

DIRT DAILY DEVELOPMENT for September 28, 2012

Deed of Trust Severs Joint Tenancy with Right of Survivorship

By Chris Burti, Vice President and Senior Legal Counsel, Statewide Title, Inc.

Countrywide HomeLoans, Inc., v. Reed, COA11-769, (May 15, 2012)

The defendants and the plaintiff, both, appealed the trial court's order granting Plaintiff's motion for summary judgment, in part, and denying Defendants' motion for summary judgment. The Court of Appeals dismissed Plaintiff's appeal for failure to file a cross-appellant's brief in this case. As to the remaining issues, it affirmed in part and reversed in part.

Margaret D. Smith ("Mrs. Smith") and the defendants, Mrs. Smith's daughter and son-in-law, purchased a home as Joint Tenants with rights of survivorship. The plaintiff loaned the purchase money which was secured by a deed of trust that was only executed by the defendant Mrs. Reed, as attorney in fact for Mrs. Smith. Neither of the defendants executed the deed of trust or promissory note in their individual capacity. Defendants lived in the home together with Mrs. Smith and in 2001 the loan went into default and foreclosure proceedings were commenced. Mrs. Smith passed away in 2004 and the defendants entered into modification agreements with the plaintiff. Subsequently, in 2009, the plaintiff filed a complaint for reformation of the deed of trust to reflect the intent of the parties by making the defendants obligors. The defendants filed an answer, counterclaims alleging negligent misrepresentation, violation of the North Carolina banking acts and requesting injunctive relief.

The trial court entered an order in 2011 granting summary judgment in the plaintiff's favor. The trial court also "declar[ed] judgment . . . as follows":

1. Margaret D. Smith, prior to her death, owned a one-half undivided interest in the real property more particularly described at Deed Book 1259, page 1119-1120, Iredell County Registry. Margaret D. Smith's one-half undivided interest is encumbered by a deed of trust to the benefit of Plaintiff which is recorded at Book 1259, pages 1122-1134 of the ICR.
2. Troy D. Reed and Judy C. Reed, as Tenants by Entireties, own a one-half undivided interest in the subject real property which is not encumbered by the deed of trust to the benefit of Plaintiff.

3. Upon the death of Margaret Smith her interest, subject to the deed of trust to the benefit of Plaintiff, vested in Troy D. Reed and wife Judy C. Reed pursuant to the Right of Survivorship as set forth in the deed.

4. The Loan Modification Agreement executed by Troy D. Reed and Judy C. Reed on July 6, 2004 does not create an encumbrance on the Reed's original one-half undivided interest in the real property.

5. Troy D. Reed and wife Judy Reed own the real property in fee simple absolute; subject to Plaintiff's deed of trust encumbering a one-half undivided interest in said real property.

The defendants argued that the trial court erred by partially granting the plaintiff's motion for summary judgment because they contended that the deed of trust did not survive Mrs. Smith's death.

We find this argument without merit.

The Court of Appeals observed that this appeal presented a novel question in North Carolina. The vesting deed created a joint tenancy with right of survivorship between Mrs. Smith and the defendants. However, the deed of trust, filed one minute after the vesting deed, was only executed by

Mrs. Smith. This Court determined that the deed of trust severed the joint tenancy, and only the portion of the property owned by Mrs. Smith was encumbered.

N.C. Gen. Stat. § 41-2 is the statute that permits the creation of a joint tenancy with right of survivorship and it provides "if the instrument creating the joint tenancy expressly provides for a right of survivorship." Further the statute codifies the common law by providing that upon "conveyance to a third party by one of two joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created..." the Court of Appeals opinion recites: "'A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt.' *Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958) (quotation omitted)."

"North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to the land for security purposes. In North Carolina, deeds of trust are used in most mortgage transactions, whereby a borrower conveys land to a third-party trustee to hold for the mortgagee-lender, subject to the condition that the conveyance shall be void on payment of debt at maturity. Thus, in North Carolina, the trustee holds legal title to the land. *Neil Realty Co. v. Medical Care, Inc.*, 110 N.C. App. 776, 778, 431 S.E.2d 225, 226-27 (1993) (citations omitted)."

The court determined that as a deed of trust is a conveyance and because North Carolina is a title theory State, "Mrs. Smith severed the joint tenancy when she, as the sole obligor on the

deed of trust, filed the deed of trust encumbering the property. After the joint tenancy was severed, Mrs. Smith's interest as a tenant in common was one-half of the property; Defendants' interest, as tenants by the entirety, was also one-half. This is because Defendants are husband and wife; as such, they held the property 'as a single tenancy by the entirety' and were "treated as a single party when determining interests in the joint tenancy with right of survivorship' upon severance of the joint tenancy. N.C. Gen. Stat. § 41-2(b)."

