

<b>M&amp;T Bank v Cohen</b>
2017 NY Slip Op 32757(U)
December 18, 2017
Supreme Court, Kings County
Docket Number: 512273/2014
Judge: Mark I. Partnow
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At an IAS Term, Part FRP2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18<sup>th</sup> day of December, 2017.

P R E S E N T:

HON. MARK I. PARTNOW,  
Justice.

-----X

M&T BANK,

Plaintiff,

- against -

Index No. 512273/2014

FRANCINE COHEN, et al.,

Defendants.

-----X

The following papers numbered 1 to 7 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-3_____
Opposing Affidavits (Affirmations)_____	5_____
Reply Affidavits (Affirmations)_____	6_____
<u>Supplemental</u> Affidavit (Affirmation) <u>In Opposition</u> _____	7_____
Memorandum of Law in Support_____	4_____

Upon the foregoing papers, defendant Francine Cohen (defendant) moves pursuant to CPLR 3211 (a)(1) and (a)(7) to dismiss M&T's complaint (plaintiff) and to vacate the notice of pendency.

According to the summons and complaint, plaintiff commenced this action to foreclose on a Home Equity Line of Credit Account Individual Mortgage encumbering the subject property located at 1940 Bay Avenue in Brooklyn. The mortgage was executed by

J. Jesse Cohen, defendant's husband (husband) on May 28, 2002 to secure a note in favor of plaintiff in the amount of \$240,000.00, which were executed solely by the husband. The husband subsequently passed away on November 12, 2013 and upon information and belief, no estate has been formed as of December 29, 2014, the filing date of the summons and complaint. Plaintiff alleges that husband and/or his estate failed and neglected to comply with the terms and conditions of the debt instrument and mortgage and thus plaintiff elects to call due the entire amount secured by the subject mortgage.

Defendant filed the instant motion seeking to dismiss the complaint as against her pursuant to CPLR 3211(a)(1) and (a)(7). Defendant states that she was married to her husband from June 1, 1992 until his death on November 12, 2013. Additionally, defendant annexes a copy of a deed dated February 26, 2002, recorded on April 30, 2002, conveying the subject property from solely the husband to both defendant and her husband. Defendant contends that due to their marital status, defendant and her husband held the property as tenants by the entirety. As tenants by the entirety, defendant argues that the spouses have equal right to possession of the property but neither can bind the entire fee without the consent of the other tenant. Defendant further contends that because the plaintiff extended a loan to her husband after the creation of the tenancy by the entirety without having defendant sign any of the loan documents, plaintiff is precluded from foreclosing on the subject property since her husband cannot impair her survivorship interest as she did not

consent or sign any of the paperwork. As the surviving spouse, defendant claims she has absolute unencumbered ownership of the property subsequent to her husband's death.

In its affirmation in opposition, plaintiff contends that the defendant's documentary submissions in support of her motion to dismiss indicate that plaintiff may have a potential and valid claim to foreclose on an equitable mortgage claim against the property. Plaintiff opines that the proceeds of its loan were likely utilized to payoff and satisfy the husband's prior mortgage to Citibank, which preexisted defendant's interest in the property. Thus, plaintiff argues that defendant's motion should be denied or, if granted, the court should permit plaintiff to amend its complaint to add a cause of action to foreclose on an equitable mortgage against the subject property. Plaintiff states that the sequence of recorded mortgages against the property demonstrates that it is entitled to foreclose on an equitable mortgage cause of action. Specifically, plaintiff contends that its mortgage was recorded immediately preceding the satisfaction of Citibank's Mortgage and that no other mortgage loan transaction can account for sufficient loan proceeds to result in Citibank's satisfaction. Under these circumstances, plaintiff opines that it would be entitled to an equitable mortgage under the doctrine of equitable subrogation.

In defendant's reply, defendant contends that plaintiff is not entitled to an equitable mortgage as actual notice of an intervening interest bars application of the doctrine of equitable subrogation. Under the instant circumstances, defendant argues that plaintiff had actual notice as the deed was recorded prior to the husband executing the subject note and mortgage to plaintiff.

In its sur reply, plaintiff disputes defendant's assertion that it had actual notice as plaintiff notes that the recording of an instrument provides constructive notice and not actual notice. Additionally, plaintiff states that having constructive notice, as opposed to actual notice, does not bar the relief afforded under equitable subrogation.

### Discussion

“On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within an cognizable legal theory” (*Mizrahi v. US Bank, NA* 64 NYS3d 572, 572 [2d Dept 2017]). “Where...evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one...” (*id.*).

It has been and “[i]t is still the law of this state [for well over a hundred years] that, where a grant is made to husband and wife without any words specifically prescribing, qualifying, or characterizing the kind or quality of the estate which each shall take, the grantees hold as tenants by the entirety” (*Miner v. Brown*, 133 NY 308, 311 [1892]; *see also*, 1 NY Law & Practice of Real Prop § 14:21 [2nd ed]). “A mortgage given by one of several parties with an interest in the mortgage property is not invalid; it gives the mortgagee security, but only to the interest of the mortgagor” (*Bayview Loan Servicing, LLC v. White*, 134 AD3d 755, 757 [2d Dept 2015] [internal citations omitted]). “As

tenants by the entirety, both spouses enjoy an equal right to possession of and profits yielded by the property” (Rose v. Levin, 107 AD3d 967, 968 [2d Dept 2013] [internal citations omitted]).

“[T]here is nothing in New York law that prevents one of the co-owners from mortgaging or making an effective conveyance of his or her own interest in the tenancy” (*id.*). “To the contrary, each tenant may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other” (*id.*). Nevertheless, “a conveyance by one tenant, to which the other has not consented, cannot bind the entire fee” (*id.*). “Since the grantee or foreclosing mortgagee, in effect, steps into the shoes of the grantor or mortgagor, his survivorship rights are measured by reference to the lifetimes of the original parties to the tenancy by the entirety” (*V.R.W., Inc. v. Klein*, 68 NY2d 560, 565 [1986]). “If the grantor or mortgagor predeceases the spouse whose interest in the property has been retained, the grantee or mortgagee is left with no interest in the property at all” (*id.*).


Here, the husband was only able to mortgage his interest in the property since the subject property was owned by the defendant and her husband as tenants by the entirety at the time the subject mortgage was signed and recorded. However, since the husband predeceased the defendant, the plaintiff is now left with no interest in the property at all as the defendant’s survivorship rights are unencumbered under the instant situation. Additionally, plaintiff did not seek to impose an equitable mortgage in its summons and complaint. Accordingly, it is hereby

**ORDERED**, that defendant's motion to dismiss pursuant to CPLR 3211(a)(7) and (a)(1) is granted; and it is further

**ORDERED**, that the Notice of Pendency dated December 17, 2014 filed on December 29, 2014 on the premises located at 1940 Bay Avenue, Brooklyn, NY 11230, and as Tax Map ID Number: Block 6748 and Lot 35 is hereby vacated.

This constitutes the decision, judgment and order of the court.

E N T E R,



Hon. Mark I Partnow,  
J. S. C.

HON. MARK I PARTNOW  
SUPREME COURT JUSTICE

Nancy T. Sunshine

NANCY T. SUNSHINE  
Clerk

KINGS COUNTY CLERK  
FILED  
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