STATE OF MICHIGAN

COURT OF APPEALS

BAC HOME LOANS SERVICING, LP,

Plaintiff/Counter-Defendant/Appellee,

v

YOLANDA THOMAS,

Defendant/Counter-Plaintiff/Appellant,

and

LOUISE COLEMAN, THE ESTATE OF GENEVA THOMAS,

Defendants

UNPUBLISHED
August 13, 2013

No. 309601
Macomb Circuit Court
LC No. 2010-004262-CH

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In this quiet title action involving a purchase money mortgage, defendant Yolanda Thomas appeals as of right the trial court's order granting judgment in favor of plaintiff, BAC Homes Loans Servicing, LP. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On August 16, 2002, Geneva Thomas and MGD Building Company entered into a building contract for a home in Macomb, Michigan. On May 12, 2003, title insurance agency Philip R. Seaver Title Company issued a title commitment concerning the property. The title commitment provides that Geneva is the proposed insured for the owner's policy and that Republic Bank is the proposed insured for the mortgage policy. Escrow closing instructions dated July 7, 2003, list Geneva as the buyer of the property. A United States Department of Housing and Urban Development settlement statement that bears Geneva's signature provides that Geneva is the borrower, MGD Building Company is the seller, Republic Bank is the lender, and Seaver Title Company is the settlement agent. An estoppel certificate dated July 18, 2003, for the issuance of a title insurance policy by Philip R. Seaver Title Company provides as

follows: "The undersigned further certify that, unless otherwise indicated below, the property is owned and occupied exclusively by them on the date hereof, and that there are no mortgages, tax liens or judgments affecting the property not disclosed by commitment." The undersigned mortgagor in the certificate is Geneva, and the certificate bears her signature.

On July 18, 2003, Geneva entered into a purchase money mortgage to secure her payment of a $240,000 loan for the property. The mortgage provides that "Geneva Thomas, a single woman" is the borrower and the mortgagor. Republic Bank is the lender, and Mortgage Electronic Registration Systems, Inc. (MERS) is both the mortgagee and Republic Bank's nominee.[1] On the same day, MGD Building Company executed a warranty deed to convey the property. The warranty deed states that MGD Building Company conveys the property to Geneva, Yolanda Thomas, and Louise Thomas[2]. Yolanda and Louise are Geneva's daughters. The deed indicates that it was notarized on July 18, 2003; it was recorded on September 12, 2003.

On September 22, 2003, April Trombley from Republic Bank sent a fax to "Anita" at Philip R. Seaver Title Company regarding "Thomas, Geneva." The fax reads as follows, in pertinent part:

> This file was closed on 07/18/03. This customer recently called us and stated that Seaver Title was supposed to draft up a deed putting her daughters on title. I think that she forgot to set that up with you, and remembered, and is now calling to do this. Her daughters are as follows:
>
> Yolanda Thomas
> Louise Thomas
>
> Please forward to us the deed, and I will have Geneva sign it and I will collect the recording fee (it is $10-12 I think) upon her signing it.

Anita Scrimenti responded to Trombley by fax on September 24 with the following notation under the heading "Items Sent": "Quit Claim Deed for Thomas – the fee is 15^{00} to record – let me know when it's ready + I'll pick it up – Thanks"; an unsigned quit claim deed dated July 18, 2003, provided for the conveyance of the property from Geneva to Geneva, Yolanda, and Louise. The deed provided that it was drafted by Geneva and included a space for notarization by Scrimenti. A quit claim deed dated July 18, 2003, conveying the property from Geneva to Geneva, Yolanda, and Louise was recorded on October 27, 2003.

---

[1] The mortgage also provides that Geneva "does hereby mortgage, warrant, grant and convey [the property] to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with the power of sale . . . ." Furthermore, the mortgage provided that "MERS (as nominee for Lender and Lender's successors and assigns) has the right: . . . to foreclose and sell the Property . . . ."

[2] Louise's last name is now Coleman.

Geneva died on October 18, 2009, and Yolanda moved into the property. Yolanda started to pay the mortgage but stopped because she could not afford it. On January 30, 2010, MERS assigned its rights and interests in the mortgage to plaintiff. The property went into default in August 2010.

Plaintiff filed a complaint against Yolanda, Louise, and the Estate of Geneva Thomas to quiet title to the property and to reform the mortgage on the basis of mutual mistake or, alternatively, to obtain either an equitable mortgage on the property if no valid mortgage existed or an order declaring that the defendants' interests in the property were subject to plaintiff's purchase money mortgage. Yolanda filed a counter-complaint against plaintiff to quiet title to the property. Yolanda requested that the court award title exclusively to defendants because they held title to the property under the warranty and quit claim deeds and the purchase money mortgage did not include Louise and Yolanda as parties.

The court clerk entered defaults against both Louise and the Estate of Geneva Thomas for failing to plead or otherwise defend. On November 15, 2011, the trial court entered a default judgment against the Estate of Geneva Thomas; the court ordered that the estate's interest in the property was subordinate to plaintiff's purchase money mortgage. However, the court declined to enter a default judgment against Louise.

Plaintiff moved the trial court for summary disposition under MCR 2.116(C)(10). Plaintiff argued that under the purchase money mortgage doctrine, it was entitled to priority over whatever interest in the property was purchased with the proceeds of the purchase money mortgage. Plaintiff also argued that there was no genuine issue of material fact that the parties' intent was for Geneva to be the grantee and for the mortgage to encumber the entire property; thus, plaintiff asserted that a mutual mistake supported reformation of the warranty deed to remove both Yolanda and Louise as grantees.

The court conducted a bench trial on February 17, 2012. Louise failed to appear for trial in violation of a subpoena ordering her appearance, and the court entered a default judgment against her, ordering that Louise's interest in the property was secondary to plaintiff's interest. After hearing testimony from several witnesses, including Yolanda[3] and Jason Seaver[4], vice president and company counsel at Seaver Title Agency, the court ruled as follows:

---

[3] Yolanda testified that she was not at the closing for the property in July 2003. She did not see Geneva sign the quit claim deed and did not know when the deed was signed. Geneva never presented her with a copy of the quit claim deed; the first time she saw the deed was after Geneva died; the deed was in Geneva's paperwork. Yolanda testified that she learned after Geneva's death that Geneva put her and Louise on the title to the property. According to Yolanda, Geneva never spoke of a mortgage.

[4] Seaver testified that he worked at Philip R. Seaver Title Company in 2003 and that he reviewed the file of the transaction in this case for trial. He explained that Seaver Title handled the closing and acted as the agent for Geneva, MGD Builders, and Republic Bank. Seaver opined that aside from the warranty deed, the documents in this case are consistent with the intent that all parties

> [T]he documents in this case were prepared in less than a professional manner. . . . [T]hey were not provided the attention they should have been to ensure their accuracy.
>
> Having said that, the facts are pretty clear. The deceased Miss Geneva Thomas made several representations during the course of the acquisition and closing of this property that this was her property, that she was the owner of the property, she was the exclusive owner of the property and in reliance on that she was afforded purchase mortgage to acquire the property. And despite that the deed ultimately contained additional names, the mortgage does not change, and it as intended that it be given to her, that she be the exclusive owner at the time the mortgage was given, and this Court finds that it was indeed an [sic] purchase money mortgage and as such priority is given to the plaintiff in this matter and they may take whatever recourse is appropriate associated with the remaining defendant.
>
> * * *
>
> Was there a mistake? Clearly there was a mistake. The Court need not get there, having found that there is a purchase money mortgage in this matter, there was a mistake, it was a mutual mistake in that the agent for all parties prepared the deed that was inappropriate as clear from all the documents and the inconsistent [sic] of the single document associated with the transfer at the time of the closing, and it's not only inconsistent with the documents it executed on that date but the subsequently failed quit claim deed.

The trial court issued a written order entering a default judgment against Louise, ordering that Louise's and Yolanda's interests in the property were subordinate and subject to plaintiff's mortgage, and dismissing Yolanda's counterclaim with prejudice

II. ANALYSIS

Yolanda argues that the trial court erred by ruling that her interest in the property is subordinate and subject to plaintiff's purchase money mortgage. Yolanda insists that the warranty deed was executed before the mortgage; therefore, she argues that her interest in the property cannot be subordinate to the mortgage because she had an interest in the property as a tenant in common before the execution of the mortgage.

---

to the transaction intended Geneva to be the sole grantee. According to Seaver, it would be an error or mistake "[o]n the part of all the parties" to have Yolanda and Louise on the warranty deed when only Geneva was on the mortgage. Furthermore, Seaver testified that the warranty deed "was prepared and then changed"; he explained that "[t]he typeface of the grantees is different"; it includes typeface from a typewriter as well as computer-generated typeface. Regarding the quit claim deed, Seaver testified that the faxes between Trombley and Scrimenti indicated that the deed was not executed on July 18, 2003, but, rather, after Scrimenti faxed a blank, unsigned quit claim deed to Trombley.

We review for clear error a trial court's findings of fact following a bench trial, and we review de novo the court's conclusions of law. *Heeringa v Petroelje*, 279 Mich App 444, 448; 760 NW2d 538 (2008). Clear error exists when a review of the entire record leaves this Court with a definite and firm conviction that a mistake has been made. *Sinicropi v Mazurek*, 279 Mich App 455, 462; 760 NW2d 520 (2008).

