

**Chappell v Wells Fargo Bank, N.A.**

2014 NY Slip Op 30072(U)

January 10, 2014

Supreme Court, New York County

Docket Number: 158422/2013

Judge: Cynthia S. Kern

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN  
J.S.C. Justice

PART \_\_\_\_\_

Index Number : 158422/2013  
CHAPPELL, MITRA  
vs  
WELLS FARGO BANK, N.A  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 1/10/14

CK, J.S.C.

CYNTHIA S. KERN  
 NON-FINAL DISPOSITION

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
MITRA CHAPPELL,

Plaintiff,

Index No. 158422/2013

-against-

**DECISION/ORDER**

WELLS FARGO BANK, N.A. a/k/a  
WELLS FARGO HOME MORTGAGE,

Defendant.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>  </u>
Answering Affidavits to Cross-Motion.....	<u>  </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action asserting claims for, *inter alia*, negligence and wrongful eviction stemming from defendant’s actions after plaintiff defaulted in her loan payments to defendant. Defendant now moves for an order pursuant to CPLR § 3211 dismissing plaintiff’s complaint on the ground that it fails to state a cause of action and/or is time-barred. For the reasons set forth below, defendant’s motion is granted.

The relevant facts are as follows. Plaintiff was the owner of the shares of stock and proprietary lease appurtenant to Unit No. 14B (the “Unit”) in the premises known as Trump

Plaza located at 167 East 61<sup>st</sup> Street, New York New York. In connection with her purchase of the Unit, plaintiff obtained a "Cooperative Purchase Loan" from defendant in the principal amount of \$275,000. According to plaintiff's complaint, some years after acquiring the Unit, she lost her job and was forced to relocate to Battle Creek, Michigan for work. At that time, she put the Unit on the market for sale and obtained several purchase offers. However, these offers were all allegedly refused by the Board of Director of Trump Plaza Owners, Inc. ("Trump Plaza"). Additionally, Trump Plaza allegedly refused to "let plaintiff sublet her apartment beyond their two-year period."

It is undisputed that at some point plaintiff failed to make her loan payments to defendant and defendant placed plaintiff's loan in default and served a Notice of Auction Sale. The sale was noticed for December 1, 2011, but was never held. Additionally, plaintiff alleges that at some point after this, defendant padlocked the door to the Unit "to prevent brokers retained by plaintiff from showing the apartment for sale." Defendant never went forward with sale of the Unit and eventually plaintiff sold the Unit to Trump Plaza for \$400,000. Thereafter, on or about February 23, 2011, plaintiff commenced suit against Trump Plaza for "price fixing."

On or about September 16, 2013, plaintiff commenced the instant action asserting three claims against defendant: (1) negligence; (2) unlawful eviction; and (3) violation of Section 9-610 of the Uniform Commercial Code ("UCC"). Defendant now moves to dismiss the complaint on the grounds that it fails to state a cause of action and any claim for unlawful eviction is time-barred.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980).

“[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept 1990). However, “conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

As an initial matter, defendant’s motion to dismiss plaintiff’s first cause of action for negligence is granted. In order for a defendant to be held liable for negligence, the plaintiff must establish that the defendant owes some duty of care to the plaintiff. *See Pulka v. Edelman*, 40 N.Y.2d 781 (1976); *see also Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 339, 342 (1928). “[A]bsent such duty, as we have said before, there can be no breach of duty, and without breach of duty there can be no liability.” *Kimbar v. Estis*, 1 N.Y.2d 399, 405 (1956). Here, plaintiff’s complaint fails to state a cause of action for negligence as plaintiff fails to allege any duty of care owed by defendant to plaintiff. Indeed, while plaintiff alleges that Wells Fargo was negligent in “padlocking the door to [the Unit], not completing the foreclosure auction and not informing plaintiff’s attorney, who was authorized to receive communication from defendant, that the foreclosure sale had not been completed” and “was also negligent because it paid \$75,000 in outstanding maintenance to Trump Plaza Owners, Inc. without informing plaintiff’s attorney or plaintiff of the payment and failing to respond to communications from plaintiff’s attorney for explanation or to reduce the amount of the pay off of the loan,” she fails to allege any relationship between her and defendant giving rise to such a duty of care.

Additionally, defendant’s motion to dismiss plaintiff’s second cause of action for wrongful eviction is granted on the ground that any such claim is time-barred. It is well settled

that “[w]rongful eviction’ claims are governed by the one-year Statute of Limitations applicable to intentional torts.” *Gold v. Schuster*, 264 A.D.2d 547 (1<sup>st</sup> Dept 1999). Here, plaintiff bases her unlawful eviction claim on “defendant’s actions in padlocking the door to the apartment and not holding an auction sale.” While it is not entirely clear from plaintiff’s complaint what date defendant’s allegedly padlocked the Unit, it had to have occurred prior to plaintiff commencing the separate action against Trump Plaza, which was filed on February 23, 2011. Thus, as the instant action was commenced on or about September 16, 2013, well over a year from when the complained about activity would have had to occur, even assuming, *arguendo*, plaintiff sufficiently stated a claim for wrongful eviction, it is time-barred and must be dismissed.

Finally, defendant’s motion to dismiss plaintiff’s third cause of action for violation of UCC Section 9-610 is also granted. Pursuant to UCC Section 9-610, “[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral . . . at any time and place and on any terms.” Here, plaintiff cannot maintain a claim against defendant under UCC Section 9-610 as defendant never disposed of the Unit. Section 9-610, by its very terms, is only applicable in situations when a secured party disposes of the collateral in question after default. In the present action, on the contrary, it is undisputed that plaintiff, not defendant, ultimately sold her interest in the Unit to Trump Plaza. Accordingly, as there was never a disposition of the Unit by defendant, plaintiff cannot bring a claim under UCC Section 9-610.

Accordingly, defendant’s motion is granted and it is hereby ordered that plaintiff’s complaint is dismissed in its entirety. The Clerk is directed to enter judgment accordingly. This

