

STATE OF MICHIGAN
COURT OF APPEALS

TCP, L.L.C.,

Plaintiff-Appellee,

v

MARIA FAUST,

Defendant,

and

NATIONAL CITY MORTGAGE COMPANY,
d/b/a, COMMON WEALTH UNITED
MORTGAGE COMPANY,

Defendant-Appellant.

UNPUBLISHED

June 21, 2012

No. 303563

Oakland Circuit Court

LC No. 2010-109076-CH

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this action for partition of property, defendant-appellant National City Mortgage Company d/b/a Commonwealth United Mortgage Company, appeals as of right from an order denying its motion for summary disposition and instead granting summary disposition in favor of plaintiff TCP, LLC. Because we conclude that plaintiff, as a joint tenant with full rights of survivorship, did not have the right to compel partition of the property where such partition destroyed the cotenant's right of survivorship, we reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

On November 17, 1978, Maria D. Faust and Gerald Coury purchased a single family residential home together. The warranty deed specifically provided that "Gerald Coury, a single man, and Maria D. Faust, a single woman" owned the property as "joint tenants with full rights of survivorship and not as tenants in common."

On January 23, 2003, Faust borrowed money from defendant secured by a mortgage lien on her interest in the property. The mortgage agreement provided that the "'Borrower' is Maria D. Faust a married woman as her sole and separate property, married to Gerald Coury[.]" The language "married to Gerald Coury" was a handwritten notation on the otherwise printed

language. The mortgage agreement listed defendant as the lender, and stated that “Borrower” signed a promissory note acknowledging that “Borrower owes Lender” \$198,400 plus interest. The conclusion of the mortgage agreement contained the following language: “By signing below, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.” On that same page of the mortgage agreement, Faust signed a signature line with the word “borrower” and her name printed below the signature line. On a subsequent borrower signature line, Coury signed his name and seemingly handwrote his printed name below the signature line. On the final page of the mortgage agreement, a notary public stated that on January 23, 2003, the mortgage “was acknowledged before me . . . by Maria D. Faust a married woman as her sole and separate property, married to Gerald Coury.” On May 2, 2003, defendant recorded its mortgage interest in the property.

On November 14, 2007, Gilbert Silverman obtained a default judgment against Coury for \$136,647.18. After unsuccessfully attempting to levy against Coury’s personal property, a writ of execution was levied against Coury’s interest in the property Coury held with Faust. Thereafter, Silverman foreclosed on Coury’s interest in the property and purchased Coury’s interest for \$159,954.67, at the January 23, 2009, sheriff’s sale. Silverman subsequently quitclaimed his interest in the property to plaintiff on March 25, 2010.

On April 2, 2010, plaintiff filed a complaint for partition of the property, naming Faust and defendant. On September 9, 2010, a default judgment was entered in plaintiff’s favor after Faust failed to respond. The trial court ordered “that the Property be sold and the proceeds distributed equally to Plaintiff and Defendant Faust, with Defendant National City’s interest being satisfied out of the share allocated to Defendant Faust.”

On September 20, 2010, defendant moved for summary disposition of plaintiff’s complaint under MCR 2.116(C)(8) and (10), asserting that its mortgage interest was recorded prior to plaintiff and, therefore, plaintiff’s interest was junior to defendant’s. Defendant argued that its interest in the lien was not on the undivided interest or estate of any one of the parties, but was, in fact, on the entire undivided interest and estate of *both* Gerald Coury and Maria Faust.

Plaintiff responded that Coury was not identified as a borrower on the mortgage between Faust and defendant; rather, it was only Faust’s interest in the property that was encumbered by the mortgage. Plaintiff argued that because Coury continued to hold his joint interest free and clear that plaintiff, as a successor, likewise owned that same interest free and clear.

On December 10, 2010, the trial court entered an opinion and order denying defendant’s motion for summary disposition and granting summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2). The trial court explained its decision as follows:

. . . Plaintiff correctly asserts that Michigan case law provides that a joint tenant may partition the Property without the consent of the cotenant. *Albro v Allen*, 434 Mich 271 (1990). . . Accordingly, [plaintiff] does not require the consent of Maria Faust or [defendant] to partition the Property.

. . . The Court also agrees with Plaintiff that Defendant National City willingly took a risk when it did not name Gerald Coury as a borrower on the mortgage. Naming both Maria Faust and Gerald Curry as borrowers would have ensured that the joint tenancy or entire Property was encumbered with the security interest. Once [plaintiff] obtained Gerald Coury's interest in the Property, it retained the right to partition the Property without the consent of Maria Faust or [defendant]. *See Albro, supra*.