A purchase money mortgage is a '"mortgage or security device taken back to secure the performance of an obligation incurred in the purchase of the property."' *Graves v American Acceptance Mtg Corp*, 469 Mich 608, 613; 677 NW2d 829 (2004), quoting Black's Law Dictionary (6th ed.). It arises when a mortgagor purchases property and gives a mortgage for the purchase money. *Id.* at 613-614. The Michigan Supreme Court has emphasized that "[t]he mortgage must have been given at the time of purchase of the security so as to constitute one transaction, and the proceeds must have been used by the mortgagor to purchase the security, in whole or in part." *Id.* at 614. "[A] purchase money mortgage takes effect immediately, as part of the 'same transaction by which seisin was acquired by the mortgagor.'" *Id.* at 613, quoting *Fecteau v Fries*, 253 Mich 51, 55; 234 NW 113 (1931).

The Michigan Supreme Court's decision in *Fecteau*, which cited to United States Supreme Court precedent as a basis for its decision, illustrates that in the context of a purchase money mortgage where the purchase of the land and the execution of the mortgage are simultaneous events, the land is acquired already encumbered by the mortgage:

> A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money. [*Fecteau*, 253 Mich at 54, quoting *United States v New Orleans R*, 79 US 362; 12 Wall 362; 20 L Ed 434 (1870).]

Relying on the same precedent from the United States Supreme Court, the United States District Court for the Eastern District of Michigan explained this legal concept more explicitly than the *Fecteau* Court:

> In a typical purchase money mortgage situation, the property-buyer receives a loan from the lender to buy property, and secures that loan by granting the lender a mortgage on the purchased property. In such a scenario, the purchase of the land and the mortgage are seen as simultaneous events, so that the mortgagor obtains the land *already encumbered* by the mortgage. *United States v. New Orleans R.R.*, 79 U.S. 362, 365, 12 Wall. 362, 20 L. Ed. 434 (1870); *cited in Slodov*[*v. United States*, 436 U.S. 238, 258 n. 23, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (1978)]. In other words, it is not the case that the mortgagor acquires the land

> and *then* gives a mortgage interest to the lender. [*Bednarowski & Michaels Dev, LLC v Wallace*, 293 F Supp 2d 728, 733 (ED Mich, 2003) (emphasis in original).]

In *Townsend v Chase Manhattan Mtg Corp*, 254 Mich App 133; 657 NW2d 741 (2002), we addressed a factual scenario similar to the one in the present case. The plaintiff in *Townsend* and his mother purchased real property in 1995 "as joint tenants with full rights of survivorship." *Id.* at 134. However, only the plaintiff's mother executed a mortgage for the property; the plaintiff was not a party to the mortgage and, thus, did not encumber his interest. *Id.* at 134, 136. After the plaintiff's mother died in 2000, the plaintiff made no payments on the mortgage, and the defendant mortgage company foreclosed. *Id.* at 134. This Court held that the plaintiff was not liable on the mortgage "because he was not a party to the mortgage, therefore the mortgage was effectively terminated by [the death of his mother] because her interest in the property was extinguished with her death." *Id.* at 137. The Court explained that because of the plaintiff's right of survivorship, the mother's interest in the property did not become part of her estate. *Id.* at 136-137.[5]

The facts of the present case are distinguishable from *Townsend* in one significant respect: Yolanda is not a joint tenant with full rights of survivorship. Under MCL 554.44, "[a]ll grants . . . of lands, made to 2 or more persons, except as provided in [MCL 554.45[6]], shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." Neither the warranty deed nor the quit claim deed expressly provided that Geneva, Louise, and Yolanda would take the property as joint tenants with full rights of survivorship or contained other similar language; therefore, they are tenants in common, which Yolanda acknowledges on appeal. See MCL 554.44. A right of survivorship, which means that a surviving tenant takes ownership of the whole estate upon the death of the other joint tenant, does not exist in tenancies in common. *Wengel v Wengel*, 270 Mich App 86, 94 & n 4; 714 NW2d 371 (2006). Therefore, unlike *Townsend*, this is not a case where a mortgage is terminated upon the mortgagor's death where the mortgagor's interest in the mortgaged property is extinguished because it does not become part of the mortgagor's estate. Rather, because there are no rights of survivorship, Geneva's interest in the property became part of her estate, see *In re Kappler Estate*, 418 Mich 237, 238-240; 341 NW2d 113 (1983) ("If the 1975 conveyance is found to create a tenancy in common, Ms. Kappler's interest in the property will pass through her estate to her son. If, on the other hand, the conveyance created a joint tenancy with right of survivorship, her interest in the property is not part of the estate and Mr. Slone as the surviving joint tenant is the sole owner of the property."), and the mortgage binds the estate, see *Dennis v Sharer*, 56 Mich 224, 231; 22 NW 879 (1885) (stating that a personal covenant in a mortgage will bind the mortgagor's personal estate after the mortgagor's death).

