IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CORNELL GLASGOW, LLC,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. N11C-07-160 JRS CCLD
	)	
LaGRANGE PROPERTIES, LLC,	)	
LaGRANGE COMMUNITIES, LLC,	)	
STEVEN J. NICHOLS, LOWELL	)	
MCCOY, and BRUCE C. JOHNSON,	)	
	)	
Defendants.	)	

Date Submitted: June 1, 2012
Date Decided: August 1, 2012

MEMORANDUM OPINION.
Upon Consideration of Defendants' Motion to Dismiss.
GRANTED in Part and DENIED in Part.
Upon Consideration of Defendant Johnson's Motion to Lift the Lis Pendens.
DENIED.

Sean J. Bellew, Esquire, and David A. Felice, Esquire. BALLARD SPAHR LLP, Wilmington, Delaware. Marc B. Kaplin, Esquire, Barbara Anisko, Esquire, and Amee S. Farrell, Esquire. KAPLIN STEWART MELOFF REITER & STEIN, P.C., Blue Bell, Pennsylvania. Attorneys for Plaintiff.

Daniel F. Wolcott, Jr., Esquire, Gregory A. Inskip, Esquire, and E. Chaney Hall, Esquire. POTTER ANDERSON & CORROON LLP, Wilmington, Delaware. Attorneys for Defendants.

Donald L. Gouge, Jr., Esquire. DONALD L. GOUGE, JR., LLC, Wilmington, Delaware. Attorney for Defendant Bruce C. Johnson.

SLIGHTS, J.

I.

This action involves a dispute over one piece of land and attached model home (referred to as "Lot 206") in a residential development in Newark, Delaware. The dispute relates to broader litigation in a companion case[1] resulting from the fractured relationship between the development's owner and builder. The defendants have moved to dismiss the Complaint in its entirety based on the rule against perpetuities. They also seek dismissal of the Complaint's equitable claims for lack of subject matter jurisdiction[2] and some of the other claims for failure to state a claim upon which relief may be granted.[3] Defendant, Bruce C. Johnson, current owner of Lot 206, has filed a motion to lift the *lis pendens* on Lot 206 which has been consolidated for decision with the pending motion. The parties have agreed to defer motion practice relating to the equitable claims until after the Court's decision regarding the viability of the legal

[1] *Cornell Glasgow, LLC v. La Grange Properties, LLC, et al.*, C.A. No. N11C-05-016.

[2] The defendants moved to dismiss on jurisdictional grounds Counts I and II (Fraudulent Transfer/Conveyance), Count III (Constructive Trust) and Count IX (Rescission). The plaintiff misnumbered the counts in the Complaint after Count V (Breach of Contract). For clarity, the Court has referred to the counts following Breach of Contract numerically beginning with Count VI (Breach of the Covenant of Good Faith and Fair Dealing) and ending with Count X (Conspiracy).

[3] The defendants moved to dismiss the following Counts for failure to state a claim: Counts I and II (Fraudulent Transfer/Conveyance), Count VII (Conversion), Count VIII (Ejectment) and Count X (Conspiracy).

claims.[4] The Court agrees that this bifurcated approach makes sense and will, therefore, defer its decision on the defendants' motion to dismiss the equitable claims until further consultation with the parties following the issuance of this decision.

The defendants' motion to dismiss the Complaint in its entirety based on the rule against perpetuities must be **DENIED** as the rule has not been violated as a matter of law. The defendants' motion to dismiss plaintiff's claims of conversion and conspiracy is **GRANTED** because plaintiff has alleged conversion of real property which is not a viable claim under Delaware law. Plaintiff's conspiracy claim fails because plaintiff has not plead an actionable tort claim to which the conspiracy can attach. Because the Court is not yet satisfied that plaintiff's claims will not affect the title and ultimate disposition of Lot 206, Defendant Johnson's motion to lift the *lis pendens* on the property must be **DENIED**.

II.

