but not less than the amount of $30,000,000.00, with interest thereon.

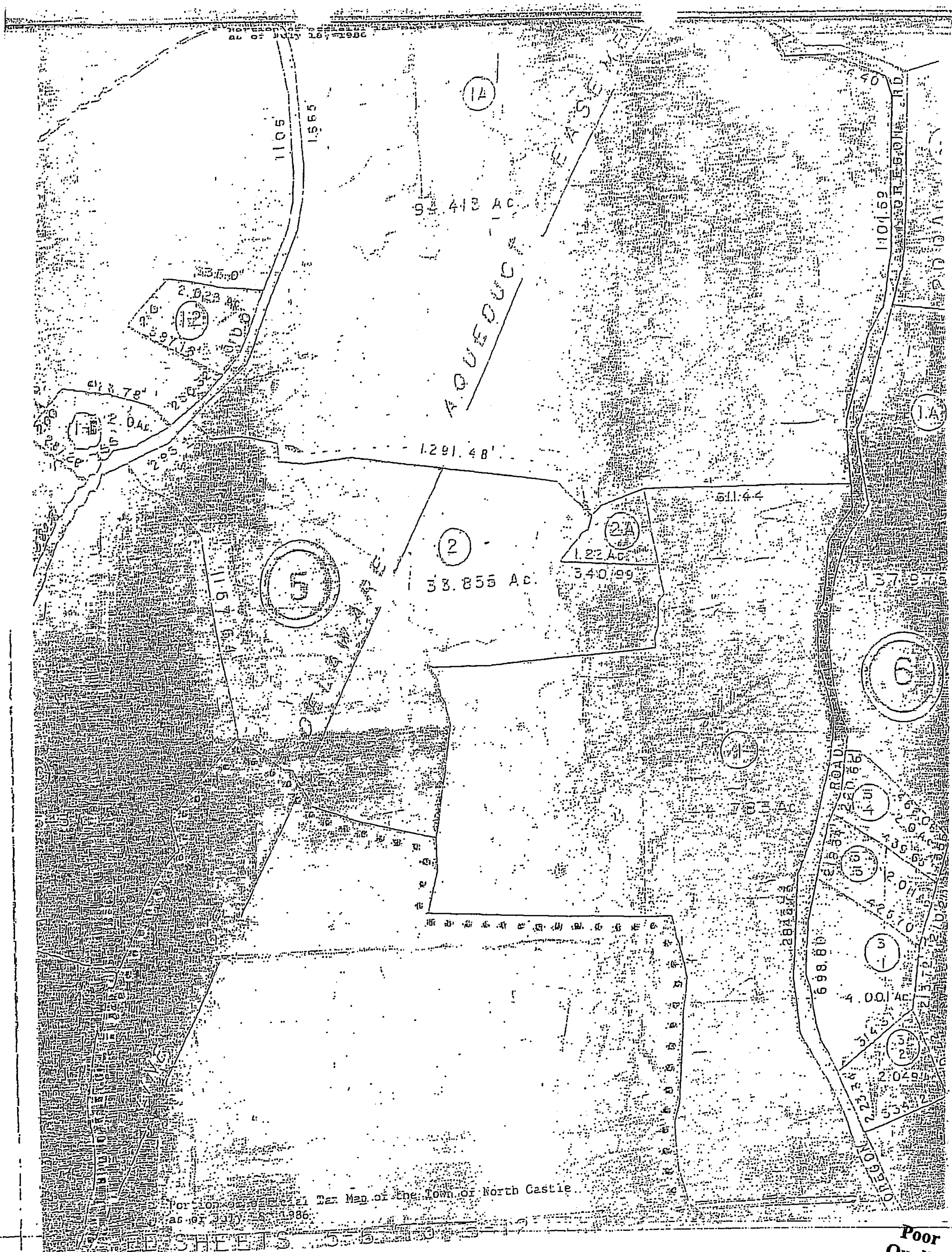
(c) That the Plaintiff have such other. further and different relief as to the Court may seem just. equitable and proper. together with the costs and disbursements of this action.

Dated: White Plains, New York
January __, 2010

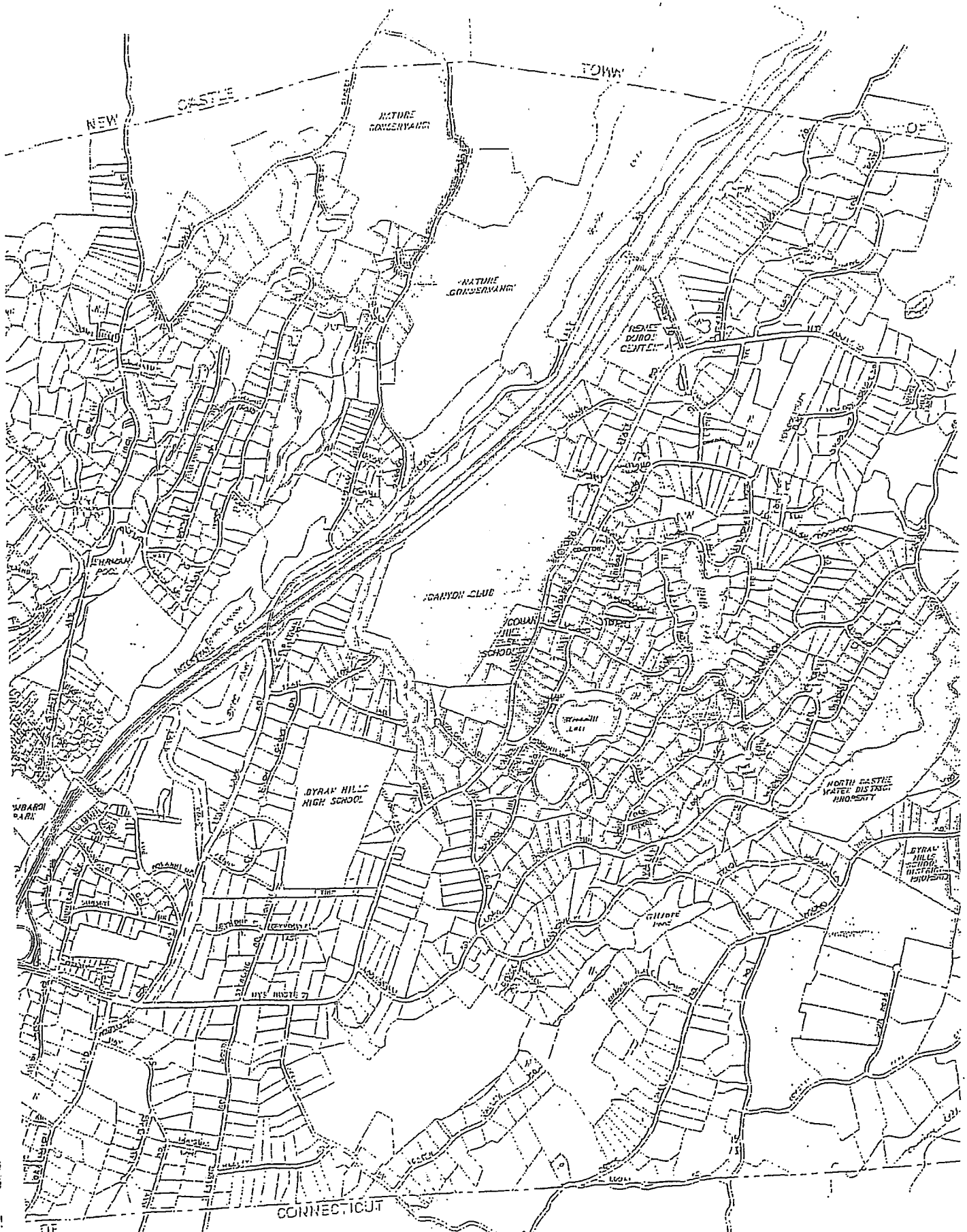
DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

EXHIBIT A



Poor Quality



Portion of Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997

Poor Quality

F

20

Exhibit F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No. 9130/06

- against –

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

REPLY AFFIRMATION IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

JOHN B. KIRKPATRICK, an attorney admitted to practice before the Courts of the State of New York, affirms as follows under penalties of perjury:

1. I am a member of the law firm Oxman Tulis Kirkpatrick Whyatt & Geiger LLP, attorneys for defendants Robert Burke, Teri Burke, Noel B. Donohoe and JoAnn Donohoe (the "Individual Defendants"), and am fully familiar with the facts set forth herein. This reply affirmation is submitted in support of the motion for a preliminary injunction made by co-defendant The Nature Conservancy ("TNC").

2. The Individual Defendants support TNC's motion and believe that TNC is entitled to the injunctive relief that it now seeks from this Court.

WHEREFORE, the Individual Defendants respectfully request that TNC's motion be granted in its entirety.

Dated: White Plains, New York
April 2, 2008

JOHN B. KIRKPATRICK

G

G00693132

DED2

24

WESTCHESTER COUNTY RECORDING AND ENDORSEMENT PAGE
(THIS PAGE FORMS PART OF THE INSTRUMENT)

THE FOLLOWING INSTRUMENT WAS ENDORSED FOR THE RECORD AS FOLLOWS:

TYPE OF INSTRUMENT DED-DEED FEE PAGE 6 TOTAL PAGES 6
(SEE CODES FOR DEFINITIONS)

STAT'Y CHARGE	5.25	MORTGE. DATE	
REC'ING CHARGE	18.00	MORTGE. AMT	
RECMGT FUND	4.75	EXEMPT YES___ NO___	
EA 5217	25.00		
TP-584	6.00	REC'D TAX ON ABOVE MTGE:	
CROSS-REF.	0.00	BASIC $	
MISC.		ADDITIONAL $	
		SUBTOTAL $	
TOTAL 59.00		SPECIAL $	
		TOTAL $	

LIBER: 10576
PAGE : 243

THE PROPERTY IS SITUATED IN WESTCHESTER COUNTY, NEW YORK IN THE:
TOWN OF NORTH CASTLE

$ 478395.00
CONSIDERATION

SERIAL NO. _____

DWELLING ___ 1-6 ___ OVER

_ DUAL TOWN
_ DUAL COUNTY/STATE

___ HELD
___ NOT HELD _____

RECEIVED:
TAX AMOUNT $ 1914.00
TRANSFER TAX# 0010546

TITLE COMPANY NUMBER: _____

EXAMINED BY TDM1

TERMINAL CTRL# 93132G006

DATE RETURNED _____

0001R1R000 05/12/93CPA/DE 59.
15:39

I HEREBY CERTIFY THAT THE ABOVE INFORMATION FEES AND TAXES ARE CORRECT
WITNESS MY HAND AND OFFICIAL SEAL

Andrew J. Spano

ANDREW J. SPANO
WESTCHESTER COUNTY CLERK

Poor Quality

1914

CONSULT YOUR LAWYER BEFORE SIGNING THIS INSTRUMENT - THIS INSTRUMENT SHOULD BE USED BY LAWYERS ONLY

G006

THIS INDENTURE, made the 2 day of APRIL, nineteen hundred and nine-,-three

BETWEEN REALIS ASSOCIATES, A New York partnership, with offices at

356 Manville Road, Pleasantville, New York 10570

61-24 CURRT. Lib

party of the first part, and ROBERT BURKE and TERI BURKE, husband and wife, both

residing at 70 Davenport Farms Lane East, Stamford, Connecticut 06903

party of the second part,

WITNESSETH, that the party of the first part, in consideration of TEN and No/100 ($10.00)----

---------- dollars,

lawful money of the United States, paid

by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the SEE SCHEDULE "A" - DESCRIPTION, ANNEXED HERETO.

SAID PREMISES being known on the Tax Assessment Map of the Town of North Castle as: Section 2, Block 5, Lot 1.2.

SUBJECT TO and assuming a mortgage made by New York Urban North II, Inc., in the amount of $140,000.00 having a principal balance at the time of this conveyance of $140,000.00, which mortgage the grantees hereby assume and agree to pay.

No right, title and interest in and to the streets are included in this sale, the same being reserved for dedication to the Town of North Castle.
The party of the second part is hereby granted an easement of ingress and egress over Oregon Hollow Road, pending dedication of same.

SUBJECT TO a road widening easement for the future widening of Oregon Road approximately twenty-five (25') feet in width, along the easterly boundary line, said easement as shown on Subdivision Map of Property known as Oregon Trails, filed in the Westchester County Clerk's Office on December 9, 1986, as Map No. 25547.

CHICAGO TITLE INSURANCE COMPANY

TITLE NO: 9310-01806

SCHEDULE A - DESCRIPTION
AMENDED 4/26/93
AMENDED 4/27/93

ALL that certain plot, piece or parcel of land, situate, lying and being in the Town of North Castle, County of Westchester and State of New York, shown and designated as Lot 2 on a certain map entitled, "Subdivision of Property known as Oregon Trails situate in the Town of North Castle, Westchester County, New York", made by Thomas C. Merritts, L.S. dated June 27, 1986 and filed in the Office of the Clerk of the County of Westchester, Division of Land Records, on December 9, 1986 as Map Number 22547, said lot being bounded and described as follows:

Beginning a point on the northerly side of Oregon Hollow at the westerly end of a curve, having a radius of 25.00 feet which connects the westerly side of Oregon Road with the northerly side of Oregon Hollow;

RUNNING THENCE along the northerly and northeasterly side of Oregon Hollow the following 5 courses and distances:

1) North 85° 23' 30" West 14.63 feet to a point of curve,

2) Along a curve to the right having a radius of 150.00 feet, a central angle of 67° 13' 26", a distance of 175.99 feet to a point of tangency,

3) North 18° 10' 04" West 51.49 feet to a point of curve,

4) Along a curve to the right having a radius of 25.00 feet a central angle of 51° 19' 04", a distance of 22.39 feet to a point of reverse curve,

5) Along a curve to the left having a radius of 55.00 feet, a central angel of 52° 11' 39", a distance of 50.10 feet to the division line between Lot 1 and Lot 2 as shown on the above mentioned filed Map No. 22547;

THENCE along said division line North 64° 47' 39" East 255.98 feet to the westerly side of Oregon Road;

THENCE along the westerly side of Oregon Road the following 10 courses and distnaces:

DESCRIPTION

CHICAGO TITLE INSURANCE COMPANY

TITLE NO: 9210-01806

SCHEDULE A - DESCRIPTION
AMENDED 4/26/93
AMENDED 4/27/93

1) South 00° 07' West 20.18 feet;

2) South 11° 53' 55" West 24.06 feet;

3) South 04° 08' 05" West 40.64 feet;

4) South 20° 17' 45" West 15.48 feet;

5) South 08° 57' 30" West 22.22 feet;

6) South 14° 28' 05" West 57.32 feet;

7) South 29° 00' 15" West 25.43 feet;

8) South 09° 07' West 37.36 feet;

9) South 04° 41' 35" West 28.48 feet;

10) South 00° 47' 30" West 43.04 feet to a point of curve;

THENCE along a curve to the right having a radius of 25.00 feet a central angle of 93° 49', a distnace of 40.93 feet to the northerly side of Oregon Hollow to the point and place of BEGINNING.,

TOGETHER with an easement of ingress and egress over Oregon Hollow to Oregon Road.

[redacted]

TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been incumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

IN PRESENCE OF:

REALTY ASSOCIATES

SUSAN CAVALIERE, Partner

GEORGE CROHN, JR., Partner

ANDREW J. FIORE, Partner

On the 27TH day of APRIL 19 93, before me personally came SUSAN CAVALIERE, GEORGE CROHN, JR. and ANDREW J. FIORE, general partner REALIS ASSOCIATES and to me known ~~to be the individuals~~ described in and who executed the foregoing instrument, and acknowledged that they executed the same, and that they had authority sign the same, and acknowledged to me that they ecuted same as the act and deed of said firm ror the use and purposes therein mentioned.

Rita Bisacquino
Notary Public

RITA BISACQUINO
NOTARY PUBLIC, State of New York
No. 60-5326050
Qualified in Westchester County
Commission Expires Dec. 31, 1994

On the day of 19 , before me personally came to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that executed the same.

STATE OF NEW YORK, COUNTY OF SS:

On the day of 19 , before me personally came to me known, who, being by me duly sworn, did depose and say that he resides at No.

that he is the ;
of

, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed h name thereto by like order.

STATE OF NEW YORK, COUNTY OF SS:

On the day of 19 , before me personally came the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides at No.

that he knows ;

to be the individual described in and who executed the foregoing instrument; that he, said subscribing witness, was present and saw execute the same; and that he, said witness, at the same time subscribed h name as witness thereto.

Bargain and Sale Deed
With Covenant Against Grantor's Acts

TITLE NO. 9210-01806

REALIS ASSOCIATES

TO

ROBERT BURKE and TERI R. BURKE

STANDARD FORM OF NEW YORK BOARD OF TITLE UNDERWRITERS
Distributed by
CHICAGO TITLE INSURANCE COMPANY

SECTION 2
BLOCK 5
LOT 1-2

COUNTY OR TOWN of North Castle, Westchester County, New York

Recorded at Request of
CHICAGO TITLE INSURANCE COMPANY

Return by Mail to

BLEAKLEY PLATT & SCHMIDT
ATT JOSEPH GLATHAAR
ONE NORTH LEXINGTON AVE
PO BOX 5056
WHITE PLAINS N.Y Zip No. 10602-5056

RESERVE THIS SPACE FOR USE OF RECORDING OFFICE

Poor Quality

H

Exhibit H

N02494221

DED2

24

*** DO NOT REMOVE ***

WESTCHESTER COUNTY RECORDING AND ENDORSEMENT PAGE
(THIS PAGE FORMS PART OF THE INSTRUMENT)

THE FOLLOWING INSTRUMENT WAS ENDORSED FOR THE RECORD AS FOLLOWS:

TYPE OF INSTRUMENT DED-DEED FEE PAGE 5 TOTAL PAGES 6
(SEE CODES FOR DEFINITIONS)

STAT'Y CHARGE	5.25	MORTGE. DATE	
REC'ING CHARGE	15.00	MORTGE. AMT	
RECMGT FUND	4.75	EXEMPT. YES ___ NO ___	
EA 5217	25.00		
TP-584	6.00	REC'D TAX ON ABOVE MTGE:	
CROSS-REF.	0.00	BASIC $	
MISC.		ADDITIONAL $	
		SUBTOTAL $	
TOTAL PAID 56.00		SPECIAL $	
		TOTAL PAID $	

LIBER: 10929
PAGE : 35

THE PROPERTY IS SITUATED IN WESTCHESTER COUNTY, NEW YORK IN THE:
TOWN OF NORTH CASTLE

$ 786500.00
CONSIDERATION

SERIAL NO. _____

DWELLING ___ 1-6 ___ OVER

_ DUAL TOWN
_ DUAL COUNTY/STATE

RECEIVED:
TAX AMOUNT $ 3146.00
TRANSFER TAX# 0000554

___ HELD
___ NOT HELD _____

TITLE COMPANY NUMBER: _____

EXAMINED BY AMC8

TERMINAL CTRL# 94221N024

DATE RETURNED _____

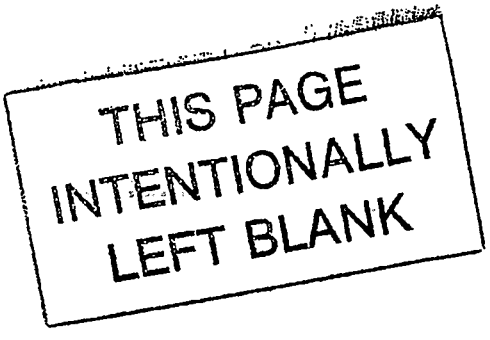
[illegible] 08/09/94CPA/BE 56.(

I HEREBY CERTIFY THAT THE ABOVE INFORMATION FEES AND TAXES ARE CORRECT
WITNESS MY HAND AND OFFICIAL SEAL

Leonard N. Spano

LEONARD N. SPANO
WESTCHESTER COUNTY CLERK

Poor Quality



Reorder Form No. 38007
Form 8007* 4-89 5M —Bargain and Sale D th Covenant against Grantor's Acts—Individual or Corporation. 91 5-613

CONSULT YOUR LAWYER BEFORE SI THIS INSTRUMENT—THIS INSTRUMENT SHOULD BE USE LAWYERS ONLY.

FST 1.24

3/H6

THIS INDENTURE, made the 7th day of July , nineteen hundred and ninety-four.

BETWEEN

REALIS ASSOCIATES, a New York Partnership with offices at
356 Manville Road, Pleasantville, NY 10570

party of the first part, and

NOEL B. DONOHOE & JOANN DONOHOE, husband and wife, both residing at
32 Harney Road, Scarsdale, NY 10583

party of the second part,

WITNESSETH, that the party of the first part, in consideration of $10.00

----------TEN---------- dollars,

lawful money of the United States, paid

by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Town of North Castle, County of Westchester, State of New York, as shown on Description annexed hereto, as Exhibit "A".

