

Bank can't use equitable subrogation to enforce mortgage against widow

Late husband the only signatory to 'refi' loan on marital home

By: Eric T. Berkman ◉ November 22, 2017



A spouse was not responsible for a debt her late husband incurred refinancing their marital home because she signed neither the note nor the mortgage securing it, the Appeals Court has ruled.

The surviving spouse, defendant Nancy Comeau, signed the original mortgage on the property and was listed on the deed, holding title with her husband, William, in a tenancy by the entirety. When William refinanced, he was the sole signatory of the note and new mortgage. He died three years later still owing

money on the new mortgage.

Plaintiff Wells Fargo Bank, successor to the refinancing lender, argued that Nancy should be liable for William's debt under the doctrine of equitable subrogation, which allows a court to reform a mortgage, restore a once-extinguished mortgage, or adjust priorities among existing mortgages when fairness dictates that it do so.

According to Wells Fargo, its mortgage should have been equitably subrogated to the position of the original mortgage so as to encumber Nancy's interest in the property.

But the Appeals Court disagreed, pointing out that the bank put itself in the position it was in by failing to have Nancy sign the new mortgage at the time of the refinancing or by bringing a claim against William's estate.

"In our view, the law does not allow Wells Fargo to enlist the aid of the court to transfer to Nancy the obligation of William to pay the note, simply because that is Wells Fargo's only remaining avenue to recover its funds," Judge Peter W. Agnes Jr. wrote for the court. "Equitable subrogation should be granted only when the rights of other parties will not be materially affected. ... Here, Nancy would be materially prejudiced if Wells Fargo were to be placed in the record position of the [original] mortgage, because that would expose her to the risk of a foreclosure if she did not pay a debt that only her deceased husband was obligated to pay."

The 12-page decision is *Wells Fargo Bank, N.A. v. Comeau*, Lawyers Weekly No. 11-143-17. The full text of the ruling can be found [here](#).

'Creative use' of equitable subrogation doctrine

Gregory N. Eaton of North Andover, who represented the defendant, said had the court applied equitable subrogation in the circumstances at hand, "it would have made people responsible for obligations they're not personally liable for."

Michael E. Aleo, a Northampton civil litigator who has represented homeowners in similar disputes, said applying equitable subrogation in a situation like the one in *Comeau* would also risk leaving the door open to lenders to be less careful when issuing loans.

However, Aleo said he could envision a bank having a credible argument under somewhat similar circumstances.

"For example, you could imagine a situation where the bank has a credible argument that the [non-signatory spouse] was at the meetings, nodded her head, and the bank just didn't get a signature," he said. "That would still be problematic because it's a transaction that should be in writing, but in that situation you might see the court going the other way."

Framingham real estate lawyer Richard D. Vetstein said the decision shows how critical it is for lenders to have both spouses sign the mortgage whenever the property is being held as tenants by the entirety, even when one spouse is not on the mortgage loan for qualification purposes.

“Otherwise, this exact situation could happen,” he said.

Meanwhile, Gordon M. Orloff, a Boston real estate lawyer, distinguished the case from *East Boston Savings Bank, et al. v. Ogan*, a 1998 Supreme Judicial Court decision the Appeals Court cited to in *Comeau*.

Ogan involved a buyer who purchased property subject to a first mortgage that the buyer and his lender knew about, and which the lender paid off, and a second mortgage of which they had constructive notice. The SJC applied equitable subrogation to subordinate the second mortgage to the buyer's equity interest and the lender's mortgage interest.

“The result was equitable because the second mortgage and the owner both expected to be subject to a second mortgage,” Orloff said.

But in *Comeau*, he said, it would be unfair to impose an obligation on Nancy arising from a transaction to which she was not a party.

“That said, this was a creative use of the doctrine of equitable subrogation and a court could have concluded that, like the second mortgagee in *Ogan*, Nancy would have been no worse off than she was under the mortgage that had been refinanced, which she had signed, if her interest remained subject to a first mortgage,” he said.

