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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

EMIGRANT BANK, and EMIGRANT MORTGAGE COMPANY, INC.,

Plaintiffs,

-against-

UBS REAL ESTATE SECURITIES, INC.,

Defendant.

INDEX NO. 602173/2006

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

FILED
MAR 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: March 14 2007

KARLA MOSKOWITZ 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 : IAS PART 3

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EMIGRANT BANK, and EMIGRANT MORTGAGE COMPANY, INC., Index No. 602173/2006

Plaintiffs,

-against-

DECISION and ORDER

UBS REAL ESTATE SECURITIES, INC.,

Defendant.

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Moskowitz, J.:

This case questions whether the parties entered into an enforceable contract or simply had an agreement to agree. Plaintiffs put out to bid a mortgage loan portfolio in an on-line auction, and defendant won as the highest bidder. Both the bid form, that defendant UBS Real Estate Securities, Inc. ("UBS") used to submit its bid, and a confirmation letter, that defendant sent plaintiffs several days later, expressly conditioned the sale on the execution of a mutually acceptable purchase and sale agreement. The parties then conducted weeks of negotiations over the composition of the loan portfolio and the price. When defendant objected to the portfolio's inclusion of certain types of mortgages, negotiations broke down, and the parties never finalized or executed a purchase and sale agreement.

Plaintiffs brought this action for breach of contract and other claims seeking both damages and specific performance. Defendant moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. Defendant contends that the complaint and documents show that the parties did not have a contract, but only an agreement to agree, and that the parties never agreed

to the price and to the mortgage pool composition – both essential times.[1]

Plaintiffs argue that the auction involved industry-standard bidding practices, resulting in a binding obligation on defendant as the buyer whose bid plaintiffs accepted and that defendant breached that obligation by refusing to close the deal. Plaintiffs claim that the parties intended to form a binding agreement. They also argue part performance of the agreement because, when they accepted defendant's bid, they refused other offers and took the mortgage portfolio off the market.

BACKGROUND

In spring 2005, plaintiffs Emigrant Bank and Emigrant Mortgage Company, Inc. (collectively, "Emigrant") hired HanoverTrade ("Hanover") to conduct an on-line bidding procedure to help sell certain Emigrant-originated mortgage loans. (Complaint, ¶ 6). The loans were a pool of approximately 342 residential mortgage loans (the "Portfolio"). (Id., ¶ 6). Many of these loans contained a Default Interest Rate Rider, that increased substantially the interest rate if an individual missed a payment on the mortgage. (Id., ¶¶ 15-17; Exh. A to Affirmation of Chad Eisenberger, dated July 26, 2006). On April 26, 2005, Emigrant posted its Portfolio offering on the Hanover web site and set a bidding deadline of May 25, 2005. (Complaint, ¶ 8). On Friday May 20, 2005, defendant UBS signed the required Confidentiality Agreement, giving it access to the information on the Hanover web site regarding the Portfolio. (Id., ¶ 10).

On May 25, 2005, UBS submitted its bid for the Portfolio. (Id., ¶ 11). The Best and

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[1] Because the court gave Emigrant permission on December 11, 2006 to make a post-submission filing for the court's consideration, the court reviewed these documents and finds that they do not alter the outcome of this case. Emigrant submitted two documents: (1) an email, dated May 25, 2005, between UBS and Hanover employees; and (2) an internal email, dated June 27, 2005, between UBS employees.

Final Bid Form ("Bid Form"), that bidders used to make their bids on the Hanover web site, contained blank spaces for the bid, either in dollars or as a percentage, and specified certain conditions that Emigrant, as the Seller, imposed. For example, Emigrant had the right to accept or reject any and/or all bids, and the "sale is subject to a mutually acceptable Purchase and Sale Agreement, which will be subject to negotiation, but substantially in the form of the agreement posted to the Hanover site." (Exh. A to Affidavit of Daniel Hickey, dated September 7, 2006; see also Complaint, ¶¶ 12-13). The Bid Form also included a space for additional "Conditions" that the bidder could supply. (Exh. A to Hickey Aff.). UBS chose to bid, as a percentage, for a Released Price (if Emigrant released and did not continue to service the loans) of 103.75% of the aggregate unpaid principal of the mortgages and for a Retained Price (if Emigrant retained and continued to service the Portfolio) of 102.5% of the aggregate unpaid principal of the mortgages. (Id.). UBS added a number of conditions to its bid, including that "a mutually acceptable mortgage loan sale and servicing agreement will be negotiated in good faith." (Id.). Emigrant orally accepted the bid and UBS' conditions. (Complaint, ¶ 14).