Also known on the Tax Assessment Map of the Town of North Castle as Section 2, Block 5, Lot 1-1.

BEING a portion of the premises acquired by the grantor by deed dated June 28, 1988 and recorded on July 7, 1988 in Liber 9236, cp 287.

The party of the second part is granted an easement to use the roads as shown on the subdivision map in Schedule A annexed hereto for ingress and egress to the nearest public road.

No right title or interest into any of the roads abutting the premises herein are included in this conveyance, the same being reserved for dedication to the Town of North Castle.

Reserving to the party of the first part for the purposes of dedicating to the Town of North Castle, a twenty-five foot road widening easement, as shown on Map No. 22547, the future widening of Oregon Road. Seller retains this easement for purposes of dedication to the Town of North Castle.

TAX MAP DESIGNATION
Dist.
Sec. 2
Blk. 5
Lot(s): 1-1

Poor Quality

CHICAGO TITLE INSURANCE COMPANY

SCHEDULE A DESCRIPTION

Title No.: 9410-00613

AMENDED

ALL that certain plot, piece or parcel of land, situte, lying and being in the Town of North Castle, County of Westchester and State of New York, shown and designated as Lot 1 on a certain map entitled, "Subdivision of Property known as Oregon Trails situate in the Town of North Castle, Westchester County, New York", made by Thomas C. Merrits, L.S. dated June 27, 1986 and filed in the Office of the Clerk of the County of Westchester, Division of Land Records, on December 9, 1986 as Map Number 22547 being bounded and described as follows:

BEGINNING at a point on the easterly side of Oregon Hollow where the same is intersected by the division line between Lots 1 and 2 on said map;

THENCE in a northwesterly direction along the easterly side of Oregon Hollow on a curve to the left having a radius of 55.00 feet a distance of 42.86 feet to the division line between Lots 1 and 20 on said map;

THENCE along the division line between Lots 1 and 20,

North 21° 36' 54" East, 331.49 feet to lands now or formerly of Eugene and Agnes E. Meyer Foundation on said map;

THENCE along said lands now or formerly of Eugene and Agnes E. Meyer Foundation,

North 89° 34' 30" East, 176.42 feet to the westerly side of Oregon Road on said map;

THENCE along the westerly side of Oregon Road,

South 6° 13' 55" West, 37.58 feet;
South 0° 07' 55" West, 13.01 feet;
North 79° 22' 30" West, 20.01 feet;
South 6° 55' 05" West, 32.63 feet;
South 40° 49' 05" West, 12.02 feet;
South 10° 55' 30" West, 13.14 feet;
South 38° 42' 10" East, 24.56 feet;
South 1° 48' 25" West, 20.61 feet;
South 12° 27' 50" West, 73.77 feet; and
South 0° 07' 00" West, 18.96 feet to the division line between Lots 1 and 2 on said map;

THENCE along the division line between Lots 1 and 2,

South 64° 47' 39" West, 255.98 feet to the easterly side of Oregon Hollow, the point and place of BEGINNING.

TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises,

TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been incumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

IN PRESENCE OF:

REALIS ASSOCIATES

By: _____
ANDREW J. FIORE, Partner

STATE OF NEW YORK, COUNTY OF ss:

On the day of 19 efore me personally came

o me known to be the individual described in and who executed the foregoing instrument, and acknowledged that executed the same.

STATE OF NEW YORK, COUNTY OF ss:

On the day of 1 , before me personally came

to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that executed the same.

STATE OF NEW YORK, COUNTY OF WESTCHESTER ss:

On the 27th day of July 1994, before me personally came ANDREW J. FIORE to me known, who, being by me duly sworn, did depose and say that he resides at No. One Pioneer Trail, Armonk, NY 10504; that he is ~~the~~ a General Partner of REALIS ASSOCIATES, the partnership, ~~the corporation~~ described in and which executed the foregoing instrument; ~~that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and~~ that he ~~signed h name thereto by like order.~~ executed the foregoing instrument in the firm name of REALIS ASSOCIATES; that he had authority to sign same and acknowledged to me that he executed the same as the act and deed of said firm for the uses and purposes therein mentioned.

Abraham C. Bein
Notary Public

ABRAHAM C. BEIN
ATTORNEY AND NOTARY PUBLIC
State of New York No. 60-0226425
Qualified in Westchester County
Commission Expires 4/30/95

STATE OF NEW YORK, COUNTY OF ss:

On the day of 19 , before me personally came

the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides at No.

that he knows ;

to be the individual described in and who executed the foregoing instrument; that he, said subscribing witness, was present and saw execute the same; and that he, said witness, at the same time subscribed h name as witness thereto.

ABRAHAM C. BEIN
ATTORNEY AND NOTARY PUBLIC
State of New York No. 60-0226425
Qualified in Westchester County
Commission Expires 4/30/95

Bargain and Sale Deed
WITH COVENANT AGAINST GRANTOR'S ACTS

TITLE NO. 9410-613

REALIS ASSOCIATES

TO

NOEL B. DONOHOE & JOANN DONOHOE

SECTION 2
BLOCK 5
LOT 1-1

~~XXXXXXXX~~ TOWN OF NORTH CASTLE
~~TAX BILLING ADDRESS~~
COUNTY - WESTCHESTER

~~Recorded At Request of Ticor Title Guarantee Company~~

RETURN BY MAIL TO:

MARIO SCLAFANI, ESQ.
27 TWIN LAKES ROAD
SOUTH SALEM, NY 10590

Zip No.

Distributed by
TICOR TITLE GUARANTEE

Poor Quality

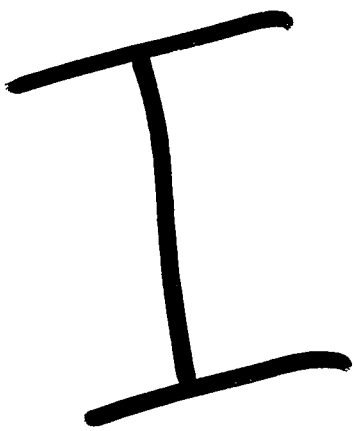


Exhibit I

480640315DED1

Control Number
480640315

Instrument Type
DED

WESTCHESTER COUNTY RECORDING AND ENDORSEMENT PAGE

(THIS PAGE FORMS PART OF THE INSTRUMENT)
***** DO NOT REMOVE *****

THE FOLLOWING INSTRUMENT WAS ENDORSED FOR THE RECORD AS FOLLOWS:
TYPE OF INSTRUMENT: DED - DEED
FEE PAGES: 10 TOTAL PAGES: 10

RECORDING FEES

STATUTORY CHARGE	$6.00
RECORDING CHARGE	$30.00
RECORD MGT. FUND	$19.00
RP 5217	$165.00
TP-584	$5.00
CROSS REFERENCE	$0.00
MISCELLANEOUS	$0.00
TOTAL FEES PAID	$225.00

TRANSFER TAXES

CONSIDERATION	$3,000.00
TAX PAID	$12.00
TRANSFER TAX #	9377

RECORDING DATE: 3/17/2008
TIME: 12:09:00

MORTGAGE TAXES

MORTGAGE DATE	
MORTGAGE AMOUNT	$0.00
EXEMPT	
COUNTY TAX	$0.00
YONKERS TAX	$0.00
BASIC	$0.00
ADDITIONAL	$0.00
MTA	$0.00
SPECIAL	$0.00
TOTAL PAID	$0.00

SERIAL NUMBER:
DWELLING:

THE PROPERTY IS SITUATED IN WESTCHESTER COUNTY, NEW YORK IN THE:
TOWN OF NORTH CASTLE

WITNESS MY HAND AND OFFICIAL SEAL

TIMOTHY C. IDONI
WESTCHESTER COUNTY CLERK

Record & Return to:
DELBELLO DONNELLAN WEINGARTEN V
ONE NORTH LEXINGTON AVE

WHITE PLAINS, NY 10601

#315

9p

NOC

DEED

THIS INDENTURE, made the 13th day of JUNE , two thousand and six

BETWEEN

REALIS ASSOCIATES, a New York Partnership, with offices at
356 Manville Road
Pleasantville, New York 10570

party of the first part, and

SEVEN SPRINGS, LLC with offices at
c/o The Trump Organization
725 Fifth Avenue
New York, New York 10022

party of the second part,

WITNESSETH, that the party of the first part, in consideration of ten dollars and other valuable consideration paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Town of North Castle, County of Westchester and State of New York, being more particularly bounded and described as follows:

SEE ATTACHED SCHEDULE "A"

SAID premises being known as part of Oregon Road, North Castle, New York.

TOGETHER, with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof; TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises; TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

The premises being conveyed are, and are intended to be, the same premises retained by the party of the first part as set forth in deed from Realis Associates to Robert Burke and Teri Burke dated April 29, 1993 and recorded on May 12, 1993 in liber 10576 page 243, and as set forth in deed from Realis Associates to Noel B. Donohoe and Joann Donohoe dated July 27, 1994 and recorded August 9, 1994 in liber 10929 page 35.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

IN PRESENCE OF:

REALIS ASSOCIATES

By: _____
Andrew J. Fiore, Partner

Poor Quality

1173991

STATE OF NEW YORK)
SS.:
COUNTY OF WESTCHESTER)

On the 12th day of June in the year 2006 before me, the undersigned, personally appeared ANDREW J. FIORE personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Eileen M. Acosta

Signature and Office of individual taking acknowledgment

EILEEN M. ACOSTA
Notary Public, State of New York
No. 01AC8010118
Qualified in Orange County
Commission Expires July 13, 20 06

DEED

REALIS ASSOCIATES

TO

SEVEN SPRINGS, LLC

TOWN OF NORTH CASTLE
COUNTY OF WESTCHESTER
Tax Map Designation:

Section Not assessed
Block
Lot

Return by Mail to
DelBello Donnellan Weingarten
Wise & Wiederkehr, LLP
One North Lexington Avenue, 11th Floor
White Plains, New York 10601

Poor Quality

1173991

Schedule "A"

All that certain plot, piece or parcel of land, situate, lying and being in the Town of North Castle, County of Westchester, and State of New York adjacent to the easterly boundary line of the parcel identified on the tax assessment map of the Town of North Castle as Section 2, Block 5, Lot 1.2, and more particularly described on Exhibit "1A" annexed hereto, to the center line of the road known as Oregon Road, and adjacent to the easterly boundary line of the parcel identified on the tax assessment map of the Town of North Castle as Section 2, Block 5, Lot 1-1, and more particularly described on Exhibit "1B" annexed hereto, to the center line of the road known as Oregon Road, together with a road widening easement for the future widening of Oregon Road approximately twenty-five (25) feet in width, along the easterly boundary line, said easement as shown on Subdivision Map of Property known as Oregon Trails, filed in the Westchester County Clerk's Office on December 9, 1986, as Map No. 22547.

EXHIBIT 1A

CHICAGO TITLE INSURANCE COMPANY

TITLE NO: 9310-01806

SCHEDULE A - DESCRIPTION
AMENDED 6/26/93
AMENDED 6/27/93

ALL that certain plot, piece or parcel of land, situate, lying and being in the Town of North Castle, County of Westchester and State of New York, shown and designated as Lot 2 on a certain map entitled, "Subdivision of Property known as Oregon Trails situate in the Town of North Castle, Westchester County, New York", made by Thomas G. Merritts, L.S. dated June 27, 1986 and filed in the Office of the Clerk of the County of Westchester, Division of Land Records, on December 9, 1986 as Map Number 22547, said lot being bounded and described as follows:

Beginning a point on the northerly side of Oregon Hollow at the easterly end of a curve, having a radius of 25.00 feet which connects the westerly side of Oregon Road with the northerly side of Oregon Hollow;

RUNNING THENCE along the northerly and northeasterly side of Oregon Hollow the following 5 courses and distances:

1) North 85° 23' 30" West 14.63 feet to a point of curve,

2) Along a curve to the right having a radius of 150.00 feet, a central angle of 67° 13' 28", a distance of 175.98 feet to a point of tangency,

3) North 18° 10' 04" West 51.49 feet to a point of curve,

4) Along a curve to the right having a radius of 25.00 feet a central angle of 51° 19' 04", a distance of 22.39 feet to a point of reverse curve,

5) Along a curve to the left having a radius of 55.00 feet, a central angel of 52° 11' 39", a distance of 50.10 feet to the division line between Lot 1 and Lot 2 as shown on the above mentioned filed Map No. 22547;

THENCE along said division line North 64° 47' 39" East 255.98 feet to the westerly side of Oregon Road;

THENCE along the westerly side of Oregon Road the following 10 courses and distances:

DESCRIPTION

CHICAGO TITLE INSURANCE COMPANY

TITLE NO: 9210-01806

SCHEDULE A - DESCRIPTION
AMENDED 4/26/93
AMENDED 5/27/93

1) South 00° 07' West 20.18 feet;

2) South 11° 53' 55" West 24.06 feet;

3) South 04° 08' 05" West 40.64 feet;

4) South 20° 17' 45" West 15.48 feet;

5) South 08° 57' 30" West 22.22 feet;

6) South 16° 28' 05" West 57.32 feet;

7) South 29° 00' 15" West 25.43 feet;

8) South 09° 07' West 37.36 feet;

9) South 04° 41' 35" West 28.48 feet;

10) South 00° 47' 30" West 43.04 feet to a point of curve;

THENCE along a curve to the right having a radius of 25.00 feet a central angle of 93° 49', a distance of 40.93 feet to the northerly side of Oregon Hollow to the point and place of BEGINNING.,

TOGETHER with an easement of ingress and egress over Oregon Hollow to Oregon Road.

EXHIBIT 1B

CHICAGO TITLE INSURANCE COMPANY

SCHEDULE A DESCRIPTION

Title No.: 9410-00613

AMENDED

ALL that certain plot, piece or parcel of land, situate, lying and being in the Town of North Castle, County of Westchester and State of New York, shown and designated as Lot 1 on a certain map entitled, "Subdivision of Property known as Oregon Trails situate in the Town of North Castle, Westchester County, New York", made by Thomas C. Morritt, L.S. dated June 27, 1985 and filed in the office of the Clerk of the County of Westchester, Division of Land Records, on December 9, 1985 as Map Number 22547 being bounded and described as follows:

BEGINNING at a point on the easterly side of Oregon Hollow where the same is intersected by the division line between Lots 1 and 2 on said map;

THENCE in a northwesterly direction along the easterly side of Oregon Hollow on a curve to the left having a radius of 55.00 feet a distance of 42.86 feet to the division line between Lots 1 and 20 on said map;

THENCE along the division line between Lots 1 and 20,

North 21° 36' 54" East, 331.49 feet to lands now or formerly of Eugene and Agnes E. Meyer Foundation on said map;

THENCE along said lands now or formerly of Eugene and Agnes E. Meyer Foundation,

North 89° 34' 30" East, 176.42 feet to the westerly side of Oregon Road on said map;

THENCE along the westerly side of Oregon Road,

South 8° 13' 55" West, 37.58 feet;
South 0° 07' 55" West, 13.01 feet;
North 79° 22' 30" West, 20.01 feet;
South 8° 55' 05" West, 32.63 feet;
South 40° 49' 05" West, 12.02 feet;
South 10° 55' 30" West, 13.14 feet;
South 38° 42' 10" East, 24.56 feet;
South 1° 48' 25" West, 20.61 feet;
South 12° 27' 50" West, 73.77 feet; and
South 0° 07' 00" West, 18.96 feet to the division line between Lots 1 and 2 on said map;

THENCE along the division line between Lots 1 and 2,

South 64° 47' 39" West, 255.98 feet to the easterly side of Oregon Hollow, the point and place of BEGINNING.

WESTCHESTER COUNTY CLERK RECORDING SHEET

110 Dr. Martin Luther King, Jr. Boulevard White Plains, NY 10601

THIS FORM MUST BE COMPLETED AND SUBMITTED WITH EACH DOCUMENT

This page is part of the instrument; the County Clerk will rely on the information provided on this page for purposes of indexing this document. To the best of the submitter's knowledge the information contained on this Recording Sheet is consistent with the information contained in the attached document.

SUBMITTER INFORMATION: Title Number: _____

Company: Delbello, Donnellan, et al LLP

Address: One North Lexington ave 11th Floor

City White Plains State: NY Zip: 10601 Telephone: 681-0200

Attention: Brad Wank

Document type: Deed # of pages - 8

1st party name(s) (i.e. grantor/mortgagor) On page ____ of document — Business Entity

Realis Associates ☐

[redacted] ☐

☐

☐

☐

2nd party name(s) (i.e. grantee/mortgagee) On page ____ of document — Business Entity

Seven Springs, LLC ☐

c/o JR Trump Organization ☐

☐

☐

☐

Tax designation (Section, Block & Lot) On page ____ of document

portion of road - See attached (Not assessed) Schedule A

City(ies) or Town(s) for Property Description On page ____ of document

North Castle

Mortgage Amount On page ____ of document

$ _____

OR

Consideration/Conveyance Amt:

$ _____

Dwelling Type: For Mortgage Only On page ____ of document

☐ 1 to 2 family

☐ 1 to 6 family

☐ Not 1 to 6 family

Check if submitted:

☐ RP-5217 - ☐ $75 ☐ $165

☐ TP-584 - Type of property conveyed [1 through 8]

☐ TP-584.1 ☐ IT-2663

RECEIVED 2008 FEB 29 PM 4:04 TIMOTHY C. IDONI WESTCHESTER COUNTY CLERK

TAXES PAID: Amount Reference # Or Check #

Mortgage Tax $ _____

Transfer Tax $ _____

Mansion Tax $ _____

RECORDING FEES PAID: Amount Reference # or Check #

$ _____

MORTGAGE TAX AFFIDAVITS SUBMITTED:

☐ 252 ☐ 255 ☐ 280 Other: _____

☐ 253 ☐ 260 ☐ 339-ee

Cross Reference(s): On page ____ of document

Property Description – If required, check the one contained within the document. On page ____ of document

☐ Metes & bounds

☐ Lot number on map filed in the Office of the County Clerk

☐ Refer to deed recorded in the Office of the County Clerk

Record and Return To:

Brad Wank, Esq.

One North Lexington ave 11th Floor

White Plains NY 10601

Poor Quality

J

Exhibit J

OVERSIZED MAPS ARE ON FILE WITH THE COURT

K

Exhibit K

Q01695362

DED2

2

*** DO NOT REMOVE ***

WESTCHESTER COUNTY RECORDING AND ENDORSEMENT PAGE
(THIS PAGE FORMS PART OF THE INSTRUMENT)

THE FOLLOWING INSTRUMENT WAS ENDORSED FOR THE RECORD AS FOLLOWS:

TYPE OF INSTRUMENT DED-DEED
(SEE CODES FOR DEFINITIONS)

FEE PAGE 24 TOTAL PAGES 24

STAT'Y CHARGE	6.25	MORTGE. DATE	
REC'ING CHARGE	72.00	MORTGE. AMT	
RECMGT FUND	4.75	EXEMPT YES NO	
EA 5217			
TP-584	6.00	REC'D TAX ON ABOVE MTGE:	
CROSS-REF.	0.00	YONKERS $	
MISC.		BASIC $	
		ADDITIONAL $	
		SUBTOTAL $	
		MTA $	
		SPECIAL $	
		TOTAL PAID $	

TOTAL PAID
114.00

LIBER: 11325
PAGE : 243

THE PROPERTY IS SITUATED
IN WESTCHESTER COUNTY,
NEW YORK IN THE:
TOWN OF BEDFORD
NEW CASTLE
NORTH CASTLE

SERIAL NO.

$ 7500000.00
CONSIDERATION

DWELLING 1-6 OVER

DUAL TOWN
DUAL COUNTY/STATE

RECEIVED:
TAX AMOUNT $ 30000.00
TRANSFER TAX# 0007377

HELD
NOT HELD

TITLE COMPANY NUMBER:

EXAMINED BY JLG1

TERMINAL CTRL# 95362Q016

DATE RETURNED

000165R000 12/28/95CPA/DE 114.00
12:51

WITNESS MY HAND AND OFFICIAL SEAL

LEONARD N. SPANO
WESTCHESTER COUNTY CLERK

99

Poor Quality

T/Bedford
T/New Castle
T/North Castle

THIS INDENTURE, made the 22nd day of December nineteen hundred and ninety-five between THE ROCKEFELLER UNIVERSITY, a New York education corporation having an address at 1230 York Avenue, New York, New York 10021 ("Grantor") and SEVEN SPRINGS, LLC, a New York limited liability company, having an address c/o The Trump Organization 725 Fifth Avenue, New York, New York 10022 ("Grantee");

W I T N E S S E T H:

WHEREAS, Grantor, in consideration of Ten Dollars and other valuable consideration paid by Grantee, does hereby grant and release unto Grantee, the heirs, successors and assigns of Grantee forever,

ALL that certain parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Towns of New Castle, North Castle and Bedford, Westchester County, New York and more particularly described on Schedule A attached hereto and made a part hereof (the "Premises");

TOGETHER with all right, title and interest, if any, of Grantor in and to any streets and roads abutting the Premises to the centerlines thereof;

TOGETHER with the appurtenances and all the estate and rights of Grantor in and to the Premises;

TO HAVE AND TO HOLD the Premises unto Grantee, the heirs, successors and assigns of Grantee forever.