A. The Parties

Plaintiff, Cornell Glasgow, LLC ("Cornell"), is a Delaware limited liability

[4] *See* Letter to the Honorable Joseph R. Slights, III from Counsel, *Cornell Glasgow, LLC v. La Grange Prop., LLC, et al.*, C.A. N11C-07-160, D.I. 45496440 (July 23, 2012). Similarly, the Court defers its decision on La Grange Communities, LLC's motion to amend its counterclaim in the companion case to include an equitable claim of alter ego. *Cornell Glasgow, LLC v. La Grange Properties, LLC, et al.*, C.A. No. N11C-05-016, D.I. 45022261 (June 26, 2012).

company.[5] Defendants La Grange Communities, LLC and La Grange Properties, LLC (collectively, "La Grange"), are Delaware limited liability companies which own the La Grange Communities Development ("Development") in Newark, Delaware.[6] Defendants, Steven J. Nichols ("Nichols") and Lowell McCoy ("McCoy"), are founding members of La Grange.[7] McCoy is also a member of the Board of Directors of NBRS Financial Bank ("NBRS").[8] Defendant, Bruce C. Johnson ("Johnson"), is the son-in-law of McCoy.[9] Johnson purchased Lot 206 from La Grange and is purportedly the current record owner of the property.

B. Background & Procedural History

On September 23, 2009, Cornell and La Grange executed a "Development Agreement" pursuant to which La Grange granted Cornell the exclusive right to build, market and sell 185 of 227 residences within a Development owned by La Grange.[10]

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[5] Complaint ("Compl.") ¶ 2.

[6] *Id.* ¶¶ 1, 3, 4.

[7] *Id.* ¶¶ 5, 6.

[8] *Id.* ¶ 15.

[9] *Id.* ¶ 7.

[10] Compl. ¶ 9; Development Agreement, attached as Ex. A to the Complaint. The Court recently described the contractual relationship between Cornell and La Grange in a separate opinion and will not restate those facts here. *See Cornell Glasgow v. La Grange*, 2012 WL 2106945, at *2-5.

La Grange was to provide improved lots to Cornell and Cornell was then to design, market, build and sell the residences to home buyers pursuant to a Sales Projection Schedule.[11]

In December 2009, Cornell and La Grange negotiated an Amendment to the Development Agreement in which Cornell paid off an existing loan of La Grange thereby allowing La Grange to procure additional financing to pay for improvements of the Development lots (as required by the Development Agreement).[12] In exchange for Cornell's compliance, Cornell had the exclusive right to market, sell and construct all 227 lots in the Development, an increase from the initial 185 lots, and La Grange delivered into escrow the deeds to twenty (20) lots.[13] The deeds were to be released to Cornell once the properties were sold to third party purchasers or upon default of the Development Agreement or Amendment by La Grange.[14] The parties executed an Escrow Agreement to finalize the terms.[15]

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[11] *Id.* ¶ 11; Ex. A at ¶ 1.A; Schedule attached to Development Agreement at Ex. A.

[12] *Id.* ¶¶ 17, 19, 20, 22; Amendment to Development Agreement attached as Ex. B to the Complaint.

[13] *Id.* ¶¶ 18, 22-24; Ex. B at ¶¶ 1, 2, 4, 17.

[14] *Id.* At the closing on the sale of a residence, the sale proceeds were used to pay the principal of Cornell's loan, plus any accrued interest and other unreimbursed costs and expenses incurred by Cornell in connection with the residence. *Id.* ¶ 30.

[15] *Id.* ¶ 25; Escrow Agreement attached as Ex. C to the Complaint.

Thereafter, pursuant to the Development Agreement, Cornell constructed a model home (the "Model") on Lot 206, one of the twenty (20) lots in escrow. The Model was to be used to market residences in the Development.[16] According to the Complaint, Cornell paid La Grange $120,000 for Lot 206 and incurred $345,009.47 in costs for construction, decoration and furnishing of the Model (totaling $465,009.47).[17] To pay these expenses, Cornell borrowed $250,578.15 from NBRS and paid the additional $214,431.32 in cash.[18] Pursuant to the Amendment, La Grange paid the monthly interest payments on Cornell's NBRS loan.[19]

In February 2011, La Grange allegedly breached the Development Agreement and Cornell pursued its breach of contract claim in this Court.[20] In April 2011, Cornell notified La Grange of further defaults under the Development Agreement and Amendment. Pursuant to the Escrow Agreement, Cornell directed the Escrow Agent to release the deed to Lot 206 to Cornell. La Grange contested the release and the Escrow Agent continued to hold the deed in escrow. On May 19, 2011, Cornell

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[16] *Id.* ¶ 31.

[17] *Id.* ¶ 32.

[18] *Id.* ¶ 33.

[19] *Id.* ¶ 34.

[20] *See Cornell Glasgow, LLC v. La Grange Properties, LLC, et al.*, C.A. No. N11C-05-016.

learned that La Grange had secretly prepared a new deed for the Model and sold the Model to Johnson on May 18, 2011.[21] The defaults that had accrued on Cornell's NBRS loan with regards to Lot 206 were satisfied at the closing. According to Cornell, however, La Grange retained the proceeds of the sale and never paid Cornell for its construction, decorating and furnishing costs associated with the Model.[22] In addition, La Grange used proceeds from the sale, which should have gone to Cornell, to pay attorneys' fees, interest and penalties that accrued as a result of its own defaults in payment of Cornell's NBRS loan.[23] Finally, La Grange continues to use the model home to market homes in the Development.[24]

Cornell filed suit against the defendants in this Court on July 22, 2011, alleging breach of contract, unjust enrichment, breach of the covenant of good faith and fair dealing, conversion and conspiracy, and requesting relief in monetary damages. Cornell also alleges fraudulent conveyance/transfer and, as to these claims, it requests relief through means of constructive trust, rescission and ejectment.

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[21] Compl. ¶ 53.

[22] *Id.* ¶ 59.

[23] *Id.* ¶ 62.

[24] *Id.* ¶ 84.

III.

Defendants have moved to dismiss: (1) the entire Complaint because the alleged conveyance that serves as the basis for all of plaintiff's claims was void *ab initio* under the rule against perpetuities (the "Rule"); and (2) Counts I and II (Fraudulent Conveyance), VII (Conversion), VIII (Ejectment), and X (Conspiracy) for failure to state a claim upon which relief can be granted.[25]

In response to the rule against perpetuities argument, Cornell argues that the Rule is not violated by the terms of the Escrow Agreement for three reasons: (1) the transfer of the Development Lots was dependent upon the Development Agreement which sets a five year plan for sale and construction of the properties; (2) the Rule has been severely restricted in the commercial context when parties are sophisticated and have bargained for reasonable terms; and (3) the interest created in Lot 206 resembled an interest outside the parameters of the Rule. In addition, Cornell asserts that its Complaint adequately pleads the elements of fraudulent transfer, ejectment, conversion and conspiracy.

Defendant Johnson separately argues that remedies at law are adequate to address any injury Cornell has suffered. Accordingly, Cornell's *lis pendens* on Lot

[25] *See* Del. Super. Ct. Civ. R. 12(b)(6).

206 must be lifted and vacated pursuant to 25 *Del. C.* § 1601(b)(1), which states that a notice of pendency may not be filed on claims "relating to real estate, which, if sustained, would entitle the party to recover solely [] money or money damages."[26] Cornell asserts in opposition that Johnson has failed to assert any of the four cancellation provisions provided by statute[27] and, further, Cornell will be awarded more than monetary damages if its claims are sustained. Cornell asserts that Johnson's motion must be denied.

IV.

In evaluating a motion to dismiss under Superior Court Civil Rule 12(b)(6), the Court must assume all well plead facts in the complaint are true.[28] A complaint will not be dismissed unless the plaintiff would not be entitled to recover under any reasonable set of circumstances susceptible of proof.[29] Stated differently, a complaint may not be dismissed unless it is clearly not viable, which may be determined as a

[26] 25 *Del. C.* § 1601(b)(1).

[27] 25 *Del. C.* §§ 1606-1609.

