

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET  
LOCATION: PORTLAND  
DOCKET NO. BCD-REA-2021-04

DEBRA MORGAN, et al., )  
 )  
Plaintiffs, C/C Defendants, )  
 )  
v. )  
 )  
ERIK SCOTT TOWNSEND, )  
Defendant, C/C Plaintiff, & )  
Third-Party Plaintiff, )  
 )  
v. )  
 )  
IAN M. SCOTT, TRUSTEE, et al., )  
 )  
Third-Party Defendants )

ORDER GRANTING THIRD PARTY  
MOTIONS TO DISMISS

Plaintiff Debra Morgan and others (“Morgan”) brought a Declaratory Judgment action against Defendant Erik Scott Townsend (“Townsend”) for breach of certain restrictive covenants pertaining to his property. Townsend counterclaimed against Morgan and brought a Third-Party Complaint against ten Third-Party Defendants. Four of those Third-Party Defendants (the “Moving Parties”) have filed two separate but materially identical Motions to Dismiss the Third-Party Complaint against them.<sup>1</sup> They argue that as to them there is no justiciable controversy; they are improper Third-Party Defendants under M.R. Civ. P. 14; and they are not subject to joinder pursuant to M.R. Civ. P. 19. For the reasons discussed below, the Court grants the Motions to Dismiss.<sup>2</sup>

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<sup>1</sup> The four Third-Party Defendants are Christopher J. LaCasse, Melissa A. LaCasse, Lorraine Polak, Trustee of the Lorraine Polak Trust of 2006, and Christopher Fenger.

<sup>2</sup> Counsel filed well written and comprehensive briefs on the Motions. Rather than waiting for oral argument which cannot be held for several weeks, the Court decides the Motions without hearing. *See* M.R. Civ. P. 7(b)(7).

## STANDARD OF REVIEW

A motion to dismiss "tests the legal sufficiency of the complaint." *Livonia v. Town of Rome*, 1998 ME 39, ¶ 5, 707 A.2d 83. In reviewing a motion to dismiss under Rule 12(b)(6), the failure to state a claim upon which relief may be granted, the Court "consider[s] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.* The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141.

## BACKGROUND

The operative pleadings are Morgan's Second Amended Complaint and Townsend's Third-Party Complaint. According to the Second Amended Complaint, Morgan and Townsend own abutting real estate in Cushing, Maine. The properties were conveyed out from the same original tract of land. The deeds to both properties contain identical restrictive covenants. The restrictive covenants limit use of the properties to private residential purposes; allow only one dwelling to be placed on each property; and further specify that no trade or business shall be conducted from any building on the properties. Morgan alleges that Townsend has violated the restrictive covenants by operating short-term VRBO rental properties out of two dwellings on his property. Morgan

seeks a Declaratory Judgment and a permanent injunction, along with damages in connection with a nuisance claim.

According to the Third-Party Complaint, the properties of Morgan, Townsend, and the ten Third-Party Defendants are all subject to the same restrictive covenants. Townsend alleges that “the Court’s determination of the import, meaning, and effect of the Deed Restrictions has the potential to impact Third-Party Defendants.” “For this reason,” according to Townsend, he has brought suit against the Third-Party Defendants “so that all individuals owning land from what was the [original parcel] have opportunity to litigate the import, meaning, and effect of the restrictive covenants.” Townsend does not allege that any of the Third-Party Defendants have violated the restrictive covenants, have caused Townsend to violate the restrictive covenants, or are liable to Morgan for Townsend’s actions.

### **DISCUSSION**

The Moving Parties contend that since neither the Second Amended Complaint nor the Third-Party Complaint allege the Moving Parties have violated the restrictive covenants, Townsend has failed to demonstrate the existence of a justiciable case or controversy regarding them. As a result, they argue, the Third-Party Complaint against them must be dismissed. Townsend counters that there is a justiciable dispute between him and Morgan, and therefore the requirement of a justiciable case or controversy is satisfied. Townsend would be correct if he had alleged any facts upon which he could assert the Moving Parties were liable to him for all or part of Morgan’s claims against him. He does not do so. Accordingly, the Moving Parties are improper Third-Party Defendants under

M.R. Civ. P. 14, and the Third-Party claims against them must be dismissed unless there is an alternative basis to keep them in the litigation.

Townsend argues that Rule 19 provides the alternative basis. *See* M.R. Civ. P. 19; *see also Hathorne v. Tice*, No. CV-15-168, 2016 Me. Super. LEXIS 137, \*5-\*6 (Me. Super. June 15, 2016)(Androscoggin County, *Kennedy, J.*) (under Rule 19 parties can be joined as plaintiffs or defendants). Townsend advances his argument on two grounds; one procedural, and one substantive. First, Townsend argues that the Court should construe his February 22, 2021, Motion for Leave to Amend Pleadings to bring the Moving Parties (and others) into the case as Third-Party Defendants pursuant to M.R. Civ. P. 14 as a motion to join the Moving Parties (and others) pursuant to M.R. Civ. P. 19.<sup>3</sup> If the Court is not willing to reinterpret his motion, Townsend asks the Court to simply issue an order joining the Moving Parties (along with the other Third-Party Defendants). Second, Townsend contends joinder is appropriate, because the Moving Parties (along with the other Third-Party Defendants) are necessary parties. The Court need not address Townsend's procedural requests because, as explained below, it is not necessary to join the Moving Parties (or the other Third-Party Defendants).

The fact that multiple property owners are subject to the same restrictive covenants is not sufficient in and of itself to require joining all such property owners in the case of a specific dispute. In *Sanseverino v. Gregor*, 2011 ME 8, 10 A.3d 735, plaintiffs brought an action claiming that defendants were conducting timber harvesting and road construction

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<sup>3</sup> Townsend also seems to argue that since the Superior Court previously issued an order granting Townsend's motion to amend the pleadings to include the Third-Party Complaint, the issue has already been decided. Such is not the case, however, because Townsend's motion was unopposed by the Third-Party Defendants who were not yet in the case, and because the Superior Court's order contained no analysis or substantive discussion. *See* Order on Defendant's Motion for Leave to Amend Pleadings dated April 3, 2021.

in violation of the restrictive covenants in their deeds. *Id.* ¶¶ 1-5. The court denied the defendants’ motion to dismiss for failure to join the other lot owners whose properties were subject to the same restrictive covenants. *Id.* ¶ 4. After a bench trial, the court found that the timber harvesting and road construction engaged in by defendants violated the restrictive covenants. *Id.* ¶ 5. Defendants later appealed, contending the court erred by failing to dismiss for failure to join the other lot owners pursuant to Rule 19. *Id.* ¶ 8.

The Law Court rejected the argument. Noting that the trial court “specifically limited its findings and judgment” to the defendants’ activities, the Law Court held that failure to join did not prevent the parties from fully adjudicating the underlying dispute, did not expose the parties to multiple or inconsistent obligations, and did not prejudice the interests of the absent lot owners. *Id.* The Law Court also determined that the court’s judgment did not impede the ability of unnamed parties to enforce their rights in the future. *Id.*; see also *Everly v. Fowler*, No. RE-14-36, 2015 Me. Super. LEXIS 125, at \*7-\*14 (Me. Super. Jun. 18, 2015)(Kennebec County, *J. Murphy*) (not necessary to join other lot owners with same easement rights).

Here, Morgan alleges Townsend is violating the restrictive covenants in his deed by engaging in the business of conducting short-term VRBO rentals out of two buildings on his property. The allegations are very specific and any decision in the case will be limited to those specific facts. There are no allegations that the Moving Parties (or any of the Third-Party Defendants) are engaging in the same or similar conduct. Under the circumstances, failure to join the other lot owners will not prevent Morgan and Townsend from fully adjudicating their dispute, will not expose the parties to multiple or inconsistent

obligations, and will not prejudice the interests of the absent lot owners. Accordingly, the Moving Parties are not necessary parties pursuant to M.R. Civ. P. 19.

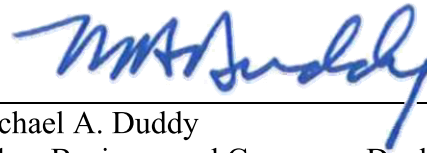
### CONCLUSION

In conclusion, the Moving Parties are improper Third-Party Defendants under M.R. Civ. P. 14, and unnecessary parties under M.R. Civ. P. 19. For all the reasons set forth above, the Moving Parties' Motions to Dismiss are Granted. Third-Party Defendants Christopher J. LaCasse, Melissa A. LaCasse, Lorraine Polak, Trustee of the Lorraine Polak Trust of 2006, and Christopher Fenger are dismissed.

SO ORDERED.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

Date: **08/23/2021**



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Michael A. Duddy  
Judge, Business and Consumer Docket

Entered on the docket: 08/24/2021