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SCANNED ON 9/21/2005

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

PRESENT: BERNARD J. FRIED J.S.C. PART 60

0601232/1999

72ND STREET ASSOCIATES
vs
GREYSTONE SERVICING CORP.,

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

SUMMARY JUDGMENT

C

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
SEP 21 2005
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/21/05

BERNARD J. FRIED J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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72nd STREET ASSOCIATES,

Plaintiff,

- against -

GREYSTONE SERVICING CORPORATION, INC. and WHITEHALL FUNDING INC.,

Defendants.

Index No. 601232/99

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FRIED, J.:

Defendants Greystone Servicing Corporation, Inc. and Whitehall Funding Inc. move, pursuant to CPLR 3212, for dismissal of the complaint. Plaintiff 72nd Street Associates cross-moves, pursuant to CPLR 3025, for leave to serve an amended complaint.

Except where noted, the following facts are not in dispute, having been resolved by the parties' "Rule 19-A Statements of Material Facts." Plaintiff owns an apartment building and property located at 200 East 72nd Street, New York, New York (Property). Defendant Greystone is an approved Federal Housing Administration (FHA) servicer of multi-family mortgages, and an issuer of United States Government National Mortgage Association (GNMA) mortgage-backed securities. At all relevant times, Whitehall, which has since ceased doing business, was a GNMA issuer, and a mortgagee, seller, and servicer of federal, government-backed mortgages.

In January 1978, Emigrant Savings Bank provided plaintiff with a loan that was secured by an FHA-insured mortgage (Mortgage) on the Property. The Mortgage – a GNMA-pooled mortgage that backed GNMA securities (Mortgage Pool), and was subject

to GNMA rules and regulations – was assigned to Greystone in December 1995.

In November 1998, plaintiff decided to prepay the Mortgage in full, because another lender, Prudential Insurance Company of America, was to refinance the Mortgage by providing plaintiff with a new, larger mortgage loan, at a lower interest rate. Plaintiff sought to have Greystone assign the Mortgage to Prudential to avoid payment of a $514,098.14 mortgage recording tax.

On November 12, 1998, Norman E. Dimson, a former general partner of plaintiff, sent Greystone a "Notice of Prepayment," stating that plaintiff intended to prepay the Mortgage in full on February 1, 1999. The letter requested that Greystone prepare a payoff statement, an assignment of mortgages, an allonge for all of the promissory notes held by Greystone, and UCC-3 termination statements. In response, on December 4, 1998, Carole Jurney, a former vice president of Greystone, sent Dimson an estoppel certificate, reflecting payoff figures on the Mortgage.

On January 5, 1999, Greystone executed an assignment agreement with Whitehall, that was submitted to GNMA for approval. On January 7, 1999, Greystone informed plaintiff that the Mortgage had been sold to Whitehall. Thereupon, plaintiff wrote to Thomas Jager, president of Whitehall, requesting an assignment of the Mortgage in recordable form from Greystone to Whitehall, an assignment of the Mortgage from Whitehall to Prudential, and a payoff letter from Whitehall with wire instructions. On January 11, 1999, Whitehall sent a payoff statement, including a request for a "mortgage assignment accommodation fee" of $350,000. Dimson called Jager, and told him that plaintiff did not intend to pay the fee, and he also called Stephen Rosenberg, president of Greystone, to complain about the fee

request. According to Dimson, Rosenberg agreed to attempt to buy back the Mortgage from Whitehall, and make the assignment to Prudential at no cost.

On January 14, 1999, Dimson wrote to Whitehall, stating that plaintiff decided to forego having the Mortgage assigned from Whitehall to Prudential, and that it would pay off the Mortgage instead. Dimson also stated that he understood from Rosenberg that Greystone offered to repurchase the servicing of the Mortgage from Whitehall, and would charge plaintiff no fee for the assignment of the Mortgage to Prudential. Dimson gave Whitehall the choice to either transfer the servicing of the Mortgage back to Greystone, and receive $50,000 from Greystone, or retain the servicing of the Mortgage, and provide plaintiff with a mortgage satisfaction on February 1, 1999. In that letter, he expressed offense by the "unconscionable fee for an assignment," and stated that, as a result of the offense caused by the fee request, plaintiff decided to forego the savings it would have achieved in the mortgage recording tax by having Whitehall assign the Mortgage (Exhibit N to Affirmation of Timothy E. Di Domenico, Esq., dated February 3, 2005).