[28] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998). The Court may consider exhibits integral to plaintiff's claim and incorporated by reference into the Complaint. *See In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59, 70 (Del. 1995).

[29] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).

matter of law or fact.[30] "Allegations that are merely conclusory and lacking factual basis, however, will not survive a motion to dismiss."[31]

V.

A. The Rule Against Perpetuities

The Court first addresses defendant's claim that the rule against perpetuities bars all of Cornell's claims. The Rule provides that "no interest is good unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest."[32] "Commercial transactions, however, have absolutely no tie to either lives in being or twenty-one years."[33] Accordingly, Delaware courts allow parties to a commercial real estate transaction to negotiate a mutually acceptable time period within which rights under the agreement must be exercised.[34] Nevertheless, an indefinite time limitation to exercise a right to a future interest, even in a commercial

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[30] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[31] *Data Mgt. Internationale, Inc. v. Saraga*, 2007 WL 2142848, at *3 (Del. Super. July 25, 2007) (citations omitted).

[32] J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

[33] *Pathmark Stores, Inc. v. 3821 Assoc., L.P.*, 663 A.2d 1189, 1193 (Del. Ch. 1995).

[34] *See id.* at 1192 ("The Delaware Supreme Court's statement is unmistakably clear - an agreement creating a future interest which exists for a fixed period of time does not violate the rule against perpetuities.") (citing *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1384 (Del. 1991)).

agreement, violates the Rule.[35]

The Court is not convinced that Cornell did not have some interest in Lot 206 upon execution of the Escrow Agreement.[36] Even assuming *arguendo* that Cornell attained no rights upon executing the Escrow Agreement, however, the Court is satisfied that the contracts between these sophisticated parties created a reasonable time (well within twenty-one (21) years) within which a request for the release of the deeds held in escrow had to be exercised. The Escrow Agreement, when read with the Development Agreement, limits the time within which claims for default and release of the deeds could be viable to the time it takes the parties to convey the Development Lots to third party purchasers. Under the Development Agreement, the lots must be sold within eleven (11) quarters (or 2.75 years) from the date of the Agreement.[37]

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[35] *Stuart Kingston*, 596 A.2d at 1384.

[36] *See, e.g.*, *Anderson v. Anderson*, 386 P.2d 406, 407 (Utah 1963) (noting that the court need not address the rule against perpetuities with regard to an equitable interest because such "interest would have arisen and become vested when the contract was executed"); *Cowden v. Broderick & Calvert, Inc.*, 114 S.W.2d 1166, 1169 (Tex. 1938) ("[T]he lessee had, from the time the lease was placed in escrow and pending performance of the conditions, an equitable title to the leasehold estate or interest."); *In re TTS, Inc.*, 125 B.R. 411, 414 (Bankr. D. Del. 1991) (noting that under New York law equitable interest in the escrow account existed although legal title remained in the grantor until occurrence of certain conditions); *In re G & G Invs., Inc.*, 458 B.R. 707, 715 (Bankr. W.D. Pa. 2011) (noting that under Pennsylvania law a depositor does not retain the beneficial interest in - i.e., equitable title to - property once it is placed in escrow); *Rabbia v. Rocha*, 34 A.3d 1220, 1224 (N.H. 2011) ("As a result of depositing property into escrow, 'the grantee acquires immediate equitable title to the subject property . . . .'") (internal citations omitted).

[37] *See* Compl. Ex. A at ¶ 1.A; Schedule attached to the Development Agreement as Ex. A. *See also* Compl. Ex. A at ¶ 1.B. ("A Home shall be considered 'sold' upon the receipt of a Contract . (continued…)

Accordingly, if the homes are "sold" within the designated period, there can be no claim for release of deeds subsequently (as they already would have been transferred to a third party purchaser). Alternatively, if the homes are not "sold" within the designated period, Cornell is subject to default under the Development Agreement and corresponding penalties. The defendants have not presented any realistic situation in which default could occur at some indefinite time beyond the eleven (11) quarters negotiated between the parties.[38] The parties contemplated an end to their relationship and defaults stemming therefrom could not go on in perpetuity. "Allowing defendants to escape the terms of the contract because [plaintiff] might exercise the option in an unreasonably remote way defies the contract's terms, logic, common sense, [and] public policy . . . ."[39] The Court also notes that the transaction between the parties consummated by the Escrow Agreement does not fit particularly well within the rule

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. . for such Home executed by or on behalf of a bona fide third party purchaser.")