AND Grantor covenants that Grantor has not done or suffered anything whereby the Premises have been encumbered in any way whatever.

AND Grantor, in compliance with Section 13 of the Lien Law, covenants that Grantor will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

IN WITNESS WHEREOF, the Grantor has duly executed this Indenture the day and year first above written.

THE ROCKEFELLER UNIVERSITY

By: David J. Lyons
David J. Lyons
Vice President

RLE\22125_1 12/21/95 11:50am

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

On the 22nd day of December 1995, before me personally came David J. Lyons to me known, who, being by me duly sworn, did depose and say that he resides at 262 Coleridge Street, Brooklyn, New York 11235; that he is a Vice President of THE ROCKEFELLER UNIVERSITY, the education corporation described in and which executed the foregoing instrument; and that he signed his name thereto by order of the board of directors of said corporation.

Elliot Arocho
Notary Public

My commission expires: 10/23/97

ELLIOT AROCHO
Notary Public, State of New York
No. 01AR5050948
Qualified in Bronx County
Certificate Filed in Bronx County
Commission Expires October 23, 1997

RLB\22125_1 12/21/95 11:50am

DESCRIPTION - SCHEDULE A

PARCEL 1

ALL that certain plot, piece of parcel of land, situate, lying and being partly in the Town of New Castle and partly in the Town of Bedford, County of Westchester and State of New York, bounded and described as follows:

BEGINNING at a point on the easterly side of Woodside Road where the same is intersected by the southwesterly corner of land now or formerly of Gallager;

RUNNING THENCE from said point of beginning along said last mentioned land and continuing along land now or formerly of Roland, the following 42 courses and distances:

(1) North 55 degrees 16 minutes 30 seconds East 22.12 feet;

(2) North 62 degrees 03 minutes 30 seconds East 22.90 feet;

(3) North 71 degrees 09 minutes 30 seconds East 44.68 feet;

(4) North 71 degrees 52 minutes 50 seconds East 44.31 feet;

(5) North 75 degrees 45 minutes 30 seconds East 43.08 feet;

(6) North 63 degrees 31 minutes 30 seconds East 25.86 feet;

(7) North 62 degrees 51 minutes 10 seconds East 14.99 feet;

(8) North 70 degrees 41 minutes 20 seconds East 13.43 feet;

(9) North 48 degrees 17 minutes 10 seconds East 10.11 feet;

(10) North 66 degrees 42 minutes 50 seconds East 33.24 feet;

(11) North 89 degrees 04 minutes 40 seconds East 8.70 feet;

(12) North 68 degrees 33 minutes 00 seconds East 7.57 feet;

(13) North 76 degrees 29 minutes 50 seconds East 20.56 feet;

(14) North 61 degrees 28 minutes 10 seconds East 20.85 feet;

(15) North 65 degrees 24 minutes 00 seconds East 56.31 feet;

(16) North 75 degrees 50 minutes 50 seconds East 13.25 feet;

(17) North 65 degrees 01 minutes 10 seconds East 57.73 feet;

(18) North 77 degrees 18 minutes 25 seconds East 18.93 feet;

(19) South 80 degrees 49 minutes 50 seconds East 4.83 feet;

(20) North 79 degrees 19 minutes 30 seconds East 19.81 feet;

(21) North 84 degrees 50 minutes 45 seconds East 40.07 feet;

(22) South 80 degrees 19 minutes 00 seconds East 13.20 feet;

(23) North 81 degrees 21 minutes 50 seconds East 81.65 feet;

(24) South 75 degrees 39 minutes 50 seconds East 103.31 feet;

(25) North 33 degrees 43 minutes 10 seconds East 80.29 feet;

(26) South 89 degrees 41 minutes 15 seconds East 300.86 feet;

(27) North 73 degrees 00 minutes 05 seconds East 30.75 feet;

(28) North 78 degrees 02 minutes 10 seconds East 38.46 feet;

(29) North 70 degrees 54 minutes 15 seconds East 33.00 feet;

(30) North 66 degrees 36 minutes 55 seconds East 40.80 feet;

(31) North 78 degrees 30 minutes 45 seconds East 12.56 feet;

(32) North 59 degrees 02 minutes 00 seconds East 7.62 feet;

(33) North 79 degrees 58 minutes 00 seconds East 33.38 feet;

(34) North 51 degrees 31 minutes 45 seconds East 28.46 feet;

(35) North 56 degrees 01 minutes 00 seconds East 45.90 feet;

(36) North 39 degrees 16 minutes 00 seconds East 58.93 feet;

(37) North 36 degrees 20 minutes 20 seconds East 38.63 feet;

(38) North 42 degrees 27 minutes 40 seconds East 32.51 feet;

(39) North 43 degrees 19 minutes 10 seconds East 35.59 feet;

(40) North 48 degrees 55 minutes 15 seconds East 123.19 feet;

(41) North 47 degrees 22 minutes 00 seconds East 114.00 feet; and

(42) North 49 degrees 43 minutes 25 seconds East 87.25 feet to the northwesterly corner of land now or formerly of Glueck;

THENCE along said last mentioned land, the following 3 courses and distances:

(1) South 09 degrees 44 minutes 20 seconds East 70.81 feet;

(2) South 13 degrees 05 minutes 50 seconds East 28.19 feet; and

(3) South 08 degrees 58 minutes 00 seconds East 70.24 feet to the northerly side of Oregon Road in the Town of Bedford;

THENCE along the northerly side of Oregon Road in the Town of Bedford and continuing along the northerly side of Lower Byram Lake Road in the Town of New Castle, southwesterly, northwesterly and southwesterly and partially along a stone wall, the following 24 courses and distances:

(1) South 56 degrees 56 minutes 00 seconds West 123.00 feet;

(2) South 50 degrees 48 minutes 00 seconds West 78.00 feet;

(3) South 27 degrees 44 minutes 10 seconds West 66.55 feet;

(4) South 34 degrees 12 minutes 20 seconds West 10.46 feet;

(5) South 24 degrees 31 minutes 10 seconds West 47.98 feet;

(6) South 18 degrees 32 minutes 15 seconds West 72.38 feet;

(7) South 16 degrees 08 minutes 00 seconds West 104.40 feet;

(8) South 18 degrees 35 minutes 45 seconds West 16.90 feet;

(9) South 18 degrees 59 minutes 20 seconds West 34.70 feet;

(10) North 70 degrees 35 minutes 00 seconds West 20.01 feet;

(11) South 19 degrees 25 minutes 00 seconds West 185.02 feet to a point of curve;

(12) Southwesterly on a curve to the right having a radius of 165.00 feet, a distance of 136.12 feet;

(13) South 66 degrees 41 minutes 00 seconds West 138.42 feet to a point of curve;

(14) Southwesterly on a curve to the left having a radius of 110.00 feet, a distance of 66.68 feet;

(15) South 31 degrees 57 minutes 00 seconds West 46.34 feet to a point of curve;

(16) Northwesterly on a curve to the right having a radius of 35.00 feet, a distance of 76.37 feet;

(17) North 23 degrees 02 minutes 00 seconds West 29.00 feet;

(18) North 45 degrees 22 minutes 00 seconds West 70.87 feet to a point of curve;

(19) Westerly on a curve to the left having a radius of 50.00 feet, a distance of 70.02 feet;

(20) South 54 degrees 24 minutes 00 seconds West 59.87 feet;

(21) South 58 degrees 22 minutes 00 seconds West 63.00 feet;

(22) South 67 degrees 36 minutes 00 seconds West 167.90 feet to a point of curve;

(23) Southerly on a curve to the left having a radius of 50.00 feet, a distance of 52.71 feet; and

(24) South 07 degrees 12 minutes 00 seconds West 114.78 feet to a point of curve;

THENCE southwesterly on a curve to the right having a radius of 50.00 feet connecting the northerly side of Oregon Road in the Town of New Castle and the northwesterly side of Lower Byram Lake Road, a distance of 65.13 feet to a point on the northerly side of Oregon Road in the Town of New Castle;

THENCE westerly along the northerly side of Oregon Road in the Town of New Castle, the following 5 courses and distances:

(1) South 81 degrees 50 minutes 00 seconds West 238.89 feet;

(2) North 85 degrees 02 minutes 00 seconds West 70.00 feet;

(3) South 83 degrees 49 minutes 50 seconds West 102.94 feet;

(4) South 85 degrees 57 minutes 50 seconds West 4.83 feet; and

(5) North 53 degrees 07 minutes 20 seconds West 15.41 feet to a point on the easterly side of Woodside Road;

THENCE northerly along the easterly side of Woodside Road, the following 23 courses and distances:

(1) North 16 degrees 04 minutes 10 seconds West 11.34 feet;

(2) North 03 degrees 30 minutes 10 seconds West 70.19 feet;

(3) North 01 degrees 13 minutes 40 seconds East 14.92 feet;

(4) North 24 degrees 21 minutes 30 seconds East 22.31 feet;

(5) North 09 degrees 59 minutes 20 seconds West 12.85 feet;

(6) North 17 degrees 23 minutes 30 seconds West 17.20 feet;

(7) North 32 degrees 53 minutes 50 seconds East 37.34 feet;

(8) North 17 degrees 46 minutes 50 seconds East 56.16 feet;

(9) North 13 degrees 36 minutes 50 seconds East 31.95 feet;

(10) North 02 degrees 31 minutes 10 seconds East 20.02 feet;

(11) North 17 degrees 43 minutes 50 seconds East 63.97 feet;

(12) North 02 degrees 26 minutes 30 seconds West 46.26 feet;

(13) North 06 degrees 35 minutes 30 seconds West 43.99 feet;

(14) North 17 degrees 56 minutes 30 seconds West 27.92 feet;

(15) North 08 degrees 59 minutes 05 seconds West 21.90 feet;

(16) North 27 degrees 02 minutes 20 seconds West 16.19 feet;

(17) North 09 degrees 58 minutes 35 seconds West 19.05 feet;

(18) North 18 degrees 21 minutes 00 seconds West 27.57 feet;

(19) North 26 degrees 49 minutes 10 seconds West 6.05 feet;

(20) North 37 degrees 06 minutes 00 seconds West 11.42 feet;

(21) North 45 degrees 59 minutes 40 seconds West 28.51 feet;

(22) North 48 degrees 25 minutes 05 seconds West 21.23 feet; and

(23) North 48 degrees 52 minutes 40 seconds West 35.75 feet to the aforesaid land now or formerly of Gallager, the point or place of BEGINNING.

EXCEPTING THEREOUT AND THEREFROM the following premises, described as "Parcel II" in Deed made by Seven Springs Farm Center, Inc. to John S. Mazella and E. Patricia Mazella, his wife, dated February 6, 1976, recorded February 9, 1976 in Liber 7312 cp 521:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Town of Bedford, County of Westchester and State of New York, bounded and described as follows:

BEGINNING at the point on the northerly side of Oregon Road where the same is intersected by the boundary line between the Town of New Castle and the Town of Bedford;

THENCE RUNNING along said boundary line, North 10 degrees 08 minutes 51 seconds West 180.16 feet to lands now or formerly of Rolf R. Roland;

THENCE TURNING AND RUNNING along said lands and along a stone wall, the following 3 courses and distances:

(1) North 51 degrees 53 minutes 15 seconds East 93.75 feet;

(2) North 50 degrees 20 minutes 00 seconds East 114.00 feet; and

(3) North 52 degrees 41 minutes 25 seconds East 87.25 feet to lands now or formerly of Richard M. and Joyce S. Glueck;

THENCE TURNING AND RUNNING along said lands and along a stone wall, the following 3 courses and distances:

(1) South 06 degrees 46 minutes 20 seconds East 70.81 feet;

(2) South 10 degrees 07 minutes 50 seconds East 28.19 feet; and

(3) South 06 degrees 00 minutes 00 seconds East 70.24 feet to the northerly side of Oregon Road;

THENCE TURNING AND RUNNING along said northerly side of Oregon Road, the following 5 courses and distances:

(1) South 59 degrees 54 minutes 00 seconds West 123.00 feet;

(2) South 53 degrees 46 minutes 00 seconds West 78.00 feet;

(3) South 30 degrees 42 minutes 10 seconds West 66.55 feet;

(4) South 37 degrees 10 minutes 20 seconds West 10.46 feet; and

(5) South 27 degrees 29 minutes 10 seconds West 22.08 feet to the point and place of BEGINNING.

DESCRIPTION - SCHEDULE A - CONTINUED

PARCEL 2

ALL that certain plot, piece or parcel of land, situate, lying and being partly in the Town of Bedford, partly in the Town of North Castle and partly in the Town of New Castle, County of Westchester and State of New York, bounded and described as follows:

BEGINNING at a point on the southerly side of Oregon Road in the Town of Bedford where the same is intersected by the dividing line between the premises herein described and the northeasterly corner of land now or formerly of Davis;

RUNNING THENCE northeasterly from said point of beginning along the southerly side of Oregon Road in the Town of Bedford, the following 12 courses and distances:

(1) North 59 degrees 28 minutes 05 seconds East 24.06 feet;

(2) North 59 degrees 37 minutes 40 seconds East 111.07 feet;

(3) North 59 degrees 36 minutes 10 seconds East 82.49 feet;

(4) North 61 degrees 51 minutes 55 seconds East 64.17 feet;

(5) North 61 degrees 52 minutes 05 seconds East 137.88 feet;

(6) North 61 degrees 19 minutes 40 seconds East 30.78 feet;

(7) North 61 degrees 23 minutes 20 seconds East 38.07 feet;

(8) North 62 degrees 13 minutes 50 seconds East 20.84 feet;

(9) North 62 degrees 06 minutes 50 seconds East 90.37 feet;

(10) North 62 degrees 05 minutes 45 seconds East 97.99 feet;

(11) North 61 degrees 06 minutes 20 seconds East 119.52 feet; and

(12) North 59 degrees 19 minutes 50 seconds East 101.38 feet to the westerly line of land now or formerly of Heinz;

THENCE along said last mentioned land, South 18 degrees 39 minutes 30 seconds East 571.16 feet to a corner;

THENCE continuing along said last mentioned land, North 77 degrees 21 minutes 20 seconds East 11.51 feet to a monument;

THENCE continuing along said last mentioned land and partially along a stone wall, the following 9 courses and distances:

(1) North 77 degrees 21 minutes 20 seconds East 67.72 feet;

(2) North 78 degrees 48 minutes 30 seconds East 114.31 feet;

(3) North 77 degrees 52 minutes 30 seconds East 303.46 feet;

(4) North 78 degrees 37 minutes 30 seconds East 78.59 feet;

(5) North 76 degrees 48 minutes 50 seconds East 97.84 feet;

(6) North 79 degrees 12 minutes 50 seconds East 121.08 feet;

(7) North 80 degrees 35 minutes 50 seconds East 114.21 feet;

(8) North 83 degrees 52 minutes 40 seconds East 28.40 feet; and

(9) North 77 degrees 50 minutes 00 seconds East 382.30 feet to the westerly boundary of the Village of Mount Kisco;

THENCE along the westerly boundary of the Village of Mount Kisco, the following 14 courses and distances:

(1) South 08 degrees 53 minutes 40 seconds East 693.23 feet;

(2) South 79 degrees 12 minutes 20 seconds West 227.80 feet;

(3) South 17 degrees 32 minutes 40 seconds East 147.00 feet;

(4) South 05 degrees 58 minutes 40 seconds East 280.00 feet;

(5) South 30 degrees 16 minutes 20 seconds West 242.00 feet;

(6) South 10 degrees 52 minutes 40 seconds East 117.00 feet;

(7) South 09 degrees 45 minutes 20 seconds West 105.00 feet;

(8) South 35 degrees 20 minutes 40 seconds East 188.00 feet;

(9) South 12 degrees 29 minutes 40 seconds East 227.00 feet;

(10) South 11 degrees 44 minutes 20 seconds West 97.00 feet;

(11) South 05 degrees 48 minutes 40 seconds East 108.00 feet;

(12) South 21 degrees 16 minutes 20 seconds West 164.00 feet;

(13) South 04 degrees 21 minutes 40 seconds East 180.00 feet; and

14: South 03 degrees 29 minutes 20 seconds West 131.00 feet to a point and other land owned by Eugene and Agnes E. Meyer Foundation;

THENCE along said last mentioned land, the following 12 courses and distances:

(1) South 89 degrees 33 minutes 30 seconds West 418.17 feet;

(2) North 84 degrees 02 minutes 25 seconds West 140.33 feet;

(3) South 70 degrees 48 minutes 05 seconds West 77.82 feet;

(4) South 57 degrees 03 minutes 20 seconds West 115.72 feet;

(5) South 18 degrees 21 minutes 20 seconds West 835.19 feet;

(6) South 82 degrees 27 minutes 20 seconds West 219.14 feet;

(7) South 57 degrees 47 minutes 30 seconds West 196.34 feet;

(8) North 84 degrees 08 minutes 25 seconds West 319.91 feet;

(9) North 81 degrees 37 minutes 15 seconds West 22.17 feet;

(10) North 83 degrees 39 minutes 35 seconds West 66.92 feet;

(11) North 86 degrees 37 minutes 10 seconds West 28.66 feet; and

(12) North 84 degrees 18 minutes 40 seconds West 243.31 feet to the easterly side of Oregon Road in the Town of North Castle;

THENCE northerly and westerly along the easterly and northerly sides of Oregon Road, the following 86 courses and distances:

(1) North 20 degrees 28 minutes 30 seconds East 9.06 feet;

(2) North 25 degrees 43 minutes 10 seconds East 18.20 feet;

(3) North 17 degrees 31 minutes 00 seconds East 37.48 feet;

(4) North 12 degrees 12 minutes 20 seconds East 41.44 feet;

(5) North 12 degrees 03 minutes 20 seconds East 49.07 feet;

(6) North 08 degrees 54 minutes 10 seconds East 24.23 feet;

(7) North 00 degrees 45 minutes 25 seconds East 53.73 feet;

(8) North 00 degrees 00 minutes 50 seconds East 37.94 feet;

(9) North 74 degrees 59 minutes 50 seconds East 2.59 feet;

(10) North 13 degrees 48 minutes 10 seconds West 24.94 feet;

(11) North 18 degrees 26 minutes 25 seconds West 29.77 feet;

(12) North 08 degrees 09 minutes 10 seconds West 38.85 feet;

(13) North 01 degrees 13 minutes 00 seconds West 16.00 feet;

(14) North 10 degrees 54 minutes 50 seconds East 128.81 feet;

(15) North 03 degrees 01 minutes 20 seconds West 12.90 feet;

(16) North 02 degrees 45 minutes 50 seconds East 102.66 feet;

(17) North 01 degrees 03 minutes 20 seconds East 72.67 feet;

(18) North 04 degrees 23 minutes 00 seconds East 50.25 feet;

(19) North 03 degrees 02 minutes 40 seconds East 39.72 feet;

(20) North 07 degrees 53 minutes 55 seconds West 9.10 feet;

(21) North 07 degrees 55 minutes 30 seconds East 13.49 feet;

(22) North 61 degrees 13 minutes 00 seconds West 36.64 feet;

(23) North 61 degrees 08 minutes 50 seconds West 80.86 feet;

(24) North 62 degrees 53 minutes 20 seconds West 41.74 feet;

(25) North 61 degrees 23 minutes 20 seconds West 54.34 feet;

(26) North 51 degrees 42 minutes 35 seconds West 4.12 feet;

(27) North 64 degrees 58 minutes 50 seconds West 47.10 feet;

(28) North 80 degrees 35 minutes 00 seconds West 34.72 feet;

(29) North 86 degrees 09 minutes 30 seconds West 54.62 feet;

(30) North 56 degrees 30 minutes 10 seconds West 3.30 feet;

(31) South 66 degrees 58 minutes 10 seconds West 5.80 feet;

(32) South 87 degrees 15 minutes 10 seconds West 23.16 feet;

(33) North 17 degrees 51 minutes 00 seconds West 22.64 feet;

(34) North 04 degrees 06 minutes 10 seconds West 15.10 feet;

(35) North 22 degrees 26 minutes 50 seconds West 30.77 feet;

(36) North 38 degrees 41 minutes 00 seconds West 7.90 feet;

(37) North 25 degrees 28 minutes 50 seconds West 13.95 feet;

(38) North 32 degrees 45 minutes 30 seconds West 38.35 feet;

(39) North 47 degrees 05 minutes 20 seconds West 21.53 feet;

