STATE OF RHODE ISLAND

PROVIDENCE, SC. SUPERIOR COURT

(FILED: January 17, 2024)

MEMORIAL REAL ESTATE GROUP, LLC, *Plaintiff,*	:	
v.	:	**C.A. No. PM-2023-01172**
111 BREWSTER CONDOMINIUM ASSOCIATION, ARDEN ENGINEERING CONSTRUCTORS, LLC, BENTLEY BUILDERS, LLC, JCT DEVELOPMENT, INC., MEMORIAL DEVELOPMENT, LLC, MEMORIAL HOSPITAL and RHODE ISLAND ATTORNEY GENERAL PETER F. NERONHA, in his official capacity as Administrator of Charitable Trusts of the State of Rhode Island, *Defendants***.**	:	

DECISION

STERN, J. Before the Court is Plaintiff, Cross-claim Defendant and Counterclaim Defendant, Memorial Real Estate Group's (Plaintiff[1]) Motion to Dismiss Defendants, Cross-claim Plaintiff, Rhode Island Attorney General Peter F. Neronha, in his official capacity as Administrator of Charitable Trusts of the State of Rhode Island (the Attorney General), and Counterclaim Plaintiffs, 111 Brewster Condominium Association, Arden Engineering Constructors, LLC, Bentley Builders, LLC, JCT Development, Inc., Memorial Development, LLC (Memorial Development),

[1] For clarity, the Court will refer to Memorial Real Estate Group as Plaintiff in this Decision.

and Memorial Hospital's (Memorial Hospital) (collectively, Defendants) declaratory judgment claims. Jurisdiction is pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure.

I

Facts and Travel[2]

The underlying action involves a judicial foreclosure for the property located at 111 Brewster Street, Pawtucket, RI 02860 (the Property), the campus of the former Memorial Hospital. (Memorial Hospital's Countercl. ¶¶ 1, 4.) Memorial Development acquired the Property via quitclaim deed (the Deed) from Memorial Hospital on January 5, 2021. (Pl.'s Am. Compl. ¶ 13; Memorial Hospital's Answer ¶ 13 and Attorney General's Answer ¶ 13 (admitting that the Deed speaks for itself)). Over a year later, on March 22, 2022, Memorial Development executed a promissory note (the Note) with a corresponding mortgage (the Mortgage) for $3,500,000 on the Property with Nextbank International, Inc. (Nextbank). (Pl.'s Am. Compl. ¶¶ 14-15; Memorial Hospital's Answer ¶¶ 14-15; and Attorney General's Answer ¶¶ 14-15 (admitting that the Note speaks for itself)).

On December 28, 2022, Nextbank assigned its interest in the mortgage to Plaintiff. (Pl.'s Am. Compl. ¶ 16; Memorial Hospital's Answer ¶ 16 and Attorney General's Answer ¶ 16 (admitting that the Assignment speaks for itself)). Memorial Development purportedly defaulted on the Mortgage by failing to make a payment due on December 1, 2022. (Pl.'s Am. Compl. ¶ 17.) The default has allegedly never been cured. *Id.* ¶ 18.

[2] The Court treats this fact section—derived from each of Defendants' respective pleadings—as true given the instant Motion. The Court also supplements facts where possible from Plaintiff's Complaint and Defendants' corresponding admissions or remarks that certain exhibits speak for themselves.

Plaintiff instituted this action on March 8, 2023 and alleged that it is foreclosing pursuant to a statutory power of sale and that all conditions under the acceleration of the Note and foreclosure of the Mortgage have occurred or been fulfilled. *See generally* Compl. The Property supposedly has interests subordinate to the Mortgage at issue, including another mortgage and several liens. *Id.* ¶ 21.

