

--- N.Y.S.2d ---, 2012 WL 2126001 (N.Y.A.D. 2 Dept.), 2012 N.Y. Slip Op. 04716  
(Cite as: 2012 WL 2126001 (N.Y.A.D. 2 Dept.))

Supreme Court, Appellate Division, Second Department,  
New York.

J.P. MORGAN CHASE BANK, N.A., appellant,  
v.

Michael Joseph CORTES, et al., respondents.

June 13, 2012.

**Background:** Mortgagee brought action for declaratory judgment that it held equitable mortgage over joint interest in property held by mortgagor's wife, who was not party to loan agreement that was secured by mortgage. The Supreme Court, Suffolk County, [Mayer](#), J., entered summary judgment in favor of mortgagor and wife, and mortgagee appealed.

**Holding:** The Supreme Court, Appellate Division, held that mortgagee did not hold equitable mortgage over joint interest held by mortgagor's wife.

Affirmed and remitted.

West Headnotes

### [\[1\] Mortgages 266](#)

#### [266](#) Mortgages

Mortgagee did not hold equitable mortgage over joint interest held by mortgagor's wife who was not party to loan that was secured by mortgage, absent showing that parties intended that wife's interest would be subject to mortgage.

### [\[2\] Mortgages 266](#)

#### [266](#) Mortgages

While a court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a special piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances.

### [\[3\] Appeal and Error 30](#)

#### [30](#) Appeal and Error

Appellate court would not consider claims raised by mortgagee for first time on appeal.

Butler, Fitzgerald, **Fiveson** & McCarthy, New York, N.Y. ([David K. Fiveson](#) and Claudia G. Jaffe of counsel), for appellant.

Spada, Ardam & Sibener, PLLC, Smithtown, N.Y. ([David M. Ardam](#) of counsel), for respondents.

[REINALDO E. RIVERA](#), J.P., [THOMAS A. DICKERSON](#), [L. PRISCILLA HALL](#), and [ROBERT J. MILLER](#), JJ.

\*1 In an action, inter alia, for a judgment declaring that the plaintiff, as the holder of the subject mortgage, has an equitable mortgage on the joint interest of the defendant Floris R. Cortes in the subject premises, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Mayer, J.), dated August 23, 2011, which denied its motion for summary judgment declaring that it has such an equitable mortgage and, in effect, searched the record and awarded summary judgment to the defendants declaring that it does not have such an equitable mortgage.

ORDERED that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Suffolk County, for the entry of a judgment, inter alia, declaring that the plaintiff does not have an equitable mortgage on the joint interest of the defendant Floris R. Cortes in the subject premises.

The defendants, Michael Joseph Cortes and Floris R. Cortes, husband and wife, respectively, held title to the subject property in both of their names. A substantial part of the property's purchase price was supplied through a mortgage loan issued by the plaintiff's predecessor-in-interest. Since the loan documents were executed in the husband's name only, when the plaintiff's predecessor-in-interest attempted to foreclose on the mortgage due to nonpayment, it was

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unable to foreclose on the wife's joint interest in the property because she had not signed the loan documents. The plaintiff commenced the instant action seeking, inter alia, a judgment declaring that it has an equitable mortgage on the joint interest of the wife in the subject premises.

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[1][2] “ ‘While [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a special piece of property is to be held or transferred to secure an obligation ... it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances’ “ ( [Fremont Inv. & Loan v. Delzol](#), 65 A.D.3d 1013, 1014, 885 N.Y.S.2d 505, quoting [Tornatore v. Bruno](#), 12 A.D.3d 1115, 1117–1118, 785 N.Y.S.2d 820 [internal quotation marks and citations omitted] ). Here, the plaintiff failed to meet its burden of establishing the intent necessary to impose an equitable mortgage. Accordingly, the plaintiff failed to demonstrate its entitlement to judgment as a matter of law, and the Supreme Court properly denied the plaintiff's motion for summary judgment declaring that it has an equitable mortgage on the joint interest of the wife in the subject premises. In addition, the Supreme Court properly, in effect, searched the record and awarded summary judgment to the defendants declaring that the plaintiff does not have an equitable mortgage on the joint interest of the wife in the subject premises.

[3] The plaintiff's remaining contention is not properly before this Court, as it was raised for the first time on appeal (see [NYU Hosp. for Joint Diseases v. Country Wide Ins. Co.](#), 84 A.D.3d 1043, 1044, 925 N.Y.S.2d 89; see [Polanco v. Lewis Flushing Corp.](#), 91 A.D.3d 624, 937 N.Y.S.2d 860).

\*2 Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Suffolk County, for the entry of a judgment, inter alia, declaring that the plaintiff does not have an equitable mortgage on the joint interest of the defendant Floris R. Cortes in the subject premises (see [Lanza v. Wagner](#), 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670, *appeal dismissed* 371 U.S. 74, 83 S.Ct. 177, 9 L.Ed.2d 163, *cert denied* 371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164; [Interested Underwriters at Lloyds v. Midge Rest., Corp.](#), 283 A.D.2d 459, 724 N.Y.S.2d 632).