(40) North 26 degrees 02 minutes 40 seconds West 39.47 feet;

(41) North 56 degrees 15 minutes 20 seconds West 11.92 feet;

(42) North 32 degrees 26 minutes 20 seconds West 23.73 feet;

(43) North 27 degrees 25 minutes 50 seconds West 57.96 feet;

(44) North 36 degrees 18 minutes 25 seconds West 114.20 feet;

(45) North 27 degrees 43 minutes 30 seconds West 45.93 feet;

(46) North 18 degrees 11 minutes 00 seconds West 74.61 feet;

(47) North 37 degrees 26 minutes 10 seconds West 12.57 feet;

(48) North 19 degrees 59 minutes 45 seconds West 22.87 feet;

(49) North 12 degrees 18 minutes 50 seconds West 14.11 feet;

(50) North 24 degrees 11 minutes 40 seconds West 20.33 feet;

(51) North 16 degrees 06 minutes 45 seconds West 16.47 feet;

(52) North 00 degrees 22 minutes 45 seconds East 18.12 feet;

(53) North 13 degrees 02 minutes 40 seconds West 27.78 feet;

(54) North 07 degrees 25 minutes 45 seconds West 45.32 feet;

(55) North 12 degrees 51 minutes 50 seconds West 24.30 feet;

(56) North 00 degrees 07 minutes 00 seconds West 14.83 feet;

(57) North 15 degrees 09 minutes 40 seconds West 49.17 feet;

(58) North 32 degrees 13 minutes 50 seconds West 39.54 feet;

(59) North 30 degrees 20 minutes 40 seconds West 43.29 feet;

(60) North 20 degrees 51 minutes 55 seconds West 25.58 feet;

(61) North 02 degrees 49 minutes 30 seconds West 15.83 feet;

(62) North 29 degrees 38 minutes 50 seconds West 15.46 feet;

(63) North 08 degrees 12 minutes 35 seconds West 12.18 feet;

(64) North 29 degrees 28 minutes 20 seconds West 17.01 feet;

(65) North 16 degrees 45 minutes 00 seconds West 17.31 feet;

(66) North 09 degrees 34 minutes 20 seconds West 28.32 feet;

(67) North 13 degrees 48 minutes 20 seconds West 36.16 feet;

(68) North 03 degrees 45 minutes 40 seconds East 12.35 feet;

(69) North 15 degrees 01 minutes 55 seconds West 46.88 feet;

(70) North 29 degrees 21 minutes 00 seconds West 53.50 feet;

(71) North 23 degrees 46 minutes 40 seconds West 17.29 feet;

(72) North 37 degrees 32 minutes 30 seconds West 14.49 feet;

(73) North 49 degrees 15 minutes 20 seconds West 44.49 feet;

(74) North 71 degrees 28 minutes 20 seconds West 11.64 feet;

(75) North 57 degrees 26 minutes 30 seconds West 10.54 feet;

(76) North 73 degrees 01 minutes 15 seconds West 37.09 feet;

(77) North 82 degrees 18 minutes 20 seconds West 47.87 feet;

(78) North 84 degrees 10 minutes 30 seconds West 22.47 feet;

(79) South 83 degrees 01 minutes 40 seconds West 22.16 feet;

(80) North 84 degrees 54 minutes 00 seconds West 17.10 feet;

(81) South 86 degrees 06 minutes 00 seconds West 27.49 feet;

(82) North 81 degrees 44 minutes 10 seconds West 153.53 feet;

(83) North 79 degrees 42 minutes 00 seconds West 134.00 feet;

(84) North 84 degrees 39 minutes 00 seconds West 43.00 feet;

(85) North 89 degrees 32 minutes 00 seconds West 114.00 feet; and

(86) North 71 degrees 22 minutes 00 seconds West 85.00 feet to a point of curve;

THENCE northeasterly on a curve to the right having a radius of 50.00 feet connecting the northeasterly side of Oregon Road and the southeasterly side of Lower Byram Lake Road, a distance of 68.56 feet to a point on the southeasterly side of Lower Byram Lake Road;

THENCE northerly, northeasterly, southeasterly and northeasterly along the easterly and southerly sides of Lower Byram Lake Road in the Town of New Castle and continuing along Oregon Road in the Town of Bedford, the following 20 courses and distances:

(1) North 07 degrees 12 minutes 00 seconds East 134.10 feet;

(2) North 67 degrees 36 minutes 00 seconds East 171.94 feet;

(3) North 58 degrees 22 minutes 00 seconds East 68.77 feet;

(4) North 54 degrees 24 minutes 00 seconds East 61.60 feet;

(5) South 45 degrees 22 minutes 00 seconds East 61.00 feet;

(6) South 23 degrees 02 minutes 00 seconds East 19.13 feet to a point of curve;

(7) Northeasterly on a curve to the left having a radius of 85.00 feet, a distance of 185.47 feet;

(8) North 31 degrees 57 minutes 00 seconds East 46.34 feet to a point of curve;

(9) Easterly on a curve to the right having a radius of 60.00 feet, a distance of 36.37 feet;

(10) North 66 degrees 41 minutes 00 seconds East 138.42 feet to a point of curve;

(11) Northerly on a curve to the left having a radius of 215.00 feet, a distance of 170.59 feet;

(12) North 68 degrees 46 minutes 40 seconds West 10.74 feet;

(13) North 29 degrees 31 minutes 00 seconds East 13.38 feet;

(14) North 25 degrees 41 minutes 40 seconds East 43.31 feet;

(15) North 19 degrees 05 minutes 15 seconds East 15.26 feet;

(16) North 16 degrees 07 minutes 45 seconds East 224.55 feet;

(17) North 18 degrees 19 minutes 50 seconds East 34.60 feet;

(18) North 26 degrees 10 minutes 25 seconds East 63.52 feet;

(19) North 22 degrees 47 minutes 50 seconds East 65.76 feet; and

(20) North 31 degrees 15 minutes 05 seconds East 23.92 feet to the northwesterly corner of the aforesaid land now or formerly of Davis;

THENCE along said last mentioned land, the following 25 courses and distances:

(1) South 34 degrees 56 minutes 00 seconds East 192.00 feet;

(2) South 31 degrees 33 minutes 00 seconds East 59.52 feet;

(3) South 08 degrees 31 minutes 00 seconds East 171.26 feet;

(4) South 01 degrees 09 minutes 00 seconds East 135.20 feet;

(5) South 05 degrees 33 minutes 00 seconds West 40.46 feet;

(6) South 11 degrees 52 minutes 00 seconds West 49.65 feet;

(7) South 07 degrees 24 minutes 00 seconds West 19.14 feet;

(8) South 13 degrees 08 minutes 29 seconds West 88.58 feet;

(9) South 66 degrees 36 minutes 00 seconds East 26.85 feet;

(10) South 71 degrees 10 minutes 00 seconds East 14.57 feet;

(11) South 56 degrees 16 minutes 00 seconds East 27.84 feet;

(12) South 24 degrees 05 minutes 00 seconds East 6.77 feet;

(13) South 49 degrees 43 minutes 00 seconds East 6.55 feet;

(14) South 71 degrees 15 minutes 00 seconds East 25.54 feet;

(15) North 89 degrees 31 minutes 00 seconds East 25.62 feet;

(16) North 28 degrees 36 minutes 00 seconds East 70.39 feet;

(17) North 69 degrees 20 minutes 00 seconds East 89.15 feet;

(18) North 76 degrees 50 minutes 00 seconds East 59.96 feet;

(19) North 86 degrees 51 minutes 00 seconds East 16.51 feet;

(20) North 81 degrees 27 minutes 00 seconds East 42.48 feet;

(21) North 78 degrees 13 minutes 52 seconds East 121.74 feet;

(22) North 10 degrees 45 minutes 22 seconds West 242.59 feet;

(23) North 14 degrees 47 minutes 20 seconds West 42.12 feet;

(24) North 10 degrees 37 minutes 41 seconds West 179.17 feet; and

(25) North 12 degrees 08 minutes 58 seconds West 474.81 feet to the southerly side of Oregon Road in the Town of Bedford, the point or place of BEGINNING.

EXCEPTING THEREOUT AND THEREFROM the following premises, described as "Parcel I" in Deed made by Seven Springs Farm Center, Inc. to John S. Mazella and E. Patricia Mazella, his wife, dated February 6, 1976, recorded February 9, 1976 in Liber 7312 cp 521:

ALL that certain plot, piece or parcel of land, situate, lying and being in the Town of Bedford, County of Westchester and State of New York, bounded and described as follows:

BEGINNING at the point on the southerly side of Oregon Road where the same is intersected by the boundary line between the Town of New Castle and the Town of Bedford;

THENCE RUNNING along said southerly side of Oregon Road,

North 25 degrees 45 minutes 50 seconds East 54.47 feet; and

North 34 degrees 13 minutes 05 seconds East 23.92 feet to land now or formerly of Mazella;

THENCE TURNING AND RUNNING along said land, the following 8 courses and distances:

(1) South 31 degrees 58 minutes 00 seconds East 192.00 feet;

(2) South 28 degrees 35 minutes 00 seconds East 59.52 feet;

(3) South 05 degrees 33 minutes 00 seconds East 171.26 feet;

(4) South 01 degrees 49 minutes 00 seconds West 135.20 feet;

(5) South 08 degrees 31 minutes 00 seconds West 40.46 feet;

(6) South 14 degrees 50 minutes 00 seconds West 49.65 feet;

(7) South 10 degrees 22 minutes 00 seconds West 19.14 feet; and

(8) South 16 degrees 06 minutes 29 seconds West 88.58 feet to a point;

THENCE TURNING AND RUNNING North 63 degrees 38 minutes 00 seconds West 21.52 feet to a point in the boundary line between the Town of New Castle and the Town of Bedford; and

THENCE TURNING AND RUNNING along said boundary line, North 10 degrees 08 minutes 51 seconds West 644.36 feet to the point and place of BEGINNING.

PARCEL 3

All that certain plot, piece or parcel of land, situate, lying and being in the Town of Bedford, County of Westchester and State of New York, bounded and described as follows:

BEGINNING at a point on the easterly side of Oregon Road where the same is intersected by the southerly line of lands conveyed by H.J. Heinz II to Elizabeth Graham Weymouth by deed dated August 21, 1972, recorded August 29, 1972 in Liber 7077 cp 348;

RUNNING THENCE along said lands now or formerly of Elizabeth Graham Weymouth, the following 12 courses and distances:

(1) South 71 degrees 40 minutes 20 seconds East 173.64 feet to a point of curve;

(2) In a southerly direction on a curve to the right with a radius of 250 feet, a distance of 304.81 feet to a point of tangency;

(3) South 01 degrees 48 minutes 50 seconds East 53.82 feet;

(4) South 03 degrees 08 minutes 20 seconds West 97.52 feet;

(5) South 04 degrees 25 minutes 30 seconds West 73.76 feet;

(6) South 08 degrees 12 minutes 20 seconds West 77.16 feet to a point of curve;

(7) In a southwesterly direction on a curve to the right with a radius of 300 feet, a distance of 196.17 feet to a point of tangency;

(8) South 44 degrees 54 minutes 25 seconds West 64.15 feet;

(9) South 38 degrees 19 minutes 40 seconds West 34.41 feet to a point of curve;

(10) In a southwesterly direction on a curve to the left with a radius of 130 feet, a distance of 64.42 feet;

(11) South 73 degrees 24 minutes 59 seconds East 493.65 feet; and

(12) North 77 degrees 41 minutes 50 seconds East 675.31 feet to lands now or formerly of the City of New York;

THENCE along the same, South 09 degrees 07 minutes 30 seconds East 251.91 feet to lands now or formerly of Eugene Meyer, Jr.;

DESCRIPTION - SCHEDULE A - CONTINUED

THENCE along said lands now or formerly of Eugene Meyer, Jr., the following 10 courses and distances:

(1) South 77 degrees 41 minutes 50 seconds West 382.30 feet;

(2) South 83 degrees 44 minutes 30 seconds West 28.40 feet;

(3) South 80 degrees 27 minutes 40 seconds West 114.21 feet;

(4) South 79 degrees 04 minutes 40 seconds West 121.08 feet;

(5) South 76 degrees 40 minutes 40 seconds West 97.84 feet;

(6) South 78 degrees 29 minutes 20 seconds West 78.59 feet;

(7) South 77 degrees 44 minutes 20 seconds West 303.46 feet;

(8) South 78 degrees 40 minutes 20 seconds West 114.31 feet;

(9) South 77 degrees 13 minutes 10 seconds West 79.23 feet; and

(10) North 18 degrees 47 minutes 40 seconds West 616.16 feet to the easterly side of Oregon Road;

THENCE along the easterly side of Oregon Road, part of the way along a stone wall, the following 8 courses and distances:

(1) North 16 degrees 31 minutes 40 seconds East 53.53 feet;

(2) North 11 degrees 48 minutes 20 seconds East 173.64 feet;

(3) North 13 degrees 18 minutes 20 seconds East 101.89 feet;

(4) North 14 degrees 03 minutes 00 seconds East 31.05 feet;

(5) North 11 degrees 48 minutes 30 seconds East 101.20 feet;

(6) North 12 degrees 06 minutes 30 seconds East 184.69 feet;

(7) North 11 degrees 33 minutes 40 seconds East 115.58 feet; and

(8) North 10 degrees 46 minutes 50 seconds East 78.07 feet to the point and place of BEGINNING.

DESCRIPTION - SCHEDULE A

Said land being the same land previously conveyed by the following deeds:

Deed from Seven Springs Center, Inc. to The Rockefeller University dated April 12, 1984 and recorded May 24, 1984 at Liber 7923 Page 639.

Deed from The Eugene & Agnes E. Meyer Foundation to The Rockefeller University dated March 30, 1993 and recorded May 21, 1993 at Liber 10583 Page 47.

TOWN:	New Castle	New Castle	North Castle	Bedford	Bedford
SECTION:	94.17	94.17	2	94.18	94.14
BLOCK:	1	1	6	1	1
LOT:	8 (formerly known as Lot A43)	9 (formerly know as Lots 52, 55 and 58)	1 and 2	1	9
ADDRESS:	Woodside Road, Oregon Road and Lower Byram Lake Road, New Castle, New York	Oregon Road and Lower Byram Lake Road, New Castle, New York	84 Oregon Road, North Castle, New York	80 Oregon Road, Bedford, New York	52 Oregon Road, Bedford, New York

Title # TA 95(10)443
COUNTY: Westchester

Record & Return To:

Bernard Diamond, esq.
The Trump Organization
725 5th avenue
New York, NY 10022

RECORDED BY:
TITLE ASSOCIATES INC.
(212) 758-0050

5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No. 21162/09

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOAN DONOHOE,

Defendants.

----------X

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Seven Springs, LLC ("Plaintiff" or "Seven Springs") in opposition to the motion of Defendant The Nature Conservancy (the "Nature Conservancy"), the motion of Defendants ROBERT BURKE and TERI BURKE and the motion of Defendants NOEL B. DONOHOE and JOANN DONOHOE, which seek an Order pursuant to CPLR 3211 (a) (1) and (7) and CPLR 3211(g) dismissing the instant action, and in support of Plaintiff's cross-motion for an Order pursuant to CPLR Sections 305 and 3025(b) amending Plaintiff's Complaint, and granting Plaintiff leave to serve and file an Amended Complaint in the form annexed to Plaintiff's cross-motion papers.

This action seeks monetary damages against the Defendants based upon their actions in denying and/or precluding the Plaintiff from exercising its rights to an Easement that provides

access to its property over the road commonly known as Oregon Road in the Town of North Castle, New York.

For the reasons set forth herein, as well as in the Affidavit of Donald J. Trump sworn to January 21, 2010 (the "Trump Aff."), the Affidavit of Alfred E. Donnellan, Esq. (the "Donnellan Aff.") sworn to January 21, 2010, and the documentary evidence attached thereto it is respectfully submitted that the Plaintiff's cross-motion should be granted, and the Defendants' motions should be denied because the complaint, as amended, sets forth a valid, well plead cause of action that is not time barred.

STATEMENT OF FACTS

The factual allegations in opposition to Defendants' motions and in support of Plaintiff's cross-motion are set forth in the Trump Aff. and Donnellan Aff., and are incorporated herein by reference[1].

POINT I

THE COMPLAINT SETS FORTH VALID CAUSES OF ACTION AND DEFENDANTS' MOTIONS TO DISMISS SHOULD BE DENIED

> "On a motion to dismiss an action pursuant to CPLR 3211(a)(7), the court must accept the factual allegations of the complaint as true, accord the plaintiff all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory...Furthermore, "[u]nder CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss". (Citations omitted).

Gem Serv. of New York, Inc. v. United Gen. Title Ins. Co., 28 A.D.3d 516, 814 N.Y.S.2d 653, 654 (2d Dept. 2006).

The sole criterion in considering a motion to dismiss is:

"... whether the pleading states a cause of action, and if from its four corners

[1] Defined terms used here have the same meaning as set forth in the Donnellan Aff., unless indicated otherwise.

> factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (see Foley v. D'Agostino, 21 A.D.2d 60, 64-65, 248 N.Y.S.2d 121, 125-127; Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3211:24; p. 31; 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3211.36). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate".

Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182, 185 (1977).

In order for a defense of failure to state a cause of action to be successful the defendant must convince the Court that "nothing the plaintiff can reasonably be expected to prove would help; that the plaintiff just doesn't have a claim". SIEGEL, NY PRACTICE (4th Edition), Sec. 265. The criterion used in determining such a motion are that the pleadings will be deemed to allege whatsoever may be implied from its statements by reasonable intendment and the pleader is entitled to every favorable inference that might be drawn. SIEGEL, N.Y. PRACTICE, supra.

As more particularly set forth below, the Amended Complaint states a valid cause of action sounding in tort.

A. Plaintiff's Application to Serve an Amended Complaint Should be Granted

CPLR 3025 provides, in relevant part, as follows:

> (b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

CPLR 305(c) provides as follows:

> "Amendment. At any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced."

The language of the statute codifies the power of the Court to exercise the widest discretion in granting leave to serve amended pleadings to ensure full litigation of the controversy. See 5 *Weinstein Korn & Miller,* 3025.11, pp. 30-589-592. As a general rule, "permission to amend pleadings should be 'freely given' [CPLR 3025, subd (b)] . . ." Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957.

The instant application for leave should be granted. CPLR 3025(b) provides that: "leave to amend a pleading may be given at any time and that such leave shall be freely given upon such terms as may be just". *See* In re Salon Ignazia, Inc., 34 A.D.3d 821, 826 N.Y.S.2d 129 (2d Dept. 2006) (defendant entitled to serve amended answer with counterclaim); *see also* Karras v. County of Westchester, 71 A.D.2d 878, 879, 419 N.Y.S.2d 653, 655 (2nd Dept. 1979). The amendment will insure that all relevant issues between the parties are fully litigated and placed before the Court for determination.

Leave to amend a pleading should be given even after lengthy delay in litigation. Stengel v. Clarence Materials Corp., 144 A.D.2d 917, 918, 534 N.Y.S.2d 28, 29 (4th Dept. 1988), Seaman Corp. v. Binghamton Savings Bank, 243 A.D.2d 1027, 1028, 663 N.Y.S.2d 432, 433 (3rd Dept. 1997). In the within action, there has been no lengthy delay in the litigation, nor will the within application cause same. This action was commenced less than 4 months ago. Since this matter is in the early stage, none of the parties would be prejudiced by the relief requested.

B. The Amended Complaint sets forth a valid cause of action sounding in tort

"The elements of a cause of action alleging prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or a series of acts which would otherwise be lawful (see Freihofer v. Hearst Corp.,

65 NY2d 135, 142-143, 490 NYS2d 735, 480 NE2d 349; Curiano v. Suozzi, 63 NY2d 113, 117, 480 NYS2d 466, 469 NE2d 1324). To make out a claim sounding in prima facie tort, 'the plaintiff [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]' (R.I. Is. House. LLC v. North Town Phase II Houses. Inc., 51 AD3d 890, 896, 858 NYS2d 372)." Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 (2d Dept. 2009).

The proposed Amended Complaint alleges, among other things, as follows:

- Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of The Town of North Castle and to the Planning Board of the Town of Bedford.

- In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel. The only viable secondary access to the Seven Springs Parcel is from the south. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

- The Town of Bedford Planning Board's refusal to permit development of the entire Seven Springs Parcel would not have occurred but for the Defendants' actions.

- The Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road, and have sought and obtained preliminary injunctive relief prohibiting Plaintiff from exercising its rights over Oregon Road.

- Plaintiff would have been able to develop the Seven Springs Parcel but for the Defendants' actions.

- The Defendants continue to unlawfully, intentionally and wrongfully deprive Plaintiff of its right to access the Easement and the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel by a system of conduct on their part, which intends to harm Plaintiff.

