

Commonwealth of Massachusetts

Supreme Judicial Court

Barnstable County

2010 Sitting

No. 10642

**Faneuil Investors Group
Limited Partnership**
Plaintiff/Appellant

v.

**Members Of The Dennis Board Of
Selectmen and the Dennis
Housing Authority**
Defendants/Appellees

**On Appeal From A Judgment Of The
Land Court Of Barnstable County**

Reply Brief For The Plaintiff/Appellant

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**I. Contrary To The Contention Set Forth In The
Dennis Housing Authority's Brief, The
Plaintiff Did Not Enter Into Any Stipulation
Waiving Its Primary Claim**

In its brief, the Dennis Housing Authority argues that the parties entered into a binding stipulation in which the plaintiff agreed that the granting of a mortgage is a conveyance under Massachusetts law and further agreed that its claim that such mortgage did not trigger the reverter clause in the deed should be deemed to be waived. [DHA Brief at 1-2]. However, the plaintiff disputes that it entered into any such stipulation and contends that the record fails to support the DHA's waiver claim.

In Paragraph 17 of its verified complaint, the plaintiff claimed that the mortgage on the subject property should not be deemed to be a conveyance of title for the purpose of triggering the reverter provision. [R. App. 10]. In its opposition to the plaintiff's motion for lis pendens filed in the trial court, the Town of Dennis acknowledged that the plaintiff had raised this argument and did not reference any stipulation or waiver. [R. App. 73-74]. In its appellate brief, the Town challenges the plaintiff's claim but again does not reference any claimed stipulation or allege that the

example, by providing copies of the transcript of the proceedings. See *Callahan v. Eastern Bank & Trust Co.*, 437 Mass. 1020, 1021 (2002); *Shawmut Community Bank, N.A. v. Zagami*, 30 Mass. App. Ct. 371, 372-373 (1991). In this case, the judge took no evidence at that hearing, and the parties elected to proceed without ordering a transcript of that hearing. While the decision not to order that transcript certainly was reasonable, having made that election, the DHA cannot simply represent what was said at that hearing in support of its contentions on appeal. Nothing in the record before this court supports the existence of a stipulation or waiver.

Finally, should this court elect to consider the parties' representations as to what was said at that hearing, the plaintiff contends that its counsel merely conceded that Massachusetts is one of the minority of states following the "title theory" of mortgages, rather than the so-called "lien theory". The title theory treats a mortgage as a transfer of title, subject to defeasance upon performance of the conditions set forth in the mortgage. *Pineo v. White*, 320 Mass. 487, 489 (1946); *Maglione v. BancBoston Mortgage Corp.*, 29 Mass. App. Ct. 88, 90 (1990); *Atlantic Savings Bank v. Metropolitan Bank and Trust Co.*, 9 Mass.

II. Conclusion

Based on the authorities cited and the reasons aforesaid, as well as the authorities set forth in its main brief, the plaintiff/appellant requests that this court reverse the judgment of the trial court and remand the matter to the trial court for entry of an order declaring the validity of the mortgage in question and for entry of a memorandum of lis pendens.

Faneuil Investors Group
Limited Partnership,
By its attorney,

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Certification

I certify that this brief complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).



Dana Alan Curhan