Jager subsequently agreed, subject to GNMA requirements, to have Whitehall assign the Mortgage to Prudential without payment of the fee. GNMA rules in effect at the time required that Whitehall obtain the unanimous consent of the holders of the GNMA securities that were backed by the Mortgage. Whitehall obtained the consent of Fannie Mae, but it did not obtain the consent of the other two holders – Bear Stearns and Chase Manhattan Bank – prior to the February 1, 1999 deadline imposed by plaintiff. Plaintiff challenges defendants' claim that they acted in good faith in the attempt to obtain the consents, because, allegedly, they had from November 12, 1998 to February 1, 1999 to obtain the consents.

Plaintiff prepaid the Mortgage in full on February 1, 1999, and obtained a satisfaction from Whitehall. Plaintiff paid a mortgage recording tax of $514,098.14. Plaintiff then commenced this action to recover that amount.

The complaint contains three causes of action. The first cause of action, for breach of contract, alleges that, after plaintiff notified Greystone on November 12, 1998, of its intention to refinance the Mortgage on the Property, and requested that Greystone notify it of all sums due, and assign the Mortgage to the new lender and proposed assignee, to save the mortgage recording tax, Greystone agreed to provide the assignment to Prudential. It alleges further that Greystone and Whitehall breached Greystone's agreement to assign the Mortgage to Prudential, thereby causing plaintiff to pay $514,098.14 in mortgage recording taxes that it otherwise would not have had to pay if the assignment had been made.

The second cause of action alleges that defendants' conduct constitutes a violation of Real Property Law § 275, which caused plaintiff damages in the amount of $514,098.14.

The third cause of action alleges that Whitehall's demand to receive the $350,000 "Mortgage Assignment Accommodation Fee" constitutes a prima facie tort. Allegedly, Whitehall's "sole motive for its acts and conduct and refusal/delay to secure necessary consents to retransfer the mortgage loans to Greystone was to economically coerce plaintiff, whose closing with Prudential had been set for February 1, 1999, to pay the unlawful and improper" fee.

Defendants now move to dismiss the entire complaint. For the reasons set forth below, the motion is granted.

Plaintiff asserts that defendants had ample opportunity to comply with GNMA regulations, and timely obtain the requisite consents for the February 1, 1999 closing. Plaintiff argues that the motion must be denied, because "there are factual issues regarding defendants' agreements to obtain the assignment and their failure to do so." However, defendants are entitled to summary judgment, because resolution of these issues would not redound in plaintiff's favor. The record conclusively establishes that the purported agreement between plaintiff and Greystone, to deliver the assignment to Prudential never materialized, thereby making the breach of contract cause of action untenable. Plaintiff has abandoned the second cause of action, which, in any event, lacks merit. The third cause of action is not validly stated.

As a preliminary matter, I note that plaintiff's reliance upon *767 Third Ave. LLC v Orix Capital Mkt., LLC*, 6 Misc 3d 1019(A), 2005 WL 287393 [Sup Ct, NY County 2005] [*Orix*]), which is a decision rendered by this court, is unpersuasive. In *Orix*, plaintiffs were asserting rights based upon enforceable agreements, the existence of which were not in dispute; i.e., promissory notes and mortgages. Here, plaintiff's breach of contract claim is based entirely upon a purported agreement between plaintiff and Greystone to assign the mortgage to Prudential. The evidence contained in the record, however, conclusively establishes that that "agreement" never came into existence.

To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms (*Matter of Express Indus. and Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589, *rearg denied* 93 NY2d 1042 [1999]).

"Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract" (*id.*). Here, the complaint states only that "Greystone agreed to provide the assignment to Prudential," and plaintiff's "Response to Statement of Undisputed Facts" describes the agreements as "oral," but both the complaint and the "Response" lack any meaningful indication of the existence of an offer, acceptance, or the identification of material terms upon which the parties allegedly agreed.

Plaintiff appears to also argue that an agreement came into being as manifested by Greystone's delivery to it, on December 4, 1998, of the estoppel certificate, in response to Dimson's November 12, 1998 request for an assignment of the mortgage to Prudential to save mortgage recording taxes. Even an implied-in-fact contract requires such elements as consideration, mutual assent, legal capacity and legal subject matter (*Maas v Cornell Univ.*, 94 NY2d 87 [1999]). Plaintiff has not identified any consideration that it offered to Greystone so as to bind Greystone to its "agreement" to provide the assignment to Prudential. Hence, the alleged agreement to provide the assignment can best be described as a gratuitous promise that is unenforceable, because it did not require plaintiff to do anything on its part (*Business Funding Corp. v Fox Print.*, 243 AD2d 397 [1st Dept 1997]; *Curtis Prop. Corp. v Greif Cos.*, 212 AD2d 259 [1st Dept 1995]).

Contrary to plaintiff's assertion, the *Orix* decision did not state that it is, and has been, the custom and practice in New York for such assignments to take place in order to save mortgage recording taxes, and that the custom is for the assignor to be reimbursed its legal fees for preparing the assignment (Affidavit of Norman E. Dimson, sworn to April 27,

2005, ¶ 9; plaintiff's Memorandum of Law, at 4). Rather, the decision in *Orix* stated that there was an issue of fact as to custom and usage. The decision in *Orix* is not dispositive in either party's favor in this action, and I decline the invitation to construe *Orix* as containing a broad pronouncement as to the duty of mortgagees vis-a-vis refinancings, assignments, and recording taxes.

Even if defendants owed a duty to plaintiff to deliver the assignment to Prudential, it is undisputed that the GNMA rules in effect at the time required the unanimous consent of the holders of the GNMA securities that were backed by the Mortgage, and that, although defendants obtained the consent of Fannie Mae, they did not obtain the consent of the other two holders – Bear Stearns and Chase Manhattan Bank – prior to plaintiff's February 1, 1999 deadline.

Defendants assert that they sought to transfer the Mortgage Pool back to Greystone to allow it to assign the Mortgage to Prudential without payment of an assignment fee by plaintiff, but were precluded from doing so by the then-existing rules and regulations of GNMA that barred Whitehall from re-transferring or re-assigning the Mortgage Pool to another GNMA issuer (i.e., Greystone) within 180 days after the assignment of the Mortgage Pool to Whitehall. As for plaintiff's contention that Greystone had not actually transferred the Mortgage as of February 1, 1999, the date of the scheduled closing of the loan between plaintiff and Prudential, and thus, it would have been possible for Greystone to assign the Mortgage to Prudential without regard to these regulations, that contention pertains to the tort causes of action (third cause of action and proposed fourth cause of action), discussed below.

The second cause of action alleges that defendants' conduct constitutes a violation of Real Property Law § 275. Plaintiff appears to have abandoned this claim. Nevertheless, as a result of an amendment in 1989, the statute is permissive as to assignments, not mandatory (*2301 Jerome Ave. Realty Corp. v Di Paolo*, 190 Misc 2d 383 [Sup Ct, Westchester County 2002]; *Harris v Crossland Mtge. Corp.*, 160 Misc 2d 520 [Dist Ct, Nassau County 1994]).

