

**Stopford v Hewitt**

2023 NY Slip Op 34469(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 151235/2023

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH PART 14

*Justice*

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WYNDHAM STOPFORD,

Plaintiff,

- v -

JAMES HEWITT, WELLS FARGO HOME MORTGAGE,  
INC.

Defendant.

-----X

INDEX NO. 151235/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS.

Defendant Wells Fargo Home Mortgage, Inc.'s ("Wells Fargo") motion to dismiss the complaint is granted in part and denied in part.

**Background**

Plaintiff and defendant Hewitt are former romantic partners who purchased a cooperative apartment together on the Upper East Side. Plaintiff contends that the parties broke up and that he no longer lives in the apartment, although Mr. Hewitt still lives in the unit. He brings the instant partition action so he can receive the value of his share of the apartment. Plaintiff and Mr. Hewitt took out a mortgage for the shares in the apartment with defendant Wells Fargo.

Wells Fargo moves to dismiss the complaint on the ground that the terms of the 2012 mortgage bar this case. It explains that the mortgage contains a term that prohibits plaintiff from bringing this case without Wells Fargo's "prior written consent." Wells Fargo insists that this unambiguous provision of the mortgage qualifies as documentary evidence that the complaint is

without merit. It observes that plaintiff did not obtain Wells Fargo's permission and that it will not consent to a sale of the property unless both plaintiff and Mr. Hewitt agree that the note will be satisfied in full from the proceeds from the sale.

Wells Fargo also argues that it should be viewed as merely a permissive party and that the complaint fails to state a claim.

In opposition, plaintiff points out that there is additional language in the mortgage that provides a solution if there is a sale. He emphasizes he has no objection to Wells Fargo's removal from the case, but insists that the entire case should not be dismissed.

In reply, Wells Fargo argues that plaintiff does not understand the mortgage and argues that plaintiff violated professional rules of conduct by including communications between counsel for plaintiff and a representative from Wells Fargo without including counsel for Wells Fargo.

### **Discussion**

The first issue this Court must address is the mortgage's relevant provisions. Under the representations section, it provides that "The Borrower will not sell, transfer, pledge or assign the Stock or the Lease, or attempt to do so without the Lender's prior written consent" (NYSCEF Doc. No. 11, ¶ 3). It also provides that "SALE OF SECURITY: If the Borrower sells or transfers the Stock and Lease, Lender shall require Borrower to repay in full the amount due under the Note" (*id.* at 5).

As an initial matter, these two contractual provisions appear to conflict. The former gives Wells Fargo the unfettered right to block any sale or transfer without its consent. And the latter paragraph suggests that the borrower can sell the shares as long as the borrower repays the full

amount due under the note. There is no restriction on the borrower's right to sell in the second provision.

The central case plaintiff cites for the proposition that dismissal is required is *BMM Four, LLC v BMM Two, LLC* (48 Misc 3d 1201(A) [Sup Ct, Westchester County 2015]). However, that case is inapposite and has little bearing on the instant motion. In *BMM* (a partition action), the Supreme Court acknowledged that the security instrument contained a clause requiring JPMorgan's consent to a sale. But the Court permitted the premises to be sold and merely required that "minimum bid/price must be fixed prior to the sale to protect JP Morgan Chase's interest in the property" (*id.* at \*5).

Here, Wells Fargo seeks to dismiss the *entire case* because plaintiff did not get its consent before bringing this case. Of course, Wells Fargo did not mention why it is withholding its consent. It does not dispute that plaintiff is entitled to seek a partition action given his interest in the cooperative shares and the alleged facts of the case. Instead, Wells Fargo argues that it has not given its consent and that it will not give its consent to a sale unless plaintiff and Mr. Hewitt agree that the note will be paid in full.

This position is nonsensical. How could plaintiff ensure that the sale will satisfy the note if Wells Fargo refuses to permit a sale in the first instance? And plaintiff does not have a crystal ball—he can't ensure that the proceeds from the partition sale will cover the remaining amount of the note before the sale occurs. To be sure, Wells Fargo is correct that it is entitled to ensure that the note be paid in full. And there are other ways to ensure that Wells Fargo's interest is protected. But the Court fails to see how that is a basis to dismiss the complaint.

More broadly, under Wells Fargo's theory, it is entitled to bar any sale of the cooperative shares without having to cite a reason. Therefore, to the extent that Wells Fargo argues that the

subject provision requires dismissal of this entire case, the Court finds that interpretation of the mortgage to be void under the common law doctrine of unconscionability. “A term of a contract is unconscionable when it is shockingly unjust or unfair” (*Riverwalk on the Hudson, Inc. v Culliton*, 62 Misc 3d 351, 356 [Cohoes City Ct 2018]). Wells Fargo’s view of the provision is exactly that—shockingly unfair in that it provides Wells Fargo with unfettered discretion to bar plaintiff’s right to transfer or sell his interest in the cooperative shares regardless of the fact that Wells Fargo has yet to identify a legitimate reason to block a sale. Wells Fargo’s view also violates the duty of good faith and fair dealing contained in every contract. Withholding consent for no reason is baffling and the Court declines to condone it here.

Moreover, because Wells Fargo seeks (in the alternative) to be dismissed from this case and plaintiff does not object, it is hereby severed and dismissed from the case.

### **Summary**

The fact is that plaintiff has alleged a cognizable cause of action for partition. He owns shares in a cooperative and he has thus far been unable to reach some sort of agreement with Mr. Hewitt or Wells Fargo to either sell his shares to Mr. Hewitt or sell his shares to someone else. Wells Fargo’s position that its consent is required is certainly a provision of the agreement, but only to the extent that it ensures that Wells Fargo retains a priority interest in the shares so that its loan is paid back in full. But the Court cannot interpret the subject mortgage provision to give Wells Fargo the right to force plaintiff to retain his interest in the cooperative shares for the life of the loan simply because Wells Fargo has unreasonably withheld its consent. After all, this involves a loan related to a residence, not a commercial loan.

The Court also rejects Wells Fargo’s arguments about alleged violations of the rules of professional conduct as completely without merit.

Accordingly, it is hereby

ORDERED that defendant Wells Fargo Home Mortgage, Inc.’s motion to dismiss is granted only to the extent that plaintiff’s claims against this defendants are severed and dismissed and denied to the extent movant sought to dismiss the entire case.

Conference: March 25, 2024 at 11:30 a.m. By March 18, 2024, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything by March 18, 2024 will result in an adjournment of the conference.

12/20/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE