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| Smith v Bank of America, NA |
| 2011 NY Slip Op 33634(U) |
| March 31, 2011 |
| Sup Ct, Nassau County |
| Docket Number: 003420/2010 |
| Judge: Thomas P. Phelan |
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice.

TERESA SMITH,

Plaintiff,

-against-

BANK OF AMERICA, NA,

Defendant.

TRIAL/IAS PART 2
NASSAU COUNTY

ORIGINAL RETURN DATE: 12/21/10
SUBMISSION DATE: 01/18/11
Index No. 003420/2010

MOTION SEQUENCE #1,2

The following papers read on this motion:

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|-----------------------------|---------|
| Notice of Motion..... | 1 |
| Notice of Cross Motion..... | 2 |
| Answering Papers..... | 3, 4, 5 |
| Memorandums of Law..... | 6, 7 |

Plaintiff moves for an order declaring that the mortgage on premises known as 20 Jefferson Street, Port Washington, New York, is null and void. Defendant opposes the motion and cross moves for summary judgment dismissing plaintiff's complaint and confirming the validity of its mortgage.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, *supra*). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324).

It is alleged in the complaint that on or about February 24, 1999, plaintiff, by quitclaim deed, conveyed her interest in the real property known as 20 Jefferson Street, Port Washington, New York, to herself and David Hassid, as joint tenants with right of survivorship. The record reveals that on or about July 3, 2006, David Hassid unilaterally encumbered the property with a credit line mortgage to defendant with a limit of \$300,000.00, which mortgage was recorded in the Nassau County Clerk's Office on November 27, 2006. Mr. Hassid died on January 14, 2009 (Grantz Aff. Ex. B).

Plaintiff avers that she was not made aware of the mortgage until after the death of Mr. Hassid on January 14, 2009, and that she was not the recipient of any of the proceeds from the credit line mortgage. It is plaintiff's contention that she is the sole owner of the property by operation of law as a result of Mr. Hassid's death free and clear of the credit line mortgage.

In support of its cross-motion defendant submits the affidavit of Janet Hartman, an Assistant Vice President of defendant, an affirmation of counsel and a memorandum of law. It is submitted by defendant that the unilateral conveyance of a mortgage by a joint tenant destroys the unity of interest, thereby severing the joint tenancy with right of survivorship and creating a tenancy in common. Defendant contends the mortgage herein is a valid mortgage encumbrance against the half interest owned by decedent's estate.

The issue before the court is whether the mortgage herein severed the joint tenancy thereby creating a tenancy in common or whether the mortgage evaporated upon the demise of the mortgagor when his interest passed by operation of law to the surviving tenant. Real Property Law § 240-c governs the severance of joint tenancy and provides that a joint tenant may unilaterally sever a joint tenancy by: "(b) Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the severing tenant as the direct grantee of the severing tenant's interest."

It is plaintiff's position that the mortgage herein did not convey an interest in the property but merely created a lien. If the mortgage is "merely a lien on the mortgagor's interest in property rather than a conveyance of title from mortgagor to mortgagee, the execution of a mortgage by a joint tenant, on his interest in the property, would not destroy the unity of title and sever the joint tenancy" (*Harms v. Sprague*, 105 Ill.2d 215, 222 [Ill.,1984]). Plaintiff submits that New York, like the State of Illinois, is a lien state. It is plaintiff's contention that the granting of a mortgage to a third party is insufficient to sever a joint tenancy.

Defendant argues that the "conveyance" of a mortgage by a joint tenant destroys the unity of interest thereby severing the joint tenancy. Defendant submits that the unilateral act of mortgaging by one joint tenant destroys the unity of interest and that the joint tenant essentially

alienates his interest. It is defendant's contention that the continuance of a joint tenancy requires the maintenance of the four unities: interest, title, time and possession, and that the unity of interest requires each joint tenant to have an equal interest in the property. Defendant argues that alienation of a joint tenant's share terminates the joint tenancy.

It is defendant's position that the execution of a mortgage qualifies as a written instrument evidencing intent to sever the joint tenancy (RPL §240-d). Plaintiff counters that there is no evidence that it was Hassid's intention to sever the joint tenancy.

Counsel for defendant cites to *In re Hoffman's Estate*, 175 Misc.2d 607 [Surr. Ct, Queens Co., 1940] for the proposition that a joint tenant may dispose of his undivided interest by mortgage or pledge. In *Hoffman's Estate* a joint tenant borrowed funds from his bank depositing his joint bank account book as collateral. The court determined that his actions indicated an intention to reduce the funds pledged to his separate possession and thereby destroyed the joint tenancy. Defendant's counsel posits that although *Hoffman's Estate* addressed a joint tenancy in personal property, the court's analysis would have been the same had the collateral interest been real property and submits that other jurisdictions have held similarly.

Other jurisdictions have also taken an opposing view. When posed with this question the court in New Mexico stated:

"New Mexico has never addressed whether one joint tenant may encumber the property interest of another cotenant without consent. The jurisdictions which have decided this question, however, have uniformly agreed that one cotenant may not encumber the other cotenant's interest without consent. *See, e.g., First National Bank of Southglenn v. Energy Fuels Corp.*, 200 Colo. 540, 618 P.2d 1115 (1980); *Harms v. Sprague*, 119 Ill.App.3d 503, 75 Ill.Dec. 155, 456 N.E.2d 976 (1983), *aff'd*, 105 Ill.2d 215, 85 Ill.Dec. 331, 473 N.E.2d 930 (1984); *American National Bank and Trust Co. v. McGinnis*, 571 P.2d 1198 (Okla.1977); *Glenn v. Webb*, 565 S.W.2d 876 (Tenn.App.1977)."

(*Texas American Bank/Levelland v. Morgan*, 105 N.M. 416, 417 733 P.2d 864 [1987]).

Recently, the Appellate Court of Illinois followed *Harms v. Sprague*, 105 Ill.2d at 224, 85 Ill.Dec. 331, 473 NE2d 930 [2010] regarding a judgment lien quoting:

"A surviving joint tenant succeeds to the share of the deceased joint tenant by virtue of the conveyance which created the joint tenancy, not as the successor of the deceased. [Citation.] The property right of the mortgaging joint tenant is extinguished at the moment of his death. While John Harms was alive, the mortgage existed as a lien on his interest in the joint tenancy. Upon his death, his interest ceased to exist and along with it the lien of the mortgage."

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(Maniez v. Citibank, F.S.B., 404 Ill.App.3d 941, 952, 937 NE2d 237 [1 Dist. 2010.])

This court agrees that the interest of the joint tenant passes to the surviving tenant by operation of law upon his death thereby extinguishing the mortgage. Accordingly, plaintiff's motion is granted and defendant's cross motion for summary judgment is denied. Submit declaratory judgment, including section, block and lot.

This decision constitutes the order of the court.

Dated: 3-31-11

HON THOMAS P. PHELAN
THOMAS P. PHELAN, J.S.C.

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