- As a result of the Defendants' actions, Plaintiff, Plaintiff's visitors, tradespeople, vehicles and the residents of the manor house are inconvenienced and deprived of the benefit of the Easement, and, more particularly are required to travel significantly greater distances to the north to access the Seven Springs Parcel.

- The Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence was and is the sole motivation for Defendants' actions.

- That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendants and will suffer continuing damages.

- By reason of the foregoing Plaintiff has sustained actual and special damages in an amount to be determined at trial but not less than $60,000,000.00, as follows:

(a) Plaintiff's inability to use the Easement - $5,000,000.00

(b) Diminution in value of the Seven Springs Parcel - $50,000,000.00

(c) Plaintiff's inability to access the Seven Springs Parcel over Oregon Road - $5,000,000.00

(See Amended Complaint, par. 24-34 and 42.) (A copy of the proposed Amended Complaint is annexed to the Donnellan Aff. as Exhibit "A".)

An easement is an incorporeal right which is appurtenant to the ownership of the dominant estate and which constitutes a charge upon the servient estate. It is a right of property, a non-possessory interest in land. (See 49 NY Jur.2d Easements §2.)

Defendants have sought, and taken steps which have had the effect of temporarily precluding Plaintiff from using the Easement (i.e. preliminary injunctive relief). This affirmative action, taken by Defendants, in depriving Plaintiff the use and enjoyment of the Oregon Road easement, is clearly an infringement on Plaintiff's property rights and right to use said Easement, and as such, constitutes a tort.

Defendants' interference with (i) Plaintiff's property rights, (ii) Plaintiff's full use and enjoyment of the property, (iii)Plaintiff's right to ingress and egress over the Easement to access the Seven Springs Parcel, (iv) development of the Seven Springs' Parcel and (v) with Plaintiff's encumbered right to access this Seven Springs Parcel unquestionably has caused, and continues to cause, economic injury to Plaintiff. Each day that passes results in a loss of potential earnings and profits for Plaintiff, which Plaintiff has a right to recover in the event that its rights to the Easement over Oregon Road are determined in its favor.

The criteria for reviewing the within motion requires that the Court take all of the Plaintiff's allegations as set forth in its Complaint (as amended) and Affidavits as true and resolve all inferences which reasonably flow therefrom in favor of Plaintiff.

Based upon the foregoing, it is respectfully submitted that Plaintiff has stated a valid cause of action against the Defendants and Plaintiff's cross-motion to amend the Complaint herein should be granted.

POINT II

This action is not an action involving public petition and participation as defined by CPLR §76-a(1)(a), and CPLR 3211(g) does not apply to Defendants' motions.

Defendants Burke and Donohoe claim that this case is an action involving public petition and participation as defined in Civil Rights Law §76-a(1)(a), commonly referred to as a "SLAPP suit", an acronym for its generic label, "Strategic Lawsuit Against Public Participation", and the standard set forth in CPLR §3211(g) should be applied to the portions of the motion seeking dismissal under CPLR §3211(a)(7).

This claim is without merit. That is because this action does not fall within the parameters of the statute. See Hariri v. Amper, 51 AD3d 146, 854 NYS2d 126 (1st Dept., 2008) and Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead, 98 F. Supp. 2d 347 (2000).

Civil Rights Law §76-a(1)(a) states:

> (a) An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

SLAPP suits are brought to "stop citizens from exercising their political rights or to punish them for having done so." See Yeshiva v. Chofetz, supra. However, the SLAPP statute is in derogation of the common law and must be strictly construed. Hariri v. Amper, supra. Not surprisingly, Defendants cite no case law where the SLAPP Law was applied to a suit involving a dispute between private parties with respect to competing claims to real property, as is the case herein.

This action is brought by Plaintiffs to recover damages against the Defendants arising out of Defendants' actions in denying and/or precluding the Plaintiff from exercising its rights to an Easement that provides access to its property over the road commonly known as Oregon Road in

the Town of North Castle, New York. In addition, there is no currently pending application to develop the portion of the Seven Springs Parcel located in North Castle. (See Trump Aff.) Accordingly, Plaintiff is not a "public applicant or permitee" within the meaning of Civil Rights Law §76-a. See Hariri, supra (landowner wishing to use property as airport was not a "public applicant or permitee" under SLAPP statute where he had never made formal application for zoning variance allowing for that use).

Finally, it is asserted in the Defendants' motion papers that Seven Springs is not looking to prevail on the merits. (Donohoe Memorandum of Law, page 9.) This assertion is simply incorrect. The 2006 Action involves Plaintiff's right to an easement over Oregon Road. Plaintiff's primary motive has been, and continues to be, to establish its right to the Easement Area, as set forth in the 2006 Action. This action simply seeks to assert Plaintiff's right to monetary damages as a result of the Defendants' actions.

Since this action is based upon private parties' rights to real property, it is not an action involving public petition and participation as defined by CPLR §76-a(1)(a), and CPLR 3211(g) does not apply to the Defendant's motions.

Notwithstanding the foregoing, even assuming for the purposes of this motion that CPLR §3211(g) did apply, and it is submitted otherwise, as set forth above, the Amended Complaint has a substantial basis in law.

Based upon the foregoing, Defendants' motions should be denied.

POINT III

PLAINTIFF'S ACTION IS TIMELY

A cause of action for prima facie tort is governed by a three-year Statute of Limitations where the injury alleged is essentially to the plaintiffs' economic interests, rather than to their

reputation. See, Jemison v. Crichlow, 139 AD2d 332, 531 NYS2d 919 (2d Dept. 1988). Furthermore, "the continuing wrong doctrine provides that, in certain cases involving continuous or repeated wrongs, the statute of limitations accrues upon the date of the last wrongful act. ('[I]n certain tort cases involving continuous or repeated injuries, the statute of limitations accrues upon the date of the last injury...' ('[A] claim to redress a continuing wrong will be deemed to have accrued on the date of the last wrongful act.'). (Citations omitted.) See, Margrabe v. Sexton & Warmflash. PC, 2009 WL 261830 (SDNY 2009). See, also Dabb v. Nynex Corp., 262 AD2d 1079, 691 NYS2d 840 (4th Dept., 1999) (applying continuing wrong doctrine to trespass and nuisance claims); Bloomingdales, Inc. v. New York City Transit Authority, 13 NY3d 61, 915 NE2d 608 (2009); and Cranesville Block Co., Inc. v. Niagara Mohawk Price Corp., 175 AD2d 444, 572 NYS2d 495 (3d Dept., 1991) (continuous interference with right to use of an easement gives rise to successive causes of action).

This case seeks monetary damages as a result of Defendants' continuing actions in precluding Plaintiff's use of the Easement Area, which have resulted in economic injury to Plaintiff. The Defendants continued action in depriving Plaintiff of its right to the Easement Area gives rise to continuous causes of action against the Defendants. Moreover, even if Defendants' actions do not constitute a continuing tort, and it is submitted otherwise, the Defendants action in seeking injunctive relief in February, 2008, and temporarily enjoining Plaintiff from exercising its rights to the Easement, triggered the accrual of Plaintiff's claims in this action[2]. This action was brought within the three year statute of limitations and, accordingly, is timely.

[2] While a temporary injunction is currently in place with respect to the use of Oregon Road, the granting of the injunction does not constitute the law of the case or an adjudication on the merits. See Kaplan v. Queens Optometric Assoc., 293 AD2d 449, 739 NYS2d 461 (2d Dept., 2002).

Finally, CPLR §203(f) provides that for limitations purposes a claim in an amended pleading will be deemed to relate back to the time the claim in the original pleading was interposed as long as the original one gives notice of the transaction or occurrence out of which the claim in the amended pleading arises. As set forth above, Plaintiff's claim in this action is consistent with the claims asserted by Plaintiff in the Complaint and Amended Complaint in the 2006 Action. In both actions the Complaint alleges that "No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim as set forth herein". (See Complaint, par. 33 and Amended Complaint, par. 34.) The 2006 Action clearly gives notice of the transactions and occurrences out of which the claims in this action arise. Accordingly, this action is timely.

POINT IV

Plaintiff is entitled to Punitive Damages

Punitive damages are recoverable for a wide variety of intentional torts when the plaintiff can show that the defendant committed the tort and can demonstrate the existence of circumstances of aggravation or outrage, such as spite, or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. See generally, Carvel Corp. v. Noonan, 350 F.3d 6, 24 (2nd Cir. 2003); Prozeralik v. Capital Cities Communications, Inc., 82 NY2d 466, 479, 605 NYS2d 218 (1993).

In Prozeralik v. Capital Cities Communications, 82 NY2d 466, 479 (1993), the Court wrote that punitive damages may be sought when the wrongdoing was deliberate "and has the character of outrage frequently associated with crime" (citation omitted). The misconduct must be exceptional, "as when the wrongdoer has acted maliciously, wantonly, or with a recklessness

that betokens an improper motive or vindictiveness...or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights" [citations and internal quotation marks omitted]. Sharapata v. Town of Islip, 56 NY2d 332, 437 NE2d 1104 (1982).

As is true in any action concerning a common law tort, punitive damages are available when the wrongful act is motivated by malice or wanton or reckless disregard of the plaintiff's rights or is accompanied by other aggravating circumstances. See Le Mistrial, Inc. v. Columbia Broadcasting System, 61 AD2d 491, 402 NYS2d 815 (1st Dept. 1978); MacKennan v. Bern Realty Co., 30 Ad2d 679, 291 NYS2d 953 (2nd Dept 1968).

It has been specifically held that punitive damages may be awarded where, as here, there is an obstruction of an easement, and the Court determines that the obstruction occurred in a malicious fashion. See, Anniskiewicz v. Harrison, 291 AD2d 829, 737 NYS2d 3116 (4th Dept., 2002). See, also Chlystun v. Kent, 185 AD2d 525, 586 NYS2d 410 (3d Dept.) (punitive damages may be awarded in a trespass action as a penalty to the trespasser and as a warning to others where the alleged conduct shows malice, a flagrant interference with the plaintiff's right to possession or other aggravating circumstances).

As set forth above, the Amended Complaint alleges that the actions taken by Defendants are willful, malicious, and are intended to deprive Plaintiff of its property rights and access to its property. As hereinbefore discussed, when considering a motion to dismiss pursuant to CPLR 3211(a)(7), the criterion used in determining such a motion are that the pleadings will be deemed to allege whatever may be implied from its statements, the pleader is entitled to all favorable inferences which may be drawn therefrom, and the Court is to determine only whether the facts as alleged fit within any cognizable legal theory. Gem Serv. of New York, Inc, supra.

Defendants intentional conduct in preventing and obstructing the Plaintiff's use of the Easement is a flagrant interference with Plaintiff's rights. Based on the foregoing, Plaintiff has stated a valid claim for punitive damages against the Defendants.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Defendant's motions should be denied in their entirety, and Plaintiff's cross-motion should be granted in its entirety.

Dated: White Plains, New York
January 22, 2010

Yours, etc

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: 
BRADLEY D. WANK
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

On the Brief:
Alfred E. Donnellan, Esq.
Bradley D. Wank, Esq.

6

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR LEAVE TO AMEND

LEONARD BENOWICH, an attorney admitted to practice in the Courts of this State, affirms the following under penalty of perjury:

1. I am a member of Benowich Law, LLP, counsel of record for defendant The Nature Conservancy ("TNC").

2. Unless otherwise indicated, I have personal knowledge of the facts and circumstances set forth herein and submit this affidavit in order to place copies of the following documents before the Court:

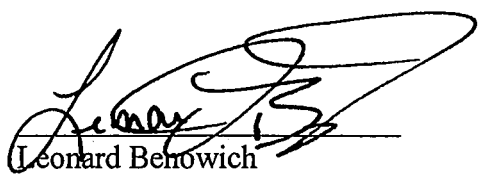
(a) A true copy of the Agreement between TNC and the Eugene and Agnes E. Meyer Foundation ("Foundation") dated May 25, 1973 is annexed as **Exhibit 7**;

(b) A true copy of page v-94 of Plaintiff's February 1998 Draft Environmental Impact Statement is annexed as **Exhibit 8**;

(c) A true copy of counsel's letter dated August 10, 2007 is annexed as **Exhibit 9**.

3. For the foregoing reasons, and for the reasons set forth in the accompanying memorandum of law, I respectfully submit that the Complaint should be dismissed, and Plaintiff's motion for leave to amend should be denied.

Dated: February 19, 2010



Leonard Benowich

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\LB-ReplyAff.wpd

7

Exhibit 7

AGREEMENT by THE NATURE CONSERVANCY, a District of Columbia corporation, having an office at 1800 North Kent Street, Arlington, Virgnia (TNC), in respect of the Meyer Sanctuary (hereinafter defined).

In consideration of the transfer by the Eugene and Agnes E. Meyer Foundation, having its office at 1730 Rhode Island Avenue, N. W., Washington, D. C. (the Foundation), to TNC of two parcels of real property (collectively called the Meyer Sanctuary), one parcel consisting of approximately 122.4 acres, and the other of approximately 108.6 acres, located in the Towns of North Castle and New Castle, Westchester County, State of New York, and more particularly described in a deed from the Foundation to TNC (the Deed), dated the same date as this Agreement and intended to be recorded promptly in Westchester County Clerk's Office, TNC hereby agrees as follows:

1. TNC will promptly apply to the appropriate governmental authorities for the exemption of the Meyer Sanctuary from real property taxes (the Taxes). In the event that TNC is unable to obtain such exemption for all or any part of the Meyer Sanctuary, TNC shall be entitled to promptly reconvey the fee simple title to all or any part of the Meyer Sanctuary not so exempted to the Foundation, or to such other grantee as

the Foundation shall direct in writing, by recordable bargain and sale deed with covenant against grantor's acts and free from all liens or encumbrances (the Reconveyance). In the event that exemption is obtained, but is later denied, canceled or lost for all or any part of the Meyer Sanctuary, TNC shall be entitled to promptly execute and deliver a Reconveyance of all or any part of the Meyer Sanctuary, with respect to which such exemption is denied, canceled or lost, to the Foundation, or to such other grantee as the Foundation shall direct in writing, and in the event of such reconveyance TNC shall repay to the Foundation or such other grantee such proportionate share of the $200,000 endowment to be received by TNC for the maintenance of the Meyer Sanctuary (the Endowment), as shall then be agreed upon by TNC and the Foundation.

2. In the event that TNC shall at any time fail to continue to maintain all or any part of the Meyer Sanctuary as a nature preserve or in a way which will conserve its essential natural character, TNC will promptly execute and deliver a Reconveyance of all or such part of the Meyer Sanctuary to the Foundation, or to such other grantee as the Foundation shall direct in writing, and TNC shall repay to the Foundation or such other grantee the then balance of the Endowment, or, if TNC shall continue to maintain any part of the Meyer Sanctuary, such proportionate share of the Endowment as shall then be agreed upon by TNC and the Foundation.

3. This agreement shall bind TNC, its successors and assigns, benefit the Foundation, its successors and assigns, and be deemed to run with the land of the Meyer Sanctuary.

Dated:

THE NATURE CONSERVANCY,

By _____

ACCEPTED:

EUGENE AND AGNES E. MEYER FOUNDATION,

By _____

chairman

STATE OF VIRGINIA)
) ss.:
COUNTY OF ARLINGTON)

On this 25th day of May 1973, before me personally came Everett M. Woodman , to me, who, being by me duly sworn, did depose and say that he resides at Virginia ; that he is President of THE NATURE CONSERVANCY, one of the corporations described in and which executed the foregoing instrument; and that he signed his name thereto by order of the Board of Governors of said corporation.

Notary Public

my commission expires; 12/16/74

District of Columbia) ss.:

On this day of May 1973, before me personally came DAVIDSON SOMMERS, to me, who, being by me duly sworn, did depose and say that he resides at 3500 WATSON PL. N.W. Wash. D.C.; that he is CHAIRMAN of EUGENE AND AGNES E. MEYER FOUNDATION, one of the corporations described in and which executed the foregoing instrument; and that he signed his name thereto by order of the Board of Directors of said corporation.

Notary Public

My Commission Expires March 14, 1975

8

Exhibit 8

329

ANNEXED TO THE FOREGOING:
EXHIBIT A-FEBRUARY 1998 DRAFT ENVIRONMENTAL IMPACT STATEMENT
[329-330]

SEVEN SPRINGS

DRAFT ENVIRONMENTAL IMPACT STATEMENT

Volume 2

February 1998

2. Access from Oregon Road in North Castle

By eliminating the man-made barricade and improving the existing dirt roadway, it would be possible to extend the existing Oregon Road (south) in North Castle to the north into the Seven Springs site. However, this road connection, in the absence of condemnation, would require approval from The Nature Conservancy, which fully owns the entire road bed south of Seven Springs, and from the Town of North Castle, which officially closed the road in 1990. At the present time, the owners of the Seven Springs site have no rights to utilize any part of this portion of the roadway.

Such a road connection had been suggested as part of the original planning for the Seven Springs project. Hence, it was included in the DEIS scoping document as an alternative. The approximately 1,500 feet of off-site road bed has an average width of 12 feet. It borders steep slopes and wetlands. If it were utilized for site access, widening and grading would be necessary. Retaining walls would be required as part of any proposed construction to minimize excavation and disturbance of steep slopes. The same characteristics would apply regardless of whether the potential road were designed for permanent or emergency access.

3. No Access to Sarles Street

The Seven Springs development could occur with one means of access, rather than two, eliminating the proposed access to Sarles Street. This alternative, shown in Exhibit 5-46 and 5-47, would result in less impact to wetlands, wetland buffers and steep slope areas to the immediate east of Sarles Street. It would also avoid disturbance of the rock wall, regrading, and tree removal required to develop adequate sight distance under the proposed action. The traffic impacts of an alternative with no access to Sarles Street would result in some additional volumes on Oregon Road (north) and at the intersection of Byram Lake Road and Oregon Road.

However, levels of service and recommended improvements would be the same as under the proposed action and the residential alternatives with access to both Sarles Street and Oregon Road (north).

The arrival and departure distributions for the residential development with no access to Sarles Street are shown on Exhibits 5-48 and 5-49. The resulting site generated traffic volumes, illustrated on Exhibits 5-50 to 5-55, were added to the Year 2000 N0-Build Traffic Volumes resulting in the Year 2000 Build Traffic Volumes shown on Exhibit 5-56 to 5-61.

9

Exhibit 9

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP

COUNSELLORS AT LAW

THE GATEWAY BUILDING
ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NEW YORK 10601

(914) 681-0200
FACSIMILE (914) 684-0288

THOMAS R. DELBELLO
JOHN T. BELOWICH*
JOHN FARRISH CARLSON**
ALFRED E. DELBELLO
ALFRED E. DONNELLAN†
JANET A. CIARA
FRANK J. HAUPEL
PAUL L. MARAT
FAITH G. MILLER
PATRICK M. REILLY
JAMES J. SULLIVAN
DRAPLEY B. WANKO
MARK P. WEINGARTEN*
LEE S. WIEDERKEHR
PETER J. WISE, AICP †

JACOB E. AMIR
MATTHEW S. CLIFFORD†
JENNIFER M. JACKMAN*
JENNIFER A. LUPARO*
SUSAN CURRIE MOREHOUSE
PERRY M. OCHACHER
STEPHAN A. RAPACCIA
JESSICA H. RESSLER
MICHAEL J. SCHWARTZ*
DANIEL G. WALSH
EVAN WIEDERKEHR
HEIDI WINELOW

ANDREW J. DALINT
RICHARD A. KATZIVE
BRANDON R. SALL*
ELIOT M. SCHUMAN
DAVID E. SELENICK & CO., LLP*

COUNSEL

*MEMBER OF NY & CT BARS
†MEMBER OF NY & NJ BARS
‡MEMBER OF NY & DC BARS
▼MEMBER OF NY, NJ & MA BARS
★MEMBER OF NY, NJ, CT & FL BARS

August 10, 2007

By Facsimile and Mail

Chairman Peg Michelman
Members of the Planning Board
Town of North Castle
15 Bedford Road
Armonk, New York 10504

Re: **Seven Springs**

Dear Chairman Michelman and Members of the Planning Board:

We represent Seven Springs, LLC, the applicant for approval of a subdivision of the property commonly known as Seven Springs. Our client has asked us to advise the Planning Board that it hereby withdraws the application made to the Planning Board for approval of a subdivision of the portion of the property that is within the Town of North Castle.

Thank you for your consideration.

Very truly yours,

MARK P. WEINGARTEN

9

cc: Supervisor Reese Berman
Roland A. Baroni, Jr., Esq., Town Attorney
Adam Kaufman, AICP, Planning Director
Chairman Donald J. Coe, Bedford Planning Board
Joel Sachs, Esq., Bedford Town Attorney
Jeffrey Osterman, AICP, Bedford Planning Director
Donald J. Trump
Hal Goldman
Peter J. Wise, Esq.