The third cause of action for prima facie tort, which is directed only at Whitehall, is not validly stated. Prima facie tort consists of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful (*Curiano v Suozzi*, 63 NY2d 113 [1984]). To state a valid claim, the complaint must allege that defendant acted with disinterested malevolence, i.e., the intent must have been solely to injure plaintiff (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *Havell v Islam*, 292 AD2d 210 [1st Dept 2002]), and not within defendant's own self-interest (*Bainton v Baran*, 287 AD2d 317 [1st Dept 2001]). The allegations in the complaint, that Whitehall's sole motivation was to economically coerce plaintiff to pay it the $350,000 "accommodation fee," is fatal to the assertion of this cause of action (*Id.*; *Hessel v Goldman, Sachs & Co.*, 281 AD2d 247 [1st Dept], *lv dismissed in part, denied in part* 97 NY2d 625 [2001]).

Plaintiff cross-moves for leave to amend the complaint to add a fourth cause of action for negligence against Greystone and Whitehall. The proposed negligence cause of action alleges that, as FHA-approved mortgagees and servicers of FHA/GNMA insured mortgages with unique and special training, plaintiff reposed trust in defendants, and relied upon them

to know the rules and procedures pertaining to its request, and to properly process that request so as to obtain the assignment. Further, defendants had a duty to reasonably and competently process plaintiff's request for an assignment of its mortgage, and to obtain that assignment. It further alleges that defendants did not act reasonably and competently in processing plaintiff's request for an assignment.

Although leave to amend should be freely given, the party seeking amendment has the burden of establishing the merit of the proposed amendment (*Hynes v Start Elevator*, 2 AD3d 178 [1st Dept 2003]). Moreover, where there has been an extended delay in moving to amend, the party seeking leave must establish a reasonable excuse for the delay (*Oil Heat Institute of Long Is. Trust v RMTS Assoc., LLC*, 4 AD3d 290 [1st Dept 2004]). Plaintiff has not provided a reasonable excuse for the delay, nor has it shown that the proposed amendment has merit. Thus, the cross motion is denied.

Plaintiff claims that it first learned of the facts upon which the negligence claim is based in 2003, after it took the deposition in November 2003 of Thomas Jager, Whitehall's president. This is belied by evidence in the record indicating that plaintiff had ample knowledge of the allegations pertaining to the negligence claim when it commenced this action in 1999, or, at the latest, in 2000, when it took the deposition of Stephen Rosenberg, Greystone's president, that explored, in detail, plaintiff's request for the assignment, as well as GNMA regulations and the need to obtain the requisite consents of the holders of the GNMA securities. Furthermore, even if plaintiff became aware of the circumstances underlying the negligence claim in late 2003, as it asserts, it still did not seek leave to amend the complaint until 2005. Where, as here, there is a failure to offer a reasonable excuse for

the long delay, then denial of the motion is a proper exercise of discretion (*Inwood Tower v Fireman's Fund Ins. Co.*, 290 AD2d 252 [1st Dept 2002]).

Plaintiff argues that the cause of action for negligence does not add any new facts to the case, but seeks only to add an additional theory in support of plaintiff's claim. The prejudice caused by the delay is exacerbated, however, where the proposed amended pleading seeks to introduce a new theory of liability (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003]). Moreover, defendants would be prejudiced because the alleged negligence occurred in February 1999, beyond the applicable three-year statute of limitations which would otherwise had run at the time that the motion to amend was made (*see Steinhardt Group v Citicorp*, 303 AD2d 326 [1st Dept], *lv denied* 100 NY2d 506 [2003]). Furthermore, defendants claim prejudice, because they tailored their discovery to the three original causes of action, and took only one deposition, that of Dimson, the former general partner of plaintiff who was primarily involved in the transaction at issue on plaintiff's behalf.

Finally, the proposed amended complaint does not appear to have merit, because plaintiff has not shown that defendants have breached a duty independent of any purported contractual obligation (*Old Republic Natl. Title Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678 [2d Dept 2005]).

Accordingly, it is

ORDERED that defendants' motion is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/20/05

ENTER: 9-20-05

J.S.C.

BERNARD J. FINE
J.S.C.

FILED
SEP 21 2005
NEW YORK
COUNTY CLERK'S OFFICE