Plaintiff's Complaint[3] seeks a decree permitting foreclosure of the Property and preventing any right of redemption. *Id.* ¶¶ 25-26. By contrast, Defendants wish to bar any foreclosure because they claim that the Deed required each Defendants' consent prior to a sale, transfer, or conveyance of the Property. (Memorial Hospital's Countercl. ¶¶ 16-17; Attorney General's Cross-cl. ¶¶ 9-12.) This provision in the Deed originates from the Court's Order in *In Re The Memorial Hospital*, PC-2020-06291, an action brought by Care New England "to modify deed restrictions on real property held by Memorial Hospital." (Memorial Hospital's Countercl. ¶ 4.) In the Order, the Court—through the application of the *cy pres* doctrine—permitted Lockwood Development Partners, or its nominee,[4] to acquire land subject to certain limitations on transferring the Property. *Id.* ¶ 5. One of the limitations in the Order included a requirement that Defendants must consent to any sale, conveyance, or transfer of the Property. *Id.* ¶ 6.

Seeking to enforce this limitation in the Deed, Defendants each filed a counter and cross-claim against Plaintiff. *See generally* Memorial Hospital's Countercl.; Attorney General's Cross-cl. Both the counter and cross-claims each contain a one-count declaratory judgment action seeking the voidance of any purported transfer of the Property between Memorial Development

[3] It should be noted that the Court granted Plaintiff's Motion to Amend its Complaint on June 12, 2023. However, Plaintiff never filed its amended complaint. Defendants' Answers both appear to respond to the proposed but unfiled amended complaint attached to Plaintiff's Motion to Amend.
[4] Lockwood's nominee eventually became Memorial Development.

and Nextbank because valid consent was not obtained by Memorial Development prior to executing the mortgage. *See id.*

On November 9, 2023, Plaintiff submitted its Motion to Dismiss Memorial Hospital's counterclaim and the Attorney General's cross-claim, arguing that the Mortgage was not a conveyance or transfer and that, even if it was, severability provisions contained within the Mortgage barred it from operating as such. *See* Pl.'s Mem. in Supp. of its Mot. to Dismiss (Pl.'s Mem.) Defendants separately filed their Objections and corresponding memorandums in support on December 11, 2023. (Docket.)

II

Standard of Review

A motion to dismiss under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure "has a narrow and specific purpose: 'to test the sufficiency of the complaint.'" *Mokwenyei v. Rhode Island Hospital*, 198 A.3d 17, 21 (R.I. 2018) (quoting *Multi-State Restoration, Inc. v. DWS Properties, LLC*, 61 A.3d 414, 416 (R.I. 2013)). A trial justice "'must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff's favor.'" *Multi-State Restoration, Inc.*, 61 A.3d at 416 (quoting *Laurence v. Sollitto*, 788 A.2d 455, 456 (R.I. 2002)) (internal citations omitted). The Court will grant a motion to dismiss "if it 'appears beyond a reasonable doubt that a plaintiff would not be entitled to relief under any conceivable set of facts.'" *Laurence*, 788 A.2d at 456 (quoting *Rhode Island Affiliate, ACLU, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989)). Importantly, "'the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.'" *Chhun* *v. Mortgage Electronic Registration Systems, Inc.*, 84 A.3d 419, 422 (R.I. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).[5]

III

Analysis

A

The Mortgage is a Conveyance

Plaintiff contends that the Mortgage does not fall within the "sale, transfer or conveyance" restrictions placed on Memorial Development by the Court's Order and the Deed. (Pl.'s Mem. 4.) Plaintiff avers that the Mortgage was a device used to develop a vacant hospital into housing and healthcare for U.S. military veterans. *Id.* at 5. Plaintiff cautions that the Court should not "elevate form over substance and theory over pragmatics" in construing the Mortgage as a conveyance. *Id.* Plaintiff also advances that restrictions on the alienation of land are disfavored and should be rejected by the Court here. *Id.*

Defendants both assert that the mortgage was a conveyance. (Memorial Hospital's Mem. in Supp. of its Opp'n to Pl.'s Mot. to Dismiss (Memorial Hospital's Mem.) at 5); (Attorney General's Mem. in Supp. of its Obj. to Pl.'s Mot. to Dismiss (Attorney General's Mem.) at 3). Each proffer that Rhode Island is a title theory state, meaning that the granting of the Mortgage on the Property amounted to a conveyance since legal title passed. (Memorial Hospital's Mem. 5.)

"There is no doubt that Rhode Island courts have adopted the so-called title theory of mortgages to resolve various questions of real-property law." *Block Island Land Trust v.*

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[5] While Defendant, Memorial Hospital's, position that declaratory judgment requires a higher standard for dismissal than other causes of action may be correct, the Court passes on opining on that issue given the Court's ultimate conclusion on the Motion. (Memorial Hospital's Mem. in Supp. of its Opp'n to Pl.'s Mot. to Dismiss (Memorial Hospital's Mem.) at 3.)

Washington Trust Co., 713 A.2d 199, 201 (R.I. 1998). Specifically, "a mortgagee not only obtains a lien upon the real estate by virtue of the grant of the mortgage deed but also obtains legal title to the property subject to defeasance upon payment of the debt." *In re D'Ellena*, 640 A.2d 530, 533 (R.I. 1994). Although "title theory is a fiction designed to aid in decision making [and] it is not an absolute per se rule of law[,]" our Supreme Court has stated that "a first mortgage is a conveyance to such mortgagee of the legal fee in the land, defeasible upon condition that the mortgagor will perform the . . . mortgage." *Block Island Land Trust*, 713 A.2d at 201; *Houle v. Guilbeault*, 70 R.I. 421, 423, 40 A.2d 438, 440 (1944) (internal brackets omitted).

According to Black's Law Dictionary, "convey" means "[t]o pass or transmit the title to property from one to another; to transfer property or the title to property by deed or instrument under seal." Black's Law Dictionary (online ed.). The Court again notes that it must deny a motion to dismiss unless it "appears beyond a reasonable doubt that a plaintiff would not be entitled to relief under any conceivable set of facts." *Rhode Island Affiliate, ACLU, Inc.*, 557 A.2d at 1232 (internal quotation omitted.)

With that, the Court turns to the language of the Order and the Deed requiring Defendants' consent prior to a potential conveyance. The Order notes that "Lockwood shall be prohibited from selling, transferring, or conveying, either directly or indirectly, . . . Unit 2, or any portion thereof, for a period of three (3) years following the Closing, which obligation shall survive the Closing and shall not merge with the Deed[.]" *See In Re The Memorial Hospital,* PC-2020-06291 (Order, dated Nov. 12, 2020). These restrictions are included in the Deed, which provides that:

> "Unless Grantor and the Attorney General of the State of Rhode Island consent to the sale, transfer or conveyance of the Property, which consent shall be evidenced by the Grantor and the Attorney General executing any deed conveying the Property, Grantee hereby covenants that Grantee shall not, directly or indirectly, sell, transfer or convey . . . the Property, or any portion thereof, for a period of

> three (3) years following the date of recording this Quitclaim Deed with the City of Pawtucket Land Records[.]" (Pl.'s Compl. Ex. A at 2.)

The Court now must examine the text of the Mortgage to decipher whether it is an unapproved conveyance in violation of the Order and Deed.[6] (Pl.'s Compl. Ex. C.) Paragraph III of the Mortgage indicates that, in exchange for the capital from the lender, "Borrower mortgages, warrants, grants, *conveys* and assigns to Lender . . . the Mortgaged Property[.]" *Id.* at 1 (emphasis added). This language appears to signal that the Mortgage was indeed a conveyance. *See id.* Based on the plain language of the Mortgage and Rhode Island's well-established status as a title-theory state, the Court is precluded from finding—beyond any reasonable doubt—that the Mortgage was not a conveyance that occurred sans Defendants' approval. *See id.*; *Block Island Land Trust*, 713 A.2d at 201.

Plaintiff attempts to maneuver around this by arguing that the Mortgage was a device to facilitate commercial development and that restrictions on alienation of property should be disfavored. (Pl.'s Mem. 5.) While the Court respects Plaintiff's noble efforts to provide housing to U.S. veterans and their families, the Court cannot ignore the clear "convey[]" language existing on the face of the Mortgage and our Supreme Court's statements in *Houle*. *Houle*, 70 R.I. at 423, 40 A.2d at 440 (expressing that "a first mortgage is a conveyance to such mortgagee of the legal fee in the land defeasible upon condition that the mortgagor will perform the condition of the mortgage"). The Court lacks leeway to ignore clear Supreme Court precedence that a mortgage is a conveyance. *See id.*

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[6] Importantly, as counsel for Defendants, the Memorial Entities, raised at oral argument, the Court must be convinced beyond a reasonable doubt that the mortgage is not a conveyance to find for the movant.

Plaintiff's memorandum contains citation to the Third Restatement of Property on Mortgages. (Pl.'s Mem. 4 (citing Restatement (Third) *Property* (*Mortgages*) § 4.1 (1997)). However, pointing to the Restatement is flawed because the applicable section is inapposite with Rhode Island's title-theory adoption. *See Houle*, 70 R.I. at 423, 40 A.2d at 440. Look no further than Comment (b) of the section, which provides "[t]his section adopts the lien theory of mortgages by its language that a mortgage creates only 'a security interest in real estate.'" Restatement (Third) *Property* (*Mortgages*) § 4.1. Accordingly, Plaintiff's reliance on the Third Restatement of Property is misplaced. *See* Pl.'s Mem. 4.

Further, Plaintiff advances other arguments supporting its proposition that the Mortgage was not a conveyance requiring Defendants' approval. *Id.* at 7-8. To this point, Plaintiff contends that the language suggesting the Mortgage was a conveyance is "supplanted" by more specific references in the covenants in the Mortgage. *Id.* at 7. Plaintiff points the Court to Sections B, C and Q.1 of the Mortgage in support thereof. *Id.* However, the Court cannot find, beyond a reasonable doubt, that the covenant's supposedly more specific language overcomes the already-stated rule that a mortgage conveys title to the mortgagor in this title-theory state. *See Houle*, 70 R.I. at 423, 40 A.2d at 440. To that end, granting Plaintiff's Motion on this ground cannot occur.

Plaintiff, moreover, argues that the Court could have used more specific language in its Order to require Defendants' permission prior to executing the Mortgage. (Pl.'s Mem. 8.) Plaintiff interprets the Court's Order to permit development of the Property. *Id.* However, the language of the Court's Order is clear: Plaintiff needed to obtain Defendants' permission prior to granting the Mortgage to a third party. *See generally In Re The Memorial Hospital*, PC-2020-06291 (Order, dated Nov. 12, 2020). Because no ambiguity exists in the Court's Order, Plaintiff's position that the Mortgage was not a conveyance fails at this motion-to-dismiss juncture. *See id.*

B

Severability

Plaintiff concludes its memorandum by arguing that, even if the Court found that the language of the Mortgage amounts to a conveyance, the severability provision within the Mortgage prevents it "from operating as such." (Pl.'s Mem. 9.) The Attorney General rebukes this assertion, positing that Plaintiff's severance argument "lacks a basic understanding of the collateralization of a loan via a Mortgage, Assignment of Rents and Security Agreement along with the distinct functions of each of those provisions which serve an essential part of the collateral package." (Attorney General's Mem. 8.)

The Court finds that Plaintiff's severability argument lacks merit. When a provision of a contract is determined to be unenforceable, "[a] court may sever the illegal portion of the agreement and enforce the remainder. Illegal portions of a contractual agreement may be severed if the illegal provision is not central to the parties' agreement[.]" 8 Williston on *Contracts* § 19:70 (4th ed.). Here, the Court has not found any portion of the Mortgage illegal or unenforceable. *See id.* Rather, the Court determines that the Mortgage could be a conveyance requiring Defendants' prior approval. Accordingly, there is nothing to sever in the Mortgage, and Plaintiff's position must be discarded.

IV

Conclusion

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Dismiss the Defendants' counter and cross-claims. Counsel shall prepare the appropriate order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Memorial Real Estate Group, LLC v. 111 Brewster Condominium Association, et al.**
CASE NO:	**PM-2023-01172**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 17, 2024**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Michael A. Kelly, Esq.**
For Defendant:	**Joseph J. Reale, Jr.; Robert J. Ameen, Esq.; Mitchell Edwards, Esq.**
For Interested Parties:	**Richard L. Gemma, Esq.; Sarah Rice, Esq.; Marissa D. Pizana, Esq.**