Thus, the deed of trust executed by Mrs. Smith only encumbered her interest in the property as a tenant in common after the severance of the joint tenancy by execution and delivery of the deed of trust. This obviously led the Court of Appeals to the further conclusion that the trial court erred in concluding that "[u]pon the death of Margaret Smith her interest, subject to the deed of trust to the benefit of Plaintiff, vested in Troy D. Reed and wife Judy C. Reed pursuant to the Right of Survivorship...". Mrs. Smith's interest in the property having converted to a tenancy in common with no right of survivorship, the trial court was also incorrect in concluding that "Troy D. Reed and wife Judy Reed own the real property in fee simple absolute[.]"

As a footnote to the opinion the court observes that "[o]ther States have codified statutes addressing the particular question raised in this appeal, and our General Assembly may also consider and address this issue, should it be so inclined. South Carolina, S.C. Code Ann. § 27-7-40(a)(iii) (2011) prohibits any encumbrance of a joint tenancy unless all joint tenants join in the encumbrance. See S.C. Code Ann. § 27-7-40(a)(iii) (providing, "[t]he fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance"). In Wisconsin, Wis. Stat. § 700.24 (2011) provides that on the death of a mortgaging joint tenant the survivor takes subject to the mortgage. See Wis. Stat. § 700.24 (stating that a real estate mortgage, a security interest, or a lien "on or against the interest of a joint tenant does not defeat the right of survivorship in the event of the death of such joint tenant, but the surviving joint tenant or tenants take the interest such deceased joint tenant could have transferred prior to death subject to such mortgage, security interest or statutory lien")."

Dale says: This is the usual result in a title-theory state. It would be weird indeed if North Carolina regarded itself as a title-theory state for mortgages, but not for deeds of trust (which, after all, look more like conveyances of title than mortgages do). A slightly more interesting question is whether a lien-theory state (with respect to mortgages) would consider a deed of trust to pass title in this context. Arizona, which is a lien-theory state for mortgages, decided that it would treat deeds of trust as likewise only conveying a lien (and hence as not severing a joint tenancy) in *Brant v. Hargrove*, 632 P.2d 978 (1981).

Dale A. Whitman
Professor of Law Emeritus
University of Missouri-Columbia
whitmand@missouri.edu

Items reported here and in the ABA publications are for general information purposes only and should not be relied upon in the course of representation or in the forming of decisions in legal matters. The same is true of all commentary provided by contributors to the DIRT list. Accuracy of data and opinions expressed are the sole responsibility of the DIRT editor and are in no sense the publication of the ABA.

Parties posting messages to DIRT are posting to a source that is readily accessible by members of the general public, and should take that fact into account in evaluating confidentiality issues.

ABOUT DIRT:

DIRT is an internet discussion group for serious real estate professionals. Message volume varies, but commonly runs 5 to 15 messages per work day.

Daily Developments are posted every work day. To subscribe/unsubscribe, <http://listserv.umkc.edu/scripts/wa.exe?SUBED1=DIRT&A=1>

DIRT has an alternate, more extensive coverage that includes not only commercial and general real estate matters but also focuses specifically upon residential real estate matters. Because real estate brokers generally find this service more valuable, it is named "BrokerDIRT." But residential specialist attorneys, title insurers, lenders and others interested in the residential market will want to subscribe to this alternative list. If you subscribe to BrokerDIRT, it is not necessary also to subscribe to DIRT, as BrokerDIRT carries all DIRT traffic in addition to the residential discussions.

To subscribe to BrokerDIRT, <http://listserv.umkc.edu/scripts/wa.exe?SUBED1=Brokerdirt&A=1>

DIRT is a service of the American Bar Association Section on Real Property, Probate & Trust Law and the University of Missouri, Kansas City, School of Law. Daily Developments are copyrighted by Patrick A. Randolph, Jr., Professor of Law, UMKC School of Law, but Professor Randolph grants permission for copying or distribution of Daily Developments for educational purposes, including professional continuing education, provided that no charge is imposed for such distribution and that appropriate credit is given to Professor Randolph, any substitute reporters, DIRT, and its sponsors.

DIRT has a WebPage at: <http://dirt.umkc.edu/>