Certificate of Service (by U.S. Mail)

LEONARD BENOWICH, an attorney duly admitted to practice in this Court, hereby affirms, under the penalty of perjury, that on February 19, 2009, I served a true copy of the foregoing **Reply Affirmation In Further Support of Motion To Dismiss And In Opposition To Motion For Leave To Amend** and **TNC's Memorandum Of Law In Support Of Its Motion To Dismiss Complaint And In Opposition To Plaintiff's Motion For Leave To Amend Its Complaint** upon the following counsel:

DelBello Donnellan Weingarten, Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
Attorneys for Defendants Noel B. and Joann Donohoe

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
3 Gannett Drive
White Plains, New York 10604-3407
Attorneys for Defendants Robert and Teri Burke

by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the party and/or parties listed above.

Dated: February 19, 2009

/s/
Leonard Benowich

7

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 21162/09

Assigned Justice
(William Giacomo)

TNC'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT

Benowich
BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

The mission of The Nature Conservancy is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the land and waters they need to survive.[1]

Preliminary Statement

Defendant The Nature Conservancy ("TNC") respectfully submits this reply memorandum in further support of its motion to dismiss the Complaint and in opposition to Plaintiff's motion for leave to amend its Complaint.

Plaintiff's motion for leave to amend its Complaint should be denied as futile.

Plaintiff's amended complaint - like its filed Complaint - alleges nothing more than that the Defendants in this case, including TNC, have had the temerity to defend themselves in *Seven Springs I*,[2] and to protect their rights and interests in their own property. Seven Springs has not prosecuted *Seven Springs I*, and it certainly has not moved for or obtained the declaration it seeks as the ultimate relief in that action. At this date, no court has declared that Seven Springs does, in fact, have the rights it claims. To the contrary, this Court has already stated that TNC - not Plaintiff - has a likelihood of succeeding. (*See* TNC Exs. 3, 6) Accordingly, no defendant can be said to have interfered with Seven Springs's purported rights, when no Court has declared that Seven Springs even has such rights.

Plaintiff acknowledges that while it may have "stated" a claim, there has been no judicial determination on the merits that it "has" or even can prevail on a claim to use the so-called

---

[1] http://www.nature.org/aboutus

[2] Capitalized terms have the same meaning as used in TNC's papers in support of its motion to dismiss the Complaint.

Easement Area. (Donellan Aff., ¶21) No Court has actually stated that Plaintiff does, in fact, have the rights it claims to have, and no Court has yet stated that the positions defendants have taken to defend themselves in *Seven Springs I* - the only "act" that any of the defendants is alleged to have done - is wrong, improper or unjustified.

Until a Court actually determines that Plaintiff has the rights it claims - including the rights it claims but has not established in and to the so-called Easement Area - no defendant in *Seven Springs I* can be said to have done anything wrong in that case, and certainly nothing actionable in this case or otherwise.

The thrust of this action is that Plaintiff wants TNC and these Defendants - the very same defendants who are defending themselves in *Seven Springs I* - to stop defending themselves in *Seven Springs I*, to stop taking the "positions" they do in that case, and to simply concede that Plaintiff has the rights over Oregon Road which no Court has yet declared it to have.

In short, Seven Springs is attempting to bully TNC into giving up its position in *Seven Springs I* that Seven Springs does not have the easement rights it claims, and it does not have the right to right to turn the unpaved hiking trail that runs through the Nature Preserve into a private, paved roadway to benefit Seven Springs's desire to develop more homes than it has already been given permission to build.

In paragraph 27 of his affirmation, Plaintiff's counsel summarizes the point of this action:

> . . .the instant action simply seeks to assert Plaintiff's rights to damages against the Defendants, should it be determined that the Defendants have wrongfully prevented Plaintiff from using, and exercising its rights with respect to the Easement Area. [Emphasis added.]

In paragraph 30, counsel states that:

> The instant action is based on Plaintiff's claim to the Easement over Oregon Road and for money damages based on Defendants' intentional acts in interfering with Plaintiff's property rights and use of the Easement. Such actions include, but are not limited to, Defendants action in seeking injunctive relief against the Plaintiff [in *Seven Springs I*], and precluding Plaintiff from exercising its full rights to ingress and egress over the Easement.

Stated simply, Plaintiff seeks to hold Defendants liable in damages for having procured the PI Order (the preliminary injunction) that was issued by Justice Bellantoni in *Seven Springs I* in April 2008 (*see* Donellan Aff., ¶23), although it characterizes its "claim" as one for *prima facie* tort.

But the PI Order (TNC Ex. 3) is not nearly so broad as Plaintiff argues in this Court. The PI Order enjoins Plaintiff from:

> (a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (I) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and
>
> (b) performing any work upon any land owned by TNC, including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes

or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal);

TNC sought, and the Court granted, the PI Order to maintain the *status quo*, and to continue the use of the Nature Preserve as such.

Plaintiff simply cannot contend - although it attempts to do so in this case - that the "position" TNC has taken in its defense of *Seven Springs I*, and its procurement of the PI Order, were motivated solely by "disinterested malevolence" for Plaintiff.

TNC is a nonprofit organization which had and has but one objective: to preserve the Nature Preserve in its current, natural state, as it is required to do under the terms and conditions imposed by its grantor. That is consistent with TNC's Mission, as set forth in its charter, or its Statement Of Election To Accept.[3] *See* page 1, *supra*.

The conditions under which the Nature Preserve was given to TNC require that TNC maintain the lands as a nature preserve, and they further provide that if "TNC shall at any time fail to continue to maintain all or any part of the [Nature Preserve] as a natural preserve or in a way which will conserve its essential natural character," TNC will have to re-convey the property back to the grantor. (*See* TNC Ex. 7)

Plaintiff's complaint in this action, and its instant motion, seek nothing more than to circumvent the facts that Plaintiff (a) has no claim against TNC (or, indeed, against any of the defendants), and (b) is precluded by settled New York law from using the disfavored claim for *prima facie* tort to assert an otherwise impermissible and unavailable claim.

For the reasons set forth in more detail below, Plaintiff's motion for leave to serve the

---

[3] http://www.nature.org/aboutus/leadership/art15495.html

amended complaint must be denied as futile because there is no basis for a claim for *prima facie* tort; there is no independent cause of action for damages resulting from the entry of an order restraining and enjoining it from trespassing on TNC's land; and any such claim for damages is, as a matter of law, to be prosecuted in the action in which the PI Order was entered and any damages are limited to the amount of the undertaking given in connection with such PI Order.[4]

Moreover, Plaintiff's claim - although dressed up as one for *prima facie* tort - is in essence a claim for slander of title, because Plaintiff claims that it has been harmed by the facts that TNC (and the other defendants) has taken the position in *Seven Springs I* that Plaintiff does not have the rights to use Oregon Road that it now claims to have, and procured the PI Order to prevent a continuing trespass by Plaintiff.[5]

Plaintiff admits that this action is but a repeat of *Seven Springs I.* In paragraph 40 of his affirmation, Plaintiff's counsel states that: "This action simply seeks to assert Plaintiff's right to monetary damages as a result of Defendants' action, and as set forth in the 2006 Action" - *i.e. Seven Springs I.* Indeed, for statute of limitations purposes, Plaintiff seeks to have any claim asserted herein deemed to "relate back" to the commencement of *Seven Springs I*, contending that "Plaintiff's claim in this action is consistent with the claims asserted by Plaintiff in" *Seven Springs I.* (Donellan Aff., ¶42)

---

[4] *See generally Bonded Concrete, Inc. v. Town of Saugerties*, 42 A.D.3d 852, 841 N.Y.S.2d 152 (3rd Dep't 2007); *see* pages 12-13, *infra.*

[5] Of course, Plaintiff did not always claim to have any rights to use that portion of Oregon Road which is within the so-called Easement Area. In a prior iteration, when Plaintiff sought (unsuccessfully) to develop a golf course on its property, Plaintiff and its professionals took the position that TNC: "fully owns the entire road bed south of Seven Springs....[T]he owners of the Seven Springs site have no rights to utilize any part of this portion of the roadway." (*See* TNC Ex. 8)

For the reasons set forth, *infra*, the Complaint should be dismissed and Plaintiff's cross-motion for leave to serve and file a proposed amended complaint should be denied.

Argument

Point I

THE AMENDED COMPLAINT MUST BE DENIED AS FUTILE

Although leave to amend a pleading should be freely granted, this Court is not required to permit futile amendments which may - and in this case certainly will - lead to needless litigation. *Castillo v. Starrett City, Inc.*, 4 A.D.3d 320, 772 N.Y.S.2d 74 (2nd Dep't 2004); *Saferstein v. Mideast Systems, Ltd.*, 143 A.D.2d 82, 531 N.Y.S.2d 333 (2nd Dep't 1988); *General Motors Acceptance Corp. v. Shickler*, 96 A.D.2d 926, 466 N.Y.S.2d 369 (1st Dep't 1983).

In this case, leave to amend should be denied as futile because the proposed amended complaint suffers from the same defects as does the original Complaint, and none of those defects is cured or corrected by the proposed amendment.

Plaintiff argues that the proposed Amended Complaint asserts one cause of action: for *prima facie* tort. (Pltf's Mem., at 4)

Plaintiff is wrong.

A. The Elements of *Prima Facie* Tort

The cause of action for *prima facie* tort "was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action which is not independently viable,"

Epifani v. Johnson, 65 A.D.3d 224, 232, 882 N.Y.S.2d 234 (2nd Dep't 2009); *see also Etzion v. Etzion*, 62 A.D.3d 646, 651-652, 880 N.Y.S.2d 79 (2nd Dep't 2009); *Lancaster v. Town of E. Hampton*, 54 A.D.3d 906, 908, 864 N.Y.S.2d 537 (2nd Dep't 2008).

The elements necessary to plead a claim of *prima facie* tort are: "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143, 490 N.Y.S.2d 735 (1985); *Curiano v. Suozzi*, 63 N.Y.2d 113, 117, 480 N.Y.S.2d 466 (1984); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 332, 464 N.Y.S.2d 712 (1983). "This means that 'the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another'." *Id.*, 59 N.Y.2d at 333; *DeNaro v. Rosalia*, 59 A.D.3d 584, 873 N.Y.S.2d 697 (2nd Dep't 2009). Where the defendant's conduct is motivated or committed at least partly in furtherance of legitimate motives, there is no claim for *prima facie* tort.

In order to make out a claim sounding in *prima facie* tort, Plaintiff must "allege that disinterested malevolence was the sole motivator for the conduct of which [it] complain[s]." *R.I. Island House, LLC v. North Town Phase II Houses, Inc.*, 51 A.D.3d 890, 896, 858 N.Y.S.2d 372 (2nd Dep't 2008); *Epifani v. Johnson*, 65 A.D.3d 224, 232, 882 N.Y.S.2d 234 (2nd Dep't 2009); *EECP Centers of America, Inc. v. Vasomedical, Inc.*, 265 A.D.2d 372, 696 N.Y.S.2d 837 (2nd Dep't 1999).

1. The proposed pleading does not allege that TNC or any of the Defendants did anything actionable

In this case, the proposed amended complaint alleges, upon information and belief, that

"Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence is the sole motivation for Defendant's actions." (Proposed Amd. Cplt., ¶41) But such a conclusory allegation is insufficient where, as here, it is (a) not well-pleaded: it does not allege any specific acts committed by any of the Defendants, and it does not contain facts which allege, or from which an inference may be drawn, that TNC (or any of the Defendants herein) acted solely out of disinterested malevolence, *Simaee v. Levi*, 22 A.D.3d 559, 802 N.Y.S.2d 493 (2nd Dep't 2005) (pleading must "allege facts indicating that the defendants' actions were motivated by disinterested malevolence"); *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc.*, 5 A.D.3d 352, 774 N.Y.S.2d 56 (2nd Dep't 2004); *EECP Centers of America, Inc., supra* (complaint dismissed for failing to allege any facts to indicate that the sole motivation for the appellant's actions was disinterested malevolence); and (b) contradicted by the allegations in the proposed amended complaint which establish that TNC's actions in seeking to procure, and procuring, the PI Order, were motivated to to protect its interest in its property - the Meyer Nature Preserve! *Meridian Capital Partners, Inc. v. Fifth Ave. 58/59 Acquisition Co. LP*, 60 A.D.3d 434, 874 N.Y.S.2d 440 (1st Dep't 2009) (existence of other interest or motive precludes *prima facie* tort claim); *WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 590 N.Y.S.2d 460 (1st Dep't 1992) (affirming dismissal of claim for *prima facie* tort where there were no well-pleaded allegations to support the conclusory allegation that disinterested malevolence was the sole motivation for defendant's actions)[6]; *Fallon v. McKeon*, 230 A.D.2d

[6] "Central to the cause of action for prima facie tort is that the defendant's intent have been solely to injure plaintiff, *i.e.*, that defendant have acted from 'disinterested malevolence' (citations omitted). Here, the complaint states, in a conclusory fashion, unsupported by factual allegations, that defendants' sole intent was to harm plaintiffs. . . . Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and

629, 646 N.Y.S.2d 230 A.D.2d 629, 646 N.Y.S.2d 109 (1st Dep't 1996) (claim for *prima facie* tort dismissed in absence of allegations of facts tending to show that disinterested malevolence was the sole motivation for defendant's actions).

Where, as here, other motives exist, such as profit, self-interest, or business advantage - or the maintenance and preservation of the Meyer Nature Preserve - a claim for *prima facie* tort does not lie. *Roberts*, *supra*, 92 A.D.2d at 444, *citing Squire Records v. Vanguard Recording Soc.*, 25 A.D.2d 190, 268 N.Y.S.2d 251 (1st Dep't 1966), *aff'd* 19 N.Y.2d 797, 279 N.Y.S.2d 737 (1967); *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 398 N.Y.S.2d 864 (1977); *Hessel v. Goldman, Sachs & Co.*, 281 A.D.2d 247, 722 N.Y.S.2d 21 (1st Dep't 2001).

Plaintiff's pleading defies simple logic and common-sense: how can the acts of a defendant ever be considered to be motivated solely by disinterested malevolence, when such a defendant - by definition - has at least the objective and interest of (a) defeating the claim asserted against it (in this case, *Seven Springs I*) and (b) protecting its interest in its own property (and Plaintiff acknowledged in *Seven Springs I* that TNC's effort to procure the PI Order was to protect TNC's claimed interest in its own property).[7] *See Griffin v. Tedaldi*, 228 A.D.2d 554, 645 N.Y.S.2d 40 (2nd Dep't 1996).

---

accorded every favorable inference. . . , nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *WFB Telecommunications, Inc., supra, quoting Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 570 N.Y.S.2d 799 (1st Dep't 1991), *quoting Roberts v. Pollack*, 92 A.D.2d 440, 444, 461 N.Y.S.2d 272 (1st Dep't 1983).

[7] *See* Affirmation of Alfred Donellan, dated March 17, 2008 (¶10), submitted in *Seven Springs I*: "TNC claims that Seven Springs (or its agents) are somehow entering on TNC's property and clear-cutting, regrading and otherwise altering the terrain within the boundaries (and proximate to) Oregon Road."

The proposed amended complaint does not allege that TNC, for example, engaged in any specific act - other than taking a "position" in *Seven Springs I*, and seeking the PI Order. Such acts, as we demonstrated in TNC's moving memorandum, are privileged precisely because they were statements or actions taken in litigation, in *Seven Springs I*.

2. *Anything TNC did - the positions it took in Seven Springs I and its procurement of the PI Order - is absolutely privileged*

As a matter of law, TNC's actions and conduct - (a) defending itself in *Seven Springs I*, (b) asserting a counterclaim for trespass in *Seven Springs I*, and (c) seeking and procuring the PI Order in *Seven Springs I* - are absolutely privileged,[8] and cannot form the basis of a claim for *prima facie* tort. *Lerwick v. Kelsey*, 24 A.D.3d 931, 807 N.Y.S.2d 147 (3rd Dep't 2005); *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 773 N.Y.S.2d 348 (1st Dep't 2004); *Martinson v. Blau*, 292 A.D.2d 234, 738 N.Y.S.2d 572 (1st Dep't 2002) (affirming dismissal of *prima facie* tort claim that defendant gave false testimony as a witness in a New Jersey court proceeding); *Carniol v. Carniol*, 288 A.D.2d 421, 733 N.Y.S.2d 485 (2nd Dep't 2001); *Jaeger v. Board of Educ. of Hyde Park Cent. School Dist.*, 258 A.D.2d 507, 685 N.Y.S.2d 278 (2nd Dep't 1999); *Rabiea v. Stein*, 21 Misc. 3d 1149(A), 875 N.Y.S.2d 823 (Sup. Ct. Nassau Co. 2008); *Gondal*

---

[8] In any event, actions taken and statements made in litigation are absolutely privileged, *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); *Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 209, 464 N.Y.S.2d 424 (1983); *Martirano v. Frost*, 25 N.Y.2d 505, 307 N.Y.S.2d 425 (1969); *Wiener v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968); *Able Energy, Inc. v. Marcum & Kliegman LLP*, ___ A.D.3d ___, ___, N.Y.S.2d ___, 2010 WL 87470 (1st Dep't Jan. 12, 2010); *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.23d 136, 615 N.Y.S.2d 410 (2nd Dep't 1994); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 828 N.Y.S.2d 315 (1st Dep't 2007) ("the principle underlying the absolute privilege for judicial proceedings is that 'the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to the litigation,' which freedom 'tends to promote an intelligent administration of justice'"); *Sinrod v. Stone*, 20 A.D.3d 560, 799 N.Y.S.2d 273 (2nd Dep't 2005), and they are not subject to collateral review in another plenary action.

Asset Management v. New York Stock Exchange, 22 Misc. 3d 1108(A), 880 N.Y.S.2d 223 (Sup. Ct. N.Y. Co. 2004).

Indeed, given that New York does not permit a claim for *prima facie* tort predicated on the malicious institution of a prior civil action, *Curiano, supra*; *Lemberg v. John Blair Communications, Inc.*, 251 A.D.2d 205, 674 N.Y.S.2d 355 (st Dep't 1998); *1109580 Ontario, Inc. v. Bear, Stearns & Co., Inc.*, 2003 WL 470308 (S.D.N.Y. Feb. 25, 2003), it certainly will not recognize a claim for wrongful defense of a prior - and as yet unresolved - action.

Nor is there any allegation in the proposed amended complaint that Plaintiff had an agreement with any of the municipal authorities (*i.e.* Bedford or North Castle), of which TNC was aware and with which TNC is alleged to have intentionally interfered. Plaintiff's development proposal in Bedford does not contemplate or require access over the so-called Easement Area or Oregon Road,[9] and Plaintiff voluntarily withdrew its development proposal in North Castle.[10]

---

[9] "[S]even lots for new single-family residences, one lot for the existing "Nonesuch" home, one lot for a private equestrian facility, and one lot to be owned by a homeowner's association on which stormwater management basins will be located. The Meyer estate house will remain on the existing 103.8-acre lot in the Town of North Castle, with access over its existing driveway from a proposed new private road in Bedford. No new development is currently proposed in the Town of North Castle or the Town of New Castle, and no access to the site from North Castle or New Castle is currently proposed."

http://www.bedfordny.info/html/pdf/planning/2009%20Seven%20Springs%20FEIS.pdf (Emphasis added.)

[10] By letter dated August 10, 2007, Plaintiff's counsel advised the North Castle Planning Board that Plaintiff "hereby withdraws the application made to the Planning Board for approval of a subdivision of the portion of the property that is within the Town of North Castle." (*See* TNC Ex. 9)

3. *The proposed pleading improperly seeks to circumvent the unavailability of a cause of action on the PI Order in Seven Springs I*

The pleadings in ths case - notwithstanding Plaintiff's attempt to characterize them as asserting a claim for *prima facie* tort - set forth allegations which purport to assert a claim, if anything, for wrongful issuance of the PI Order. But it is well-settled that "[p]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs." *Lancaster v. Town of East Hampton*, 54 A.D.3d 906, 864 N.Y.S.2d 537 (2nd Dep't 2008). Plaintiff may not recast a claim that is otherwise unavailable as a matter of New York law as one for *prima facie* tort. *See e.g. Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983); 2 PJI 3:7 *Intentional Torts - Interference with Person or Property - Prima Facie Tort* (2009 ed.) ("*2 PJI*").

Plaintiff's proposed pleading - as well as the affirmation of its counsel and the affidavit of its principal, Donald Trump - make plain that this action seeks damages for what Plaintiff characterizes as the wrongful issuance of the PI Order. But casting its pleading as one for *prima facie* tort is an impermissible attempt to circumvent the fact that there is no cause of action for wrongful issuance of a preliminary injunction, and that Plaintiff's only remedy is one for damages under the undertaking - should Plaintiff be able to prove in *Seven Springs I* that the PI Order was improperly issued. *Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 398 N.Y.S.2d 877 (1977); *Bonded Concrete, Inc., supra*; *Town of Putnam Valley v. Cabot*, 50 A.D.3d 775, 856 N.Y.S.2d 166 (2nd Dep't 2008).