Upon review of the materials presented, Defendant National City Bank's motion for summary disposition is denied. The Court finds that Gerald Coury conveyed his interest in the life estate to [plaintiff] and only Maria Faust's interest in the Property was encumbered by the mortgage and, therefore, [defendant] has no standing to object to the partition. *See Albro, supra*. The Court finds that although Gerald Coury signed the National City mortgage, it was not notarized and he was not listed as a borrower. The mortgage documents entitled "borrower" stated only "Maria D. Faust a married woman as her sole and separate property, married to Gerald Coury." Only Maria Faust's signature and interest in the Property was notarized. The Court finds that had [defendant] intended to encumber Gerald Coury's interest in the Property with the mortgage, it would have listed Gerald Curry as a borrower in the mortgage documents.

The trial court entered an order in conformity with its opinion on January 5, 2011. Defendant's motion for reconsideration was denied. Defendant now appeals as of right.

II. STANDARD OF REVIEW

"An action to partition land is equitable in nature" and "such actions are reviewed de novo with the trial court's findings of fact reviewed for clear error[.]" *In re Temple Marital Trust*, 278 Mich App 122, 141-142; 748 NW2d 265 (2008).

We also review "de novo the decision of the trial court on the motion for summary disposition." *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

In reviewing defendant's motion for summary disposition, the trial court found that plaintiff, not defendant, was entitled to summary disposition. "The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

III. ANALYSIS

“In an action for partition, the court determines ‘whether the premises can be partitioned without great prejudice to the parties,’ the property’s value and use, and any other matters the court finds pertinent.” *Temple Marital Trust*, 278 Mich App at 144, quoting MCR 3.401(A). Whether a party has the right to compel partition of a property depends on the party’s form of ownership. See *Tkachik v Mandeville*, 487 Mich 38, 75-76; 790 NW2d 260 (2010).

Michigan law recognizes two types of joint tenancy: a “standard” joint tenancy, and an “indestructible” joint tenancy. *Albro v Allen*, 434 Mich 271, 274-275; 454 NW2d 85 (1990). The “principal characteristic” of both the standard and indestructible joint tenancy is the right of survivorship; that is, “[u]pon the death of one joint tenant, the surviving tenant or tenants take the whole estate.” *Id.* (internal citations omitted). However, in a standard joint tenancy, unlike in an indestructible joint tenancy, “the right of survivorship may be destroyed by severance of the joint tenancy.” *Id.* at 275. A standard joint tenancy “may be severed by an act of the parties, by conveyance by either party, or by levy and sale on an execution against one of the parties.” *Id.* One way to sever a joint tenancy is a partition action. *Smith v Smith*, 290 Mich 143, 155; 287 NW 411 (1939), quoting *Midgley v Walker*, 101 Mich 583, 584; 60 NW 296 (1894).

By contrast, an indestructible joint tenancy (which is functionally equivalent to a life estate with dual contingent remainders) may not be severed by a unilateral action of one of the parties, because such unilateral action would deprive the other party of his right of survivorship. *Albro*, 434 Mich at 275-276. As observed by this Court,

. . .in an ordinary joint tenancy, the right of survivorship can be destroyed by severance of the joint tenancy through an act of one tenant by such means as conveyance to a third party or by levy and sale, and the remaining joint tenant or tenants and the grantee then become tenants in common.

On the other hand, a joint tenancy with full rights of survivorship . . . is composed of a joint life estate with dual contingent remainders. The operative contingent remainder is in fee simple. “While the survivorship feature of the ordinary joint tenancy may be defeated by the act of a cotenant, the dual contingent remainders of the joint tenancy with full rights of survivorship are indestructible.” The contingent remainder of a cotenant is not subject to being destroyed by the actions of the other cotenant. [*Wengel*, 270 Mich App at 94-95, citing *Albro*, 434 Mich at 275-276, 278 (footnotes and citations omitted).]

Differentiating between a standard joint tenancy and an indestructible joint tenancy turns on the language of the granting instrument; in order to create an indestructible joint tenancy, the instrument must include express words of survivorship, such as “and to the survivor of them,” “to them and the survivor of them,” “or survivor of them,” “with right of survivorship,” or “with full rights of survivorship.” *Albro*, 434 Mich at 275 (internal citations omitted).

Here, the property’s warranty deed indicates that Coury and Faust owned the property “as joint tenants with full rights of survivorship and not as tenants in common.” Accordingly, Coury and Faust owned the property as joint tenants with full rights of survivorship. Because the granting instrument created an indestructible joint tenancy, it could not be severed unilaterally by plaintiff though an action for partition. See *Albro*, 434 Mich at 275; *Smith*, 290 Mich at 155.

Reversed with instruction that the trial court enter judgment in favor of defendant consistent with our finding that plaintiff did not have a right to compel partition.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Amy Ronayne Krause