---

[5] The Court emphasized that the case did "not involve the question whether a security interest survives death where the secured property becomes an asset of the debtor's estate." *Townsend*, 254 Mich App at 136.

[6] MCL 554.45 provides that MCL 554.44 "shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife."

When the purchase money mortgage and the warranty deed were executed at closing on July 18, 2003, the purchase money mortgage took effect immediately as part of the same transaction by which seisin was acquired. See *Fecteau*, 253 Mich at 55; see also *Graves*, 469 Mich at 613. Contrary to Yolanda's contention, she did not have an interest in the property as a tenant in common before the execution of the purchase money mortgage. When Geneva, Louise, and Yolanda acquired their interests in the property, the property was already encumbered by the purchase money mortgage. See *Fecteau*, 253 Mich at 54; see also *Bednarowski & Michaels Dev, LLC*, 293 F Supp 2d at 733. Plaintiff can foreclose despite Yolanda's interest in the property.

Accordingly, Yolanda has failed to demonstrate that the trial court erred by ruling in favor of plaintiff on the basis of the purchase money mortgage doctrine.[7]

Finally, we note that plaintiff requests in its appellate brief that this Court sanction Yolanda under MCR 7.216(C) for a vexatious appeal. We have reviewed plaintiff's request and decline to do so.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Jane M. Beckering

[7] Given this conclusion, we need not address the parties' arguments regarding the issue of reformation of the warranty deed on the basis of mutual mistake.

STATE OF MICHIGAN

COURT OF APPEALS

BAC HOME LOANS SERVICING, LP,

Plaintiff/Counter-Defendant/Appellee,

v

YOLANDA THOMAS,

Defendant/Counter-Plaintiff/Appellant,

and

LOUISE COLEMAN, THE ESTATE OF GENEVA THOMAS,

Defendants

UNPUBLISHED
August 13, 2013

No. 309601
Macomb Circuit Court
LC No. 2010-004262-CH

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I do not agree with the majority's treatment of the purchase money mortgage doctrine, but concur in the result of this case because I find no error in the trial court's alternative basis for its ruling.

The purchase mortgage doctrine provides that property purchased with a mortgage is transferred to the mortgagor already encumbered. However, a purchase money mortgage cannot encumber the interests of those other than the mortgagor. In this case, the face of the warranty deed executed at the closing transferred ownership from seller MGD Building Co to Geneva Thomas, Yolanda Thomas and Louise Thomas as tenants in common. Therefore, pursuant to the deed itself, each of the three owned an equal one-third undivided share of the property.

Neither Yolanda nor Louise Thomas entered into a mortgage as relates to their respective one-third interests in the property. Geneva Thomas did enter in such a mortgage.

As Geneva Thomas' mortgage was a purchase money mortgage, the mortgage attached itself to the property received by Geneva Thomas at the time of closing and so is superior to any lien obtained thereafter, even if recorded first. *Fecteau v Fries*, 253 Mich 51; 234 NW 113

(1931). However, as noted in *Fecteau*, the "[purchase money mortgage] attaches to such interest as the mortgagor acquires" (citing *United States v Railroad*, 12 Wall. (U.S.) 362). Accordingly, the mortgage provided to BAC by Geneva Thomas would take precedence over subsequently created liens, but it could not attach itself to property that Geneva Thomas did not own. The deed as written gave her a one-third interest in the property and so the mortgage could only attach to that one-third interest. Thus, if the deed were enforced as written, BAC would be entitled to foreclose on that one-third interest and, if it chose to, seek a sale or division of the real property.

The majority reviews the overwhelming evidence that inclusion of Yolanda Thomas and Louise Thomas on the warranty deed was a mutual mistake of BAC and Geneva Thomas. Given that evidence, I find no clear error in the trial court's reformation of the warranty deed to show that Geneva Thomas was the sole purchaser of the property and had a 100% interest in it. However, the fact that the deed should be reformed in equity does not mean that the unreformed deed can encompass more than what is on the face of the document. The deed as written, therefore, cannot create a lien on the property owned by Yolanda or Louise Thomas, neither of whom ever applied for nor entered into a mortgage.

/s/ Douglas B. Shapiro