TNC is not subject to liability for having sought or procured the PI Order, except as and

under - and as limited by - the $100,000 undertaking it gave as required by the PI Order. Under settled New York law, absent an undertaking there is no right to recover for damage resulting from the issuance of a preliminary injunction. *Reingold v. Bowins*, 34 A.D.3d 667, 826 N.Y.S.2d 316 (2nd Dep't 2006), *citing J.A. Preston Corp. v. Fabrication Enters.*, 68 N.Y.2d 397, 401, 509 N.Y.S.2d 520 (1986). And even if it is ultimately determined that TNC was not entitled to issuance of the PI Order, Plaintiff's "recovery of resulting damages attributable to the injunction will be limited to the amount of the undertaking as fixed by the court (citations omitted); *see also* CPLR 6312[b]), *i.e.*, the undertaking is 'the source and measure of liability'." *Bonded Concrete, Inc., supra, citing City of Yonkers v. Federal Sugar Ref. Co.*, 221 N.Y. 206, at 209 (1917); *Reingold, supra.*

In short, this entire action is but an effort to circumvent the fact that the remedy Plaintiff seeks is unavailable under New York law, and it is not made available by the creative efforts of its counsel to call its claim by a different name.

*4. **The proposed pleading contains no particularized allegation of special damages***

The proposed amended complaint woefully fails to allege any cognizable special damages.

Special damages are the only type of damages recoverable in an action for *prima facie* tort, and they must be alleged "with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts'." *Epifani, supra, quoting Ginsberg v. Ginsberg*, 84 A.D.2d 573, 574, 443 N.Y.S.2d 439 (2nd Dep't 1981).

Special damages are ordinarily for injuries to a trade, occupation, professional reputation or property, and the term generally comprehends interference with some form of contractual

relation. *2 PJI, supra.*

Plaintiff claims that it sustained the following damages:

1. $5 million for its inability to use its purported easement;

2. $50 million for the diminution in value of the Seven Springs Parcel; and

3. $5 million for Plaintiff's inability to access the Seven Springs Parcel from the south over Oregon Road.

(Proposed Amd Cplt., ¶50)

These are all general damages and, thus, they are not recoverable in a claim for *prima facie* tort. General allegations of loss, especially when supported by damages set forth in round numbers without particularization, are not recoverable in a claim for *prima facie* tort. *Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435, 441, 199 N.Y.S.2d 33 (1960); *Emergency Enclosures, Inc. v. National Fire Adjustment Co., Inc.*, 68 A.D.3d 1658, ___ N.Y.S.2d ___ (4th Dep't 2009) ("In pleading special damages, actual losses must be identified and causally related to the alleged tortious act". . ."[G]eneral allegations of lost sales from unidentified lost customers are insufficient"); *Epifani, supra*; *Rall v. Hellman*, 284 A.D.2d 113, 726 N.Y.S.2d 629 (1st Dep't 2001); *Wasserman v. Maimonides Medical Center*, 268 A.D.2d 425, 702 N.Y.S.2d 88 (2nd Dep't 2000); *Leather Dev. Corp. v. Dun & Bradstreet, Inc.*, 15 A.D.2d 761, 224 N.Y.S.2d 513 (1st Dep't 1962) ("damages pleaded in such round sums, without any attempt at itemization, must be deemed allegations of general damages"), *aff'd* 12 N.Y.2d 909, 237 N.Y.S.2d 628 (1963); *2 PJI, supra.*

The loss must be "specific and measurable." *Freihofer, supra*, 65 N.Y.2d at 143 (1985); *Epifani, supra*; *Cardo v. Board of Managers, Jefferson Village Condo 3*, 29 A.D.3d 930, 931,

817 N.Y.S.2d 315 (2nd Dep't 2006).

Accordingly, the proposed amended complaint fails to allege special damages, and it fails to allege special damages with the requisite particularity.

B. The Purported Claim is Time-Barred

Even assuming, *arguendo*, that Plaintiff has stated a claim for *prima facie* tort - and it has not - such a claim is subject to a one-year statute of limitations and is time-barred.

First, a claim for *prima facie* tort is subject to a one-year statute of limitation. CPLR 215(3); *Dinerman v. City of New York Admin. for Children's Services*, 50 A.D.3d 1087, 857 N.Y.S.2d 221 (2nd Dep't 2008); *Benyo v. Sikorjak*, 50 A.D.3d 1074, 858 N.Y.S.2d 215 (2nd Dep't 2008); *Russek v. Dag Media Inc.*, 47 A.D.3d 457, 851 N.Y.S.2d 399 (1st Dep't 2008); *Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 A.D.3d 368, 835 N.Y.S.2d 57 (1st Dep't 2007); *Peerless Abstract Corp. v. Seltzer*, 35 A.D.3d 423, 824 N.Y.S.2d 717 (2nd Dep't 2006); *Yong Wen Mo v. Gee Ming Chan*, 17 A.D.3d 356, 792 N.Y.S.2d 589 (2nd Dep't 2005).

Plaintiff contends that because it claims to seek damages for purported injury to its economic interests, it's claim is subject to a 3-year statute of limitations (Pltf's Mem., at 10), *citing Jemison v. Crichlow*, 139 A.D.2d 332, 531 N.Y.S.2d 919 (2nd Dep't 1988). But to the extent Plaintiff's claim is based on the "position" that TNC took in *Seven Springs I* - even assuming such "position" is not privileged - the claim seeks damages for injury to the reputation of Plaintiff or its title in the Seven Springs Parcel and its rights (if any) to use Oregon Road within the Easement Area. That is a claim for slander of title, regarding the nature or extent of Plaintiff's title in and to the Easement Area. *Fink v. Shawangunk Conservancy*, 15 A.D.3d 754, 790 N.Y.S.2d 249 (3rd Dep't 2005). Such a claim is subject to a one-year statute of limitations.

39 College Point Corp. v. Transpac Capital Corp., 27 A.D.3d 454, 810 N.Y.S.2d 520 (2nd Dep't 2006); *Hanbidge v. Hunt*, 183 A.D.2d 700, 583 N.Y.S.2d 288 (2nd Dep't 1992) ("A cause of action sounding in slander of title is governed by a one-year Statute of Limitations"). Of course, a *prima facie* tort claim is not permitted where the purpose is to circumvent an already expired statute of limitations. *2 PJI 3:7, supra* ("nor may a plaintiff avoid a statute of limitations by denominating the claim a prima facie tort"); *Havell v. Islam*, 292 A.D.2d 210, 739 N.Y.S.2d 371 (1st Dep't 2002); *Entertainment Partners Group, Inc. v. Davis*, 198 A.D.2d 63, 603 N.Y.S.2d 439 (1st Dep't 1993); *Ramsay v. Mary Imogene Bassett Hosp.*, 113 A.D.2d 149, 495 N.Y.S.2d 282 (3rd Dep't 1985).

The proposed amended complaint does not identify a single act that was committed within one-year of the date (September 22, 2009) on which this action was filed. The PI Order was entered on April 14, 2008, much more than one-year before this action was commenced. Plaintiff does not identify that any act - not a single act - was undertaken, performed or committed by TNC or any of the Defendants after the date the PI Order was entered, or within a year of the date on which this action was commenced. Accordingly, the purported claim is time-barred.

Plaintiff's argument that this action is subject to a 3-year statute of limitations because it seeks damages for injuries to economic interests rather than to Plaintiff's reputation (Pltf's Mem., at 9-10), is misplaced. No special damages are alleged or identified, and there is no allegation that Plaintiff had, or lost, a single contract to sell or otherwise dispose of or use any portion of its lands.

Second, Plaintiff appears to contend that it is entitled to have this *prima facie* tort claim

relate back to the date when *Seven Springs I* was commenced, on May 15, 2006. That argument is, frankly, ridiculous, because the facts and alleged acts which underlie the *prima facie* tort claim did not arise until years after *Seven Springs I* was commenced, and after Defendants determined to defend themselves against Plaintiff's claims and allegations in *Seven Springs I.*

CPLR 203(f) provides:

> *Claim in amended pleading.* A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

It is Plaintiff's burden to establish the applicability of the relation back doctrine provided for in CPLR 203(f). *Cardamone v. Ricotta*, 47 A.D.3d 659, 660, 850 N.Y.S.2d 511 (2nd Dep't 2008); *Nani v. Gould*, 39 A.D.3d 508, 509, 833 N.Y.S.2d 198 (2nd Dep't 2007).

There simply is no basis on which the purported *prima facie* tort claim could have been asserted in *Seven Springs I*, and there is basis in law for the proposition that an amended pleading in a subsequent action can be deemed to relate back to the commencement of a separate, prior action.

Point II

THE PROPOSED AMENDED COMPLAINT CONTAINS NO BASIS FOR PUNITIVE DAMAGES

The proposed amended complaint offers no greater basis for punitive damages than does the original Complaint. Even Plaintiff's memorandum demonstrates the complete lack of any

basis for punitive damages in this case.

Plaintiff's threat to seek punitive damages from TNC - a venerable charitable organization - for defending itself in *Seven Springs I* is the height of *chutzpah*.[11] *See Gemveto Jewelry Co. v. Jeff Cooper, Inc.*, 568 F.Supp. 319, 328 (S.D.N.Y. 1983), *vacated and remanded on other grounds*, 800 F.2d 256 (2d Cir. 1986) ("The assertion by the defendants of these claims against plaintiff who was trying to protect its patents against defendants' unethical conduct is an outstanding example of chutzpah to the nth degree").

It is Plaintiff, not TNC, that has engaged in conduct that is punitive and sanctionable. Plaintiff seeks to prevent TNC from defending its property rights and acting consistent with its Mission and its charter as a charitable, nonprofit organization dedicated to preserving "the plants, animals and natural communities that represent the diversity of life on Earth."

Plaintiff, for its part, seeks to build more houses than it has the right to build. For this, Plaintiff turns the world upside-down and asks this Court to allow Plaintiff to sue TNC and to subject TNC to punitive damages for doing nothing more than defending its own property rights.

TNC has done nothing more than to defend itself and its property in *Seven Springs I*, and its historic, charitable Mission. We are unaware of any case which has held that any party - and certainly not a charitable organization - may be held liable in punitive damages for defending itself in another litigation.

As we pointed out in TNC's moving memorandum, although Plaintiff alleges that TNC

---

[11] *Burns v. Burns*, 2001 WL 1568402 (Sup. Ct. Nassau Co., Sept. 7, 2001) ("Chutzpah", to those who may not know, is a Yiddish word. In the affirmative, it may be defined as moxie or guts. In the negative, it implies unbelievable gall, nerve or presumption"); *Ulloa v. City of New York*, 193 A.D.2d 487, 597 N.Y.S.2d 386 (1st Dep't 1993); *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n.5 (2nd Cir. 2009).

and the other defendants have acted maliciously or with malice, there is no factual allegation - well-pleaded or otherwise - that any of the Defendants has done anything that is or could remotely be considered as malicious.

In its memorandum (at page 11), Plaintiff contends that punitive damages are available in a case where the defendant's conduct "has the character of outrage frequently associated with crime," *quoting Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 479, 605 N.Y.S.2d 218 (1993). But, in that case, the Court of Appeals instructed that punitive damages are not available in cases simply where the defendant has acted maliciously. *Id.*, at 478. Rather, the Court of Appeals quoted from Professor Prosser to identify the high burden that a plaintiff must allege and prove in order to seek and obtain punitive damages:

> "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (Prosser and Keeton, Torts § 2, at 9-10 [5th ed. 1984]).

There is no such conduct here. Indeed, so benign is the conduct at issue in this case that Plaintiff has been singularly unable to allege or describe what it is that it claims TNC and the other defendants have done in this case. The only conduct that warrants the imposition of punitive damages is that of Plaintiff in filing and perpetuating this unjustified action.

Plaintiff later relies on *Anniskiewicz v. Harrison*, 291 A.D.2d 829, 737 N.Y.S.2d 316 (4th Dep't 2002) for the proposition that obstruction of an easement justifies the imposition of punitive damages. (*See* Pltf's Mem., at 12) In that case, the court upheld the award of punitive

damages because there was evidence that defendant engaged in "malicious conduct. . .which was intended to intimidate plaintiff." 291 A.D.2d, at 829.

There is no such evidence here. To the contrary, in this case it is the Plaintiff - not the Defendants - who is engaging in conduct intended to intimidate. Plaintiff's reliance on *Chlystun v. Kent*, 185 A.D.2d 525, 586 N.Y.S.2d 410 (3rd Dep't 1992) is also misplaced. In that case, the Appellate Division sustained the award of punitive damages in a trespass action where the defendant engaged in offensive conduct (having nothing to do with its defense of a prior action),[12] but reversed it where such offensive conduct was not demonstrated. *Id.*

The Second Department has repeatedly, and recently rejected claims for punitive damages where "the factual allegations set forth in the complaint do not evidence that the defendant engaged in conduct which rises to the high level of moral culpability necessary to support an award of punitive damages." *99 Cents Concepts, Inc. v. Queens Broadway, LLC*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2010 WL 378121 (2nd Dep't Feb. 2, 2010); *Fragrancenet.com, Inc. v. Fragrancex.com, Inc.*, 68 A.D.3d 1051, 890 N.Y.S.2d 357 (2nd Dep't 2009) ("Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations'").

---

[12] "In this case plaintiff testified that defendants used her property repeatedly without permission, widened the roadway and traveled at great speed, showering her with dust and cinders on one occasion. She also said that Kent II repeatedly used abusive language toward her. We perceive no reason to reduce the award for punitive damages for trespass." 185 A.D.2d at 527.

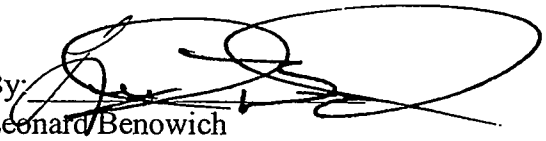
Conclusion

TNC's motion should be granted, and Plaintiff's cross-motion should be denied.

The Complaint should be dismissed in all respects.

Dated: February 19, 2010

BENOWICH LAW, LLP



By: _____
Leonard Benowich
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400
Attorneys for Defendant
The Nature Conservancy

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\Reply mem.wpd

8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No. 21162/09

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

SEVEN SPRINGS, LLC'S REPLY MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This reply memorandum of law is respectfully submitted on behalf of Plaintiff Seven Springs, LLC in further support of its cross-motion for an order pursuant to CPLR Sections 305 and 3025(b) amending Plaintiff's Complaint, and granting Plaintiff leave to serve and file an Amended Complaint in the form annexed to Plaintiff's moving papers as Exhibit "A"; and in response to the Affirmation of Leonard Benowich, Esq., dated February 19, 2010 (the "Benowich Aff."), and accompanying Memorandum of Law, Affirmation of Lois N. Rosen, Esq. dated February 19, 2010 (the "Rosen Aff.") and accompanying Memorandum of Law, and Affidavit of Janine Mastellone, Esq. dated February 19, 2010 (the "Mastellone Aff.") and accompanying Memorandum of Law.

The facts upon which this memorandum is based are set forth in the Affidavit of Alfred E. Donnellan, Esq., sworn to January 21, 2010, with exhibits (the "Donnellan Aff.") and the Affidavit of Donald J. Trump, sworn to January 21, 2010 (the "Trump Aff."), which were

previously submitted in support of Plaintiff's cross-motion and in opposition to the Defendant's motions to dismiss and are incorporated herein by reference.[1]

Plaintiff's cross-motion should be granted, and the Defendants' motions should be denied, because the Complaint, as amended, sets forth a valid, well plead cause of action that is not time barred.

ARGUMENT

POINT I

THE AMENDED COMPLAINT SETS FORTH A VALID CAUSE OF ACTION AND PLAINTIFF'S CROSS-MOTION SHOULD BE GRANTED

As the Appellate Division recently stated:

> "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit"; *Trataros Constr., Inc. v. New York City Hous. Auth.*, 34 A.D.3d 451, 452-453, 823 N.Y.S.2d 534. Additionally, "[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Sample v. Levada*, 8 A.D.3d 465, 467-468, 779 N.Y.S.2d 96; *see Sleepy's Inc. v. Orzechowksi,* 7 A.D.3d 511, 775 N.Y.S.2d 581; *Zacma Cleaners Corp. v. Gimbel*, 149 A.D.2d 585, 586, 540 N.Y.S.2d 268). These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance.

Lucido v. Mancuso, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008).

Moreover,

> "Defendants' purported desire to know the specific allegations as to each defendant can be sought via a demand for a bill of particulars and disclosure. Indeed, disclosure will undoubtedly

[1] Defined terms used here have the same meaning as set forth in the Donnellan Aff. unless indicated otherwise.

> result in a refining of the action. The lack of exact specificity at this procedural juncture, however, is not a ground for dismissal."

Serio v. Rhulen, 24 A.D.3d 1092, 806 N.Y.S.2d 283 (3d Dept., 2005). *See also, Pernet v. Peabody Engineering Corporation*, 20 A.D.2d 781, 248 N.Y.S.2d 132 (1st Dept. 1964) ("Vagueness or conclusory nature of certain allegations of complaint for breach of guaranty of employment contract were not such as to render complaint insufficient, and further particularity could be obtained by demand for bill of particulars or by means of disclosure proceeding. CPLR Rule 3211(a)(7); §3013"; *Kraft vs. Sheridan*, 134 A.D.2d 217, 521 N.Y.S.2d 238 (1st Dept., 1987) ("Further particularity as to the theory of recovery may be obtained by a demand for a bill of particulars (*Pernet vs. Peabody Engineering Corp.*, 20 A.D.2d 781, 782, 248 N.Y.S.2d 132 [1st Dept., 1964]").

Defendants' arguments are couched and presented as if this were a motion for summary judgment. It is not. The criteria for reviewing Plaintiff's cross-motion require that the Court take all of the Plaintiff's allegations as set forth in its Complaint (as amended) and Affidavits as true and resolve all inferences which reasonably flow therefrom in favor of Plaintiff. See, *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977). It is respectfully submitted that the Amended Complaint, together with the Trump Aff., which allege that the actions taken by Defendants are willful, malicious and are intended to deprive Plaintiff of its property rights and access to its property state a valid cause of action, which is all Plaintiff is required to do at this stage. The Court is respectfully referred to Plaintiff's opening Memorandum of Law in opposition to Defendants' Motions to Dismiss and in support of Plaintiff's Cross-Motion, pp. 4-7, which specifically addresses the elements of a prima facie tort, the allegations of the Amended

Complaint (Donnellan Aff., Ex. A, Amended Complaint ¶¶ 24-41) and the sufficiency of the allegations to support Plaintiff's claims.

As set forth above, the Plaintiff is not required to establish the merit of the proposed amendment in the first instance. See *Lucido*, supra. Defendants also object to the lack of specificity of the Amended Complaint. This assertion is unavailing. The specific allegations as to each defendant can be sought via a demand for bill of particulars and disclosure. See *Serio*, supra.

TNC asserts in its Reply Memorandum of Law (p. 4) that because it is a nonprofit organization which has as an objective "to preserve the Nature Preserve," it cannot have been motivated solely by disinterested malevolence for Plaintiff. What is clear is that TNC and the other Defendants are seeking to prevent Plaintiff from using the Easement Area, and from developing its property located in North Castle. Whether TNC has, as alleged, other motivations is not clear at this point. No discovery has taken place in this case. Accordingly, it is premature to dismiss this case, and to conclude, as a matter of law, that TNC's actions are not motivated by disinterested malevolence.

It is asserted in the Burke and Donohoe responding papers, by their attorneys, that neither the Burkes nor the Donohoes joined in the motion for the April 14, 2008 Preliminary Injunction. This claim is belied by the Reply Affirmation of John B. Kirkpatrick dated April 2, 2008, which states, in pertinent part, that:

> "This reply affirmation is submitted in support of the motion for a preliminary injunction made by co-defendant The Nature Conservancy ("TNC").
> The Individual Defendants support TNC's motion and believe that TNC is entitled to the injunctive relief that it now seeks from this Court."

See Donnellan Aff., Ex. F.

The foregoing clearly demonstrates that Burke and Donohoe did not oppose the motion, or remain neutral, and take no position, but in fact joined in the motion for a preliminary injunction. It cannot reasonably, and in good faith, be argued otherwise.

It is further argued by the Defendants that even if the Court finds that the Defendants joined in the application for injunctive relief, their statements are privileged and not actionable.

Defendants' claim of privilege misstates the law of qualified privilege, which requires that plaintiff prove malice, which it must do in any event to establish a cause of action for *prima facie* tort. Defendants' own cases make this clear. The Court of Appeals in *Park Knoll Associates v. Schmidt*, 59 N.Y.2d 205, 211, 464 N.Y.S.2d 424 (1983), relied on by defendants, held that a non-governmental litigant has only a qualified privilege in litigation matters, one that can be overcome by a showing of malice. ("It appearing that defendant can establish the interest necessary to warrant a qualified privilege here, the burden rests upon plaintiff, if it is to sustain its cause of action, to prove that she acted out of malice. The complaint here contains sufficient allegations of malice to withstand the motion to dismiss." 59 N.Y.2d at 211 [emphasis added].) Likewise, the Court of Appeals in *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007), also relied on by defendants, stated: "Communications that are protected by a qualified privilege are not actionable unless a plaintiff can demonstrate that the declarant made the statement with malice. Malice in this context has been interpreted to mean spite or a knowing or reckless disregard of a statement's falsity..." 8 N.Y.3d at 365 [emphasis added].).

Other cases cited by defendants do not declare, as claimed, that a party's actions in private litigation are absolutely privileged and cannot form the basis for a *prima facie* tort. Rather, they are consistent with the holdings quoted above. *Lerwick v. Kelsey*, 24 A.D.3d 931,

807 N.Y.S.2d 147 (3rd Dept. 2005), did not, as defendants claim, have anything to do with absolute privilege; it concerned qualified privilege, and held that the allegations were insufficient to show that malevolence was the only factor leading to an employees' termination. *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 773 N.Y.S.2d 348 (1st Dept. 2004), also relied on by defendants, held that although a witness' statement was qualifiedly privileged, "plaintiffs can defeat this qualified privilege by showing that defendant spoke with malice." 5 A.D.3d at 109.

It should be noted too that if as a general matter a plaintiffs' conduct in litigation were absolutely privileged, there would be no cause of action for malicious prosecution. There is, of course, such a cause of action. See, *Dudick v. Gulyas*, 277 A.D.2d 686, 716 N.Y.S.2d 407 (3rd Dept. 2000).

It is asserted that Seven Springs' claim that "the only viable access to the Seven Springs Parcel is from the south via lower Oregon Road" is untrue, and that "a connection with Sarles Street was 'viable' originally." Rosen Aff. (at p. 11, fn 6) This assertion is misleading and conveniently omits the entire allegation of the Amended Complaint (¶ 25) and Donnellan Aff. (¶ 34.) The Donnellan Aff. states (at ¶ 34) that

> "It is asserted in TNC's Memorandum of Law (at page 11) that "the Complaint does not allege that 'secondary access' must be over Oregon Road". There is no requirement that Plaintiff allege that secondary access must be over Oregon Road to state a cause of action against the Defendants. The Defendants are precluding Plaintiff from exercising its property rights over the Easement Area. By precluding the Plaintiff from exercising its property rights over the Easement Area Plaintiff is being denied a valuable property right and is being damaged on a continuous basis. Notwithstanding the foregoing, the Complaint and Amended Complaint allege that "the only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road". Furthermore, the only viable secondary access to the Seven Springs Parcel is from the south. Accordingly, as a practical matter, access

> to the Seven Springs Parcel from the south must be over Oregon Road. By precluding Plaintiff from accessing the Seven Springs Parcel over Oregon Road the Defendants are preventing Plaintiff from using the only access route available to Plaintiff based upon its claimed Easement rights."

As the foregoing demonstrates, the issue is access to the North Castle portion of the Seven Springs Parcel from the south over Plaintiff's claimed easement rights. Access over Sarles Street to the North Castle portion of the Seven Springs Parcel is from the north and is irrelevant.

Defendants refer to development of the portion of the Seven Springs Parcel in Bedford to support their assertion that Plaintiff has not suffered damage as a result of Defendants' actions. This is a red herring. The Seven Springs Parcel is located in New Castle, North Castle and Bedford. (Trump Aff. ¶ 3.) Plaintiff's damages arise out of its inability to develop the entire Seven Springs Parcel, including that portion of the Seven Springs Parcel located in North Castle, and having to travel greater distances to the north to access the Seven Springs Parcel. (Trump Aff., ¶¶ 20 and 21.) These damages arise directly from Plaintiff's being precluded from exercising its full right to ingress and egress over the Easement. Further, and critically, as a result of Plaintiff's being deprived of its right to access the Easement, Plaintiff has no current application pending to develop the portion of the Seven Springs Parcel located in North Castle. (See Trump Aff., ¶ 20.)

Moreover, Defendants' actions in precluding Plaintiff from exercising its property rights over the Easement Area are causing damage to Plaintiff without regard to Plaintiff's development of the Seven Springs' Parcel. Plaintiff has stated a valid cause of action for an implied Easement over Oregon Road. As more particularly set forth in the Trump Aff. and the proposed Amended Complaint, the Seven Springs Parcel contains, among other things, a manor house that is located

in North Castle that is approximately 90 years old. The house is the private dwelling of Donald Trump and his family.

As a result of the Defendants' actions, Plaintiff, Plaintiff's visitors, tradespeople, emergency vehicles and the residents of the manor house are inconvenienced and deprived of the benefit of the Easement, and, more particularly are required to travel significantly greater distances to the north to access the Seven Springs Parcel. (See Donnellan Aff., ¶¶ 34, 35 and 36.)

The Burke and Donohoe Defendants assert that they have a valid defense based upon a twenty-five foot road-widening easement that had been reserved by Realis Associates. (See Rosen Aff., ¶ 35 and Mastellone Memo of Law, p. 9.) This assertion is without merit. The Donohoe Deed and Burke Deed, under which each Defendant acquired title to their respective properties, state that "No right title or interest into any of the roads abutting the premises herein are included" in the conveyance, and that the conveyance is subject to a road widening easement for the future widening of Oregon Road approximately 25 feet in width. (See Donnellan Aff., Exhibits "H" and "I".) Based on the foregoing, the Defendants have no valid basis in law or fact to prevent, or attempt to prevent, Plaintiff from having unobstructed access over Oregon Road or the Easement Area. (See Amended Complaint, ¶¶ 46 and 47.)

Defendants' assertion that this is a SLAPP suit is likewise without merit. Not surprisingly, the Defendants do not address or respond to the fact that this action does not fall within the parameters of the applicable statute because Plaintiff's underlying claims, as more particularly set forth in the 2006 Action, involve a dispute between private parties to the Easement Area, and as there is not current application pending to develop the portion of the

Seven Springs Parcel in North Castle, Plaintiff is not a "public applicant or permitee" under the statute. (See Plaintiff's Memorandum of Law, p. 9.)

Defendants' further assert that Plaintiff's proposed Amended Complaint fails to allege special damages as required for the cause of action of prima facie tort. This assertion is likewise unavailing.

Special damages must be alleged with sufficient particularity to identify actual losses and be related causally to the tortious acts. *Epifani v. Johnson*, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234 (2d Dept. 2009) and cases cited. Case law, however, does not identify the level of pleading specificity required. Here, the alleged damages cannot be a surprise to Defendants, nor can they at this stage be usefully stated other than in round figures. Quite simply, they are the economic loss caused by Defendants' intentionally thwarting plaintiff's development of the entire Seven Springs Parcel, and in particular that portion of the Seven Springs Parcel located in North Castle, and by Plaintiff being precluded from exercising its full right to ingress and egress over the Easement. They are both obvious and capable of more precise calculation by a fact-finder at any time. For Defendants to pretend they do not have adequate information or notice as to how their impeding Plaintiff's access to Plaintiff's property via the Easement has directly caused, and continues to cause, damage to Seven Springs is play-acting. Harming, indeed terminating further development of the Seven Springs Parcel or use by Plaintiff of the Easement is exactly what Defendants have sought to accomplish. In any event, should the Court find that more specificity is required, the appropriate remedy is disclosure. See, *Serio v. Rhulen*, supra.

Furthermore, Defendants intentional conduct in preventing and obstructing the Plaintiff's use of the Easement is a flagrant interference with Plaintiff's rights entitling Plaintiff to punitive damages. The Court is respectfully referred to Plaintiff's opening Memorandum of Law in

opposition to Defendants' Motions to dismiss and in support of Plaintiff's cross-motion, pp. 11-13, which specifically address Plaintiff's right to punitive damages in this case.

Finally, contrary to the assertions in the Defendants' opposition papers Plaintiff is not precluded from asserting its right to damages until the court renders a final determination as to the rights of the parties with respect to the Easement. If this were the case, a party would be precluded from asserting a right to damages until liability is found. There is no support for such a proposition.

Based on the foregoing, it is respectfully submitted that the Amended Complaint sets forth a valid cause of action and Plaintiff's cross-motion should be granted.

POINT II

PLAINTIFF'S ACTION IS TIMELY

Defendants' assertion regarding this case being time barred are likewise without merit. As more particularly set forth in Plaintiff's opening Memorandum of Law, a cause of action for prima facie tort is governed by a three year statute of limitations where the injury is essentially to the Plaintiff's economic interests rather than to their reputation. See *Jemison v. Crichlaw*, 139 A.D.2d 332, 531 N.Y.S.2d 919 (2d Dept., 1988). Defendants' attempt to distinguish *Jemison* by asserting that Plaintiff's claim is for slander of title, which is subject to a one year statute of limitations, is unavailing. This case seeks monetary damages as a result of Defendants' continuing actions in precluding Plaintiff's use of the Easement Area, which have resulted in economic injury to Plaintiff by, among other things, preventing and/or delaying development of the portion of the Seven Springs Parcel located in North Castle, and diminution in value of the Seven Springs Parcel by Plaintiff being precluded from accessing the Seven Springs Parcel from the south. Defendants' attempt to limit Plaintiff's claim to a one year statute of limitations is not

supported by the allegations of the Amended Complaint and, in any event, is inappropriate in the context of a motion to dismiss.

Furthermore, Defendants' continued action in depriving Plaintiff of its rights to the Easement Area gives rise to continuous causes of action against the Defendants. (See Plaintiff's Memorandum of Law, p. 10.)

Finally, and contrary to the Defendants' assertions, an amended pleading in a subsequent action can be deemed to relate back to the commencement of a separate prior action. See, *Town of Guilderland v. Texaco Refining and Marketing, Inc.*, 159 A.D.2d 829, 552 N.Y.S.2d 704 (3d Dept. 1990) (it is permissible to relate back to the original commencement of the action not only a claim the Plaintiff seeks to add in the same action, but even one sought to be added to a separate but connected action) and Plaintiff's opening Memorandum of Law, p. 11. The 2006 Action involves the same parties to this action and clearly, and admittedly, gives notice of the transactions and occurrences out of which the claims in this action arise[2].

Based upon the foregoing, this action is timely.

---

[2] See December 11, 2009 Rosen Aff. (¶ 4) ("This is the third in a series of lawsuits that Seven Springs has commenced with respect to its claim that it possesses easement rights over a portion of a road known as Oregon Road in the Town of North Castle. In the first action, which was commenced in or about May 2006, Seven Springs brought suit against TNC, the Town of North Castle (the "Town"), Realis Associates, the Burkes, and the Donohoes, and asked the Court *inter alia*, for a declaratory judgment as to its rights with respect to the lower portion of Oregon Road..."; TNC Memorandum of Law dated November 16, 2009 in support of motion to dismiss (p. 2) ("This is the second action that Plaintiff has commenced against these Defendants, but it is the third action commenced by Plaintiff concerning Oregon Road. In the first action, *Seven Springs, LLC v. The Nature conservancy, et al.*, Index No. 9130/06 ("*Seven Springs I*"), Seven Springs seeks a declaration that it has an easement over a portion of Oregon Road in the Town of North Castle, including over land that is owned by TNC"); Burke Memorandum of Law dated December 2, 2009 in support of motion to dismiss (p. 2) ("On or about May 15, 2006, the plaintiff commenced an action pursuant to Article 15 of the Real Property Action and Proceedings Law to compel a determination of claims relative to real property, described and known as Oregon Road, located in the County of Westchester..." (See also, Donnellan Aff. ¶¶ 9, 10 and 27, and Plaintiff's Memorandum of Law, p. 11.)

POINT III

SEVEN SPRINGS, LLC IS NOT COLLATERALLY ESTOPPED FROM ASSERTING ITS CLAIMS IN THIS ACTION

Seven Springs' action for *prima facie* tort is authorized by CPLR 6315:

> **"CPLR 6315: Ascertaining damages sustained by reason of preliminary injunction or temporary restraining order**
>
> The damages sustained by reason of a preliminary injunction or temporary restraining order may be ascertained upon motion on such notice to all interested persons as the court shall direct. Where the defendant enjoined was an officer of a corporation or joint-stock association or a representative of another person, and the amount of the undertaking exceeds the damages sustained by the defendant by reason of the preliminary injunction or temporary restraining order, the damages sustained by such corporation, association or person represented, to the amount of such excess, may also be ascertained. The amount of damages so ascertained is conclusive upon all persons who were served with notice of the motion and such amount may be recovered by the person entitled thereto in a separate action."

Where there is a showing of bad faith amounting to malicious prosecution, or where the application for the judicial restraint was maliciously motivated, damages from an improperly issued injunctive relief can be recovered in a separate action. See, *General Elec. Co. v. Metals Resources Group Ltd.*, 293 A.D.2d 417, 419, 741 N.Y.S.2d 218 (1st Dept. 2002); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.*, 168 A.D.2d 238, 241, 562 N.Y.S.2d 616 (1st Dept. 1990); *Brooklyn Consol. Lumber Corp. v. City Plastering Co.*, 236 A.D. 799, 259 N.Y.S. 561 (2nd Dept. 1932); Siegel, *New York Practice* § 329 (4th ed.). CPLR 6315 is the procedural vehicle for recovering those damages. In such a proceeding, the damages awarded may exceed the amount of the undertaking of the party that obtained the injunction. *A & M Exports, Ltd. v. Meridien Intern. Bank, Ltd.*, 222 A.D.2d 378, 380, 636 N.Y.S.2d 35 (1st Dept. 1995); *Doran & Associates, Inc. v. Envirogas, Inc.*, 112 A.D.2d 766, 768, 492 N.Y.S.2d 504 (4th Dept. 1985). Indeed, CPLR 6315 does not by its terms limit damages to the amount of the bond or

undertaking. Further, an award of damages may include attorneys' fees. *Shu Yiu Louie v. David & Chiu Place Restaurant, Inc.*, 261 A.D.2d 150, 152, 689 N.Y.S.2d 476 (1st Dept. 1999); *A & M Exports, Ltd. v. Meridien Intern. Bank, Ltd.*, 222 A.D.2d 378, 380, 636 N.Y.S.2d 35 (1st Dept. 1995).

Seven Springs thus appropriately brought this action for *prima facie* tort. The elements of the cause of action require a showing that "disinterested malevolence," or malice, was the sole motivation for defendants' conduct. *Epifani v. Johnson*, 65 A.D.3d 224, 822 N.Y.S.2d 234 (2nd Dept. 2009). The issuance of a preliminary injunction against Seven Springs in the 2006 Action did not determine whether those who sought the injunction were maliciously motivated. Indeed, whether Defendants' actions in obtaining the injunction, though lawful, were motivated only by their unjustified intention to harm Seven Springs – which is the essence of the claim here, *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143, 490 N.Y.S.2d 735 (1985) – was not before the Court. Likewise, the Court could of course not have determined previously whether Seven Springs suffered special damages as a result of the injunction.

Defendants' reliance on *Blue Chip Mortg. Corp. v. Strumpf,* 50 A.D.3d 936, 937, 857 N.Y.S.2d 607 (2nd Dept. 2008), *Bonded Concrete, Inc. v. Town of Saugerties*, 42 A.D.3d 852 (3d Dept. 2007), and related cases, to support the assertion that Plaintiff is barred from asserting its claims in this action, and is limited in its recovery to the amount of the undertaking, or $100,000.00, is misplaced. Plaintiff's claim in this action is supported by CPLR §6315 and, in any event, the issues sought to be raised in this action, namely Defendants' tortious acts, were not before the Court in the 2006 Action.

The Burke and Donohoe Defendants claim that Plaintiff's damages claim is limited to the amount of the undertaking, with respect to them. This is inconsistent with their position that they

did not join in the application for the injunction. If these Defendants did not join in the application for the injunction in the 2006 Action, then Plaintiff's recovery against these Defendants cannot be limited to the amount of the undertaking given with respect to the injunction.

Based upon the foregoing, Seven Springs is not collaterally estopped from asserting a claim for damages relative to the issuance of the preliminary injunction in the 2006 Action, and Seven Springs' right of recovery is not limited to the amount of the undertaking as fixed by the Court in the 2006 Action.

CONCLUSION

WHEREFORE, for the reasons set forth herein, it is respectfully submitted that Plaintiff's cross-motion should be granted in its entirety and Defendants' motions should be denied in their entirety, together with such other and further relief as the Court may deem just and proper.

Dated: White Plains, New York
March 5, 2010

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: Bradley D. Wank

Bradley D. Wank, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

NEW YORK STATE SUPREME COURT
COUNTY OF WESTCHESTER : PART RJ

SEVEN SPRINGS, LLC,,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

INDEX NO. 9130/06

Westchester County Courthouse
White Plains, N.Y. 10601
APRIL 4, 2008

B E F O R E:

HON. RORY J. BELLANTONI,
Acting Justice of the Supreme Court

SUSAN M. LANZETTA
Official Court Reporter

A P P E A R A N C E S:

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP.
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, NY 10601
BY: ALFRED E. DONNELLAN, ESQ.
BRADLEY D. WANK, ESQ.

LEONARD BENOWICH, ESQ.
Attorneys for Defendant Nature Conservancy
1025 Westchester Avenue
White Plains, NY 10604

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP.
Attorneys for Defendants Burke & Donohoe
120 Bloomingdale Road
White Plains, NY 10605
BY: JOHN KIRKPATRICK, ESQ.

STEPHENS BARONI REILLY & LEWIS, LLP
Attorneys for Town of North Castle
175 Main Street
White Plains, NY 10601
BY: GERALD REILLLY, ESQ.
CHRISTEN HOLT, ESQ.

additional rules and requirements the Court must follow and the rule of construction and intent of the grantors and grantees at the time of the original grant seem paramount. At the end of the day the plaintiff may demonstrate that there was an implied easement and defendant may not be able to demonstrate the intent was otherwise then set forth in the complaint papers at this point in time it appears defendants are likely to success on the merits.

As far as irreparable harm, it's very difficult to limit the way in which the property would be used if the property is opened for the use of Seven Springs, its agents, servants, employees, one cannot guarantee that it will be used in a way that does not cause irreparable harm. Certainly you talk about a Nature Conservancy, although it was a public road at the time the Conservancy was created, the nature of the property has changed since

1973. The road has become overgrown. To allow traffic on that road at this point in time would irreparablely damage or have the affect of causing irreparable harm both to the physical property, the land itself and to the nature of the Conservancy. There also is a question as to whether or not the opening of the road would create traffic or a use that would in such a way cause the Conservancy to lose its property. If the land must be maintained as a Conservancy and the Court were not at this point in a position to grant the injunction and the road were used by folks at the invitation or permission of Seven Springs to go in there and to do anything other than simply hike and enjoy the preservation, one could argue that the nature and quality of the Conservancy has been changed and although it hasn't been referred to as a reverter, might cause the Conservancy to lose the property. That would certainly

cause irreparable harm and as such I'm making a finding there would be irreparable harm by opening the street.

As far as a weighing of the equities, this road is there for folks to walk on, if Seven Springs wants to have engineers walk down that road to survey property with an expectation that ultimately it will prevail, with the expectation it wants to develop property, no reason why the surveyors can't use macadam road and walk down. The Conservancy is open to the public. There wouldn't be any cause of action for trespass or alike. The surveyors would be allowed to walk down that road as like any other member of the public, correct?

MR. BENOWICH: I don't know what they would be doing.

THE COURT: It's open to the public?

MR. BENOWICH: It is open to the public. So long as they honor the

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Index No. 21162/09

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

ORDER TO SHOW CAUSE FOR REARGUMENT AND A STAY

Benowich

BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

To

Service of a copy of the within is hereby admitted.

0001237/3/ 09:29:00 0//21/10 JJCE JJCE CHECKS
********** $A.00 01

Dated: .....

Attorney(s) for .....

Check Applicable Box

☐ Certification By Attorney

☐ Attorney's Affirmation

certify that the within has been compared by me with the original and found to be a true a. complete copy.

state that I am the attorney(s) of record for in the within action; I have read the foregoing and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.:

I, being duly sworn, depose and say: I am

Check Applicable Box

☐ Individual Verification

the in the within action: I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

☐ Corporate Verification

the of a corporation and a party in the within action; I have read the foregoing and know the contents thereof: and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief. and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.: (If both boxes are checked—indicate after names, type of service used.)

I, being sworn, say: I am not a party to the action, am over 18 years of age and reside at

On I served the within

Check Applicable Box

☐ Service By Mail

by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within this State, addressed to each of the following persons at the last known address set forth after each name:

☐ Personal Service on Individual

by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as *a party therein:*

Sworn to before me on

.....
The name signed must be printed beneath