On Friday May 27, 2005, UBS sent a confirmation letter to Emigrant, that outlined various parameters of the purchase, including the cut-off date ("June 23, 2005 or such other date as mutually agreed to by the Seller and Purchaser"), the closing date ("June 28, 2005 or such other date as may be agreed upon between the parties hereto"), the aggregate unpaid principal, and the purchase price percentage, with proposed "Buy Up Percentage" and "Buy Down Percentage" provisions, among other provisions. (Exh. E to Hickey Aff.). This confirmation also contained a provision that "[t]his transaction is subject to the execution of a Master Seller's Warranties, Purchase and Interest Servicing Agreement ("the Agreement") between the Seller

and the Purchaser mutually acceptable to both parties and their respective legal counsel." (Id., ¶ 13). Under a subsection labeled "Due Diligence," UBS proposed that, in the event that its due diligence revealed a material variance in the quality of the mortgage loans or a material variance in the overall characteristics of the mortgage loan pool, Emigrant and UBS would negotiate in good faith a repricing, "provided, however, in the event that the Seller and Purchaser are unable to reach a mutually satisfactory agreement on such re-pricing, then the Purchaser shall have the right to cancel any obligation hereunder without any liability to the Seller or any third party." (Id., ¶ 10). Emigrant did not sign this confirmation letter. (Id. at 7).

Following the bidding, Emigrant and UBS proceeded to negotiate the material terms of the potential purchase, including the price and composition of the portfolio. (Complaint, ¶ 15). The parties marked up most of the pages of a 37-page, single-spaced draft purchase agreement but never signed it. (See Exhs. D and E to Eisenberger Affirm.). This draft purchase agreement contained many complex provisions about the transfer of mortgage servicing obligations, early payment defaults, termination and indemnification, but the Bid Form did not state these provisions. (See id.). Significantly, the merger clause in the draft agreement did not recognize the Bid Form as a governing document. (See Exh. E to Eisenberger Affirm., at 26, § 31). On June 28, 2005, in an e-mail from a Hanover employee to Emigrant, Hanover recommended a conference call between UBS and Emigrant as soon as possible "to determine the feasibility of moving forward" because of problems with a corporate loan issue and a pledged loan account issue. In addition, the parties needed to confirm the final pool composition and pricing. (Exh. C to Eisenberger Affirm.).

During this time, UBS continued to conduct its due diligence. Emigrant asserts that it

provided documents to UBS disclosing the presence of the Default Interest Rate Riders on a number of the mortgage loans in the portfolio and that UBS never objected to their presence. (Complaint, ¶ 15). According to Emigrant, on July 7, 2005, the parties completed negotiation of the documentation for the Purchase and Sale Agreement. (Id.). On July 7, 2005, UBS notified Emigrant that it would not execute the agreement and would not negotiate the transaction any further. (Id., ¶ 16). Emigrant alleges that UBS justified terminating the transaction because loans in the Portfolio contained Default Interest Rate Riders and UBS considered these loans non-customary and predatory. (Id., ¶ 17). Emigrant asserts that it has not been able to find another buyer for the portfolio. (Id., ¶ 46).

In or about June 20, 2006, Emigrant brought this action asserting six causes of action: breach of contract, negligent misrepresentation, promissory estoppel, breach of the duty of good faith, breach of the duty to negotiate in good faith and specific performance.

UBS now moves to dismiss the complaint for failure to state a claim and on the basis of documentary evidence. UBS argues that the court should dismiss the three causes of action sounding in contract (breach of contract, breach of the duty of good faith and breach of the duty to negotiate in good faith) because the parties did not reach a binding agreement. UBS asserts that Emigrant is asking this court to enforce a preliminary bid at a time when the parties had not fixed any of the material terms. In addition, UBS urges that Emigrant's oral acceptance of UBS' bid was expressly conditioned on the negotiation and execution of a mutually agreeable contract, and a conditional acceptance of an offer does not create a contract. Even if, as Emigrant claims, an agreement arose when UBS made its bid, UBS argues that the parties had not agreed on the material terms of the proposed contract. For example, not only did the Bid Form lack many

significant and material terms (e.g., termination, indemnification, early payment defaults and the transfer of the mortgage servicing obligations), the parties continued to negotiate the two most critical terms, price and Portfolio composition. UBS further argues that the parties expressly intended that only a final written agreement would bind them and that the parties never executed a final agreement. According to UBS, no agreement, not even a preliminary agreement to negotiate, existed because (1) the Bid Form contained an express reservation of the right not to be bound in the absence of a writing; (2) there was no partial performance by either party; (3) the parties had not yet agreed upon the key terms; and (4) this complex transaction, involving a loan portfolio worth approximately $100 million, is of a type usually committed to writing.

On the implied covenant claims, UBS asserts that these claims only arise when the parties have formed a contract but that the parties did not enter into an agreement and they had no binding agreement to negotiate a final agreement. UBS also contends that the statute of frauds bars these claims.

With respect to the remaining claims, UBS argues that they are similarly deficient and duplicative because plaintiffs base them on the unsupported theory that UBS broke a promise to buy the Portfolio. It asserts that none of the elements for a negligent misrepresentation claim are satisfied and that this claim duplicates the contract claim. On the promissory estoppel claim, UBS asserts that Emigrant fails to plead a clear and unambiguous promise to buy the Portfolio and that Emigrant's reliance on the conditional bid was not reasonable. UBS further argues that specific performance is not a separate cause of action and that it is inappropriate because damages would be an adequate remedy.

In opposition, Emigrant argues that the contract claims are sufficient, for parties can enter

into an enforceable agreement even when they contemplate a subsequent, more formal written contract. It contends that whether the parties intended their agreement to be binding is an issue of fact for the fact finder. Emigrant asserts that the language in the Bid Form and in the draft purchase and sale agreement does not constitute an express reservation of a right not to be bound prior to execution of a Purchase and Sale Agreement. Emigrant urges that it has partially performed the contract by accepting UBS' bid, taking the Portfolio off the market and drafting the draft purchase and sale agreement. Emigrant disputes that the Bid Form fails to contain essential terms and points to the form agreement on the Hanover web site. Emigrant argues that an objective method exists to supply any essential terms that are missing because the court can look to the July 7 draft Purchase and Sale Agreement to fill in the gaps.

Regarding the claims for breach of the duty of good faith and breach of the duty to negotiate in good faith, Emigrant contends that the damages it seeks on these claims differ from those it seeks on the contract claim. It further contends that a court could find a binding agreement to negotiate in good faith, even if it finds no binding agreement to purchase the Portfolio, and that this agreement was not merely an agreement to agree. As to defendant's statute of frauds argument, Emigrant asserts that the Bid Form and confirmation sufficiently satisfy the statute of frauds.

Emigrant urges that whether it adequately pleads a special relationship for the negligent misrepresentation claim is a question of fact and that this claim is independent of the breach of contract claim. It makes identical arguments with regard to the promissory estoppel claims.

DISCUSSION

The court grants defendant's motion to dismiss the complaint.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court affords the pleading a liberal construction and presumes the facts pleaded to be true, allegations that do not state a viable claim, bare legal conclusions and "'factual claims ... flatly contradicted by documentary evidence are not entitled to such consideration.'" (Mark Hampton, Inc. v Bergreen, 173 AD2d 220, 220 [1st Dept 1991], appeal denied 80 NY2d 788 [1992] [citation omitted]; Skillgames, LLC v Brody, 1 AD3d 