The decision also could have interesting implications in the bankruptcy context, said Donald R. Lassman of Needham.

The Appeals Court found that applying equitable subrogation would give Wells Fargo rights greater than its predecessor had bargained for while materially prejudicing the rights of other parties, Lassman said.

The result would be no different had the case involved a living spouse who signed a note and mortgage, later filing for bankruptcy, and the lender seeking to enforce the loan against the non-signatory spouse, he said.

Lassman pointed to Section 509 of the U.S. Bankruptcy Code, which expressly provides for subrogation in circumstances in which an entity is “liable with the debtor” on a claim.

The legislative history plainly indicates that subrogation is intended for true co-debtors, the bankruptcy lawyer explained.

“Because Wells Fargo was neither ‘liable with’ nor a ‘co-debtor of’ the original obligor to [Wells Fargo's predecessor], Wells Fargo would similarly find that relief was not available under Section 509,” Lassman said.

Wells Fargo's attorneys, Andrew S. Lee and Michelle A. McHale, of Lynnfield, could not be reached for comment prior to deadline.



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Single signatures

The Comeaus owned a residence in Groveland as a tenancy in the entirety.

As of September 2003, their house was encumbered by a mortgage to Haverhill Co-Operative Bank. Both spouses were listed on the mortgage, but Nancy did not sign the note.

In 2005, William refinanced the loan by executing a note in his name to Washington Mutual Bank, secured by a mortgage.

William, the only signatory to the Washington Mutual note or mortgage, used a portion of the proceeds from the refinancing to pay off the first mortgage.

When William died in January 2008, his undivided interest in the property passed to Nancy by right of survivorship. At the time, there was an outstanding balance on the Washington Mutual note.

At some point, Wells Fargo acquired the Washington Mutual note and mortgage. However, it never made a claim against William's estate for the unpaid balance, and the statute of limitations ultimately expired on any such claim.

Seeking to avoid a total loss, Wells Fargo sued Nancy in Superior Court seeking a declaration that its 2005 mortgage should be equitably subrogated to the record position of Haverhill's now-extinguished 2003 mortgage so that Nancy's interest in the property would be subject to the Wells Fargo mortgage. According to the plaintiff, any other result would unjustly enrich Nancy.

Judge Timothy Q. Feeley denied the bank's motion for summary judgment, finding that equitable subrogation was not available under the circumstances. Wells Fargo appealed.

Matters of equity

The Appeals Court found that applying equitable subrogation and putting Wells Fargo in the record position of Haverhill would unjustly give the bank a greater interest in the property than its predecessor, Washington Mutual, had bargained for by contracting only with William.

Specifically, Agnes said, nothing in the record supported Wells Fargo's claim that Washington Mutual intended to hold a mortgage on the entire property not subject to Nancy's right of survivorship.

Rather, he said, Washington Mutual intended to receive only William's interest in the property subject to any encumbrances of record, namely Nancy's survivorship right as tenant by the entirety.

"The law did not forbid William from mortgaging only his interest in the property, and the law did not forbid Washington Mutual from taking such an interest as security," Agnes wrote.

Additionally, the judge said, Wells Fargo had the opportunity to make a claim against William's estate for the balance of the 2005 loan but declined to do so. Accordingly, it would be unfair to expose Nancy to foreclosure by subjecting her to a debt that was not hers to begin with.

Therefore, the court concluded, Feeley's decision should be affirmed.

Wells Fargo Bank, N.A. v. Comeau

THE ISSUE: Could a lender use equitable subrogation to hold a surviving spouse liable for her late husband's refinancing debt when she had not signed either the note or the mortgage securing it?

DECISION: No (Appeals Court)

LAWYERS: Andrew S. Lee and Michelle A. McHale, of Wacks & McHale, Lynnfield (plaintiff)

Gregory N. Eaton of Oakley, O'Sullivan & Eaton, North Andover (defense)

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