[38] The defendants suggest that the deadline of two years for construction in the Purchase Agreements to third parties, attached to the Development Agreement as Ex. C, does not provide finality to the perpetuities period because it only provides third party purchasers the option of terminating the agreement at that time. However, at that time, the third party either continues with the agreement (holding by contract an interest in the property) or the third party terminates the agreement and Cornell and/or La Grange are in default depending on the reason for the termination.

[39] *Pathmark*, 663 A.2d at 1193. The statute of limitations for breach of contract is three years and would also prevent a claim for default in perpetuity. *See* 10 *Del. C.* § 8106.

against perpetuities. In *Stuart Kingston Inc. v. Robinson*,[40] the Supreme Court invalidated a right of first refusal with an unlimited option to exercise the right.[41] In *Welsh v. Heritage Homes of Delawarr, Inc.*,[42] the Court of Chancery invalidated a right to buy back property upon the occurrence of certain conditions with an unlimited option to exercise the right.[43] In contrast, the transfer of La Grange's twenty lots into escrow served mainly as security for Cornell, which drew money from its loan based upon La Grange's representation that it would pay back the loan over time. Payment of the loan was presumably on a schedule as well, enforced by NBRS, and would not have continued in perpetuity. Furthermore, neither party had any intention of encumbering the land in the future; rather, the goal was to sell all of the property pursuant to an Agreement in which "time was of the essence."[44] The defendants' motion to dismiss based on the rule against perpetuities, therefore, must fail.

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[40] 596 A.2d 1378 (Del. 1991).

[41] *Id.* at 1384-85.

[42] 2008 WL 442549 (Del. Ch. Feb. 19, 2008).

[43] *Heritage Homes*, 2008 WL 442549, at *7-8 ("[T]here is nothing in the language of the Buyback Provision, the deed, or elsewhere in the Agreement that requires Heritage Homes to exercise the option within any fixed period of time."). *See also Heritage Homes of De La Warr, Inc. v. Alexander*, 2005 WL 2173992, at *2 (Del. Ch. Sept. 1, 2005) (same).

[44] Compl. Ex. A at ¶ 19; Ex. C at ¶ 17(d).

B. The 12(b)(6) Arguments as to Cornell's Legal Claims

1. Conversion (Count VII)

Conversion is "any distinct act of dominion wrongfully exerted over the property of another, in denial of [the plaintiff's] right, or inconsistent with it."[45] It is well-settled in Delaware that conversion applies to chattel but not to real property.[46] Chattel is "[m]ovable or transferable property; personal property; esp., a physical object capable of manual delivery and not the subject matter of real property."[47] Real property is "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land."[48] Cornell's claim for conversion of "the model" (the model home erected on Lot 206) can be construed only as a claim for conversion of real property. Accordingly, it is not actionable as a matter of law and must be dismissed.

2. Civil Conspiracy (Count X)

"Civil conspiracy is not an independent cause of action; it must be predicated on

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[45] *Drug, Inc. v. Hunt*, 168 A. 87, 93 (Del. 1933).

[46] *See Stevanov v. O'Connor*, 2009 WL 1059640, at *13 (Del. Ch. Apr. 21, 2009). *See also* RESTATEMENT (SECOND) TORTS § 222A(1) (1965) ("Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor must justly be required to pay the other the full value of the chattel.").

[47] BLACK'S LAW DICTIONARY, *Chattel* (9th ed. 2009).

[48] *Id. Property, real property*.

an underlying wrong. Thus, if plaintiff fails to adequately allege the elements of the underlying claim, the conspiracy claim must be dismissed."[49] Dismissal of Cornell's conversion claim leaves no surviving tort claim in the Complaint. Further, conspiracy cannot be predicated on fraudulent transfer,[50] breach of contract[51] or breach of the covenant of good faith and fair dealing.[52] Thus, Cornell's civil conspiracy claim must be dismissed.

3. Fraudulent Conveyance (Counts I & II)

Cornell has not opposed the defendants' characterization of Cornell's fraudulent conveyance, constructive trust and rescission claims as equitable. As plead, the Court agrees that the claims are grounded in equity.[53] Accordingly, the Court defers its

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[49] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009).

[50] *Edgewater Growth Capital Partners, L.P., et al. v. H.I.G. Capital, Inc., et al.*, 2010 WL 720150, at *2 (Del. Ch. Mar. 3, 2010).

[51] *Kuroda*, 971 A.2d at 892.

[52] *Id.*

[53] *See John Julian Const. Co. v. Monarch Builders, Inc.*, 324 A.2d 208, 211 (Del. 1974) (agreeing with appellees' argument that "the Superior Court is without jurisdiction to set aside a fraudulent conveyance"); *Adams v. Jankouskas*, 452 A.2d 148, 152 n.4 (Del. 1982) ("Courts of equity, by [] extending the fundamental principle of [constructive] trusts . . . to cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property.") (quoting 1 POMEROY'S EQUITY JURISPRUDENCE § 166, at 210-11 (5th ed. 1941)); *Bryant v. Way*, 2012 WL 1415529, at *11 (Del. Super. Apr. 17, 2012) ("[The Superior Court] lacks jurisdiction to order equitable rescission, which in addition to [] legal remedies, typically requires that the court cause an instrument . . . to be set aside and annulled.").

analysis of the merits of the fraudulent conveyance claim pending resolution of the legal claims.

4. Ejectment (Count VIII)

Cornell has premised its claim of ejectment on its claim of legal title over Lot 206. Although Cornell's legal title stems from La Grange's default of the Development Agreement, Amendment and Escrow Agreement, ejectment would be viable only if the Court unwinds the alleged fraudulent conveyance and voids Johnson's deed to the property. Such actions would require equitable intervention. Cornell acknowledges this distinction and requests ejectment within its prayers for equitable relief. The resolution of the motion to dismiss this claim is deferred.

C. Lis Pendens

Defendant Johnson requests that the Court lift the *lis pendens* from his property. The *lis pendens* statute authorizes "a party asserting a claim, the object of which is to affect the title to, or enforce an equitable lien on, real estate" to file a notice of pendency of the action with the Office of the Recorder of Deeds in the county where the property is situated.[54] At this stage in the litigation, where the disposition of the property is still uncertain, and Cornell's equitable claims have not been addressed, the

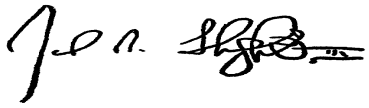
[54] *Robert J. Smith Companies, Inc. v. Barke, L.L.C.*, 1997 WL 294442, at *1 (Del. Ch. May 28, 1997) (citing 25 *Del. C.* § 1601(a)).

Court will not lift the *lis pendens* on Lot 206.[55] Accordingly, Johnson's motion to lift the *lis pendens* on Lot 206 must be denied without prejudice.

VI.

For the reasons stated above, the defendants' motion to dismiss the Complaint in its entirety based on the rule against perpetuities is **DENIED**. The defendants' motion to dismiss Cornell's claims of conversion (Count VII) and conspiracy (Count X) is **GRANTED**. The defendants' motion to dismiss Cornell's equitable claims (Counts I, II, III, and IX) and the defendants' motion to dismiss Cornell's claims of fraudulent conveyance (Counts I and II) and ejectment (Count VIII) for failure to state a claim upon which relief may be granted is deferred. Finally, because the disposition of Lot 206 remains unknown, defendant Johnson's motion to lift the *lis pendens* must be **DENIED** without prejudice.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

[55] *Id.* (denying a motion to vacate notice of *lis pendens* because the claim in the action was that the lots contractually (and equitably) belonged to plaintiff and the "very purpose of the *lis pendens* statute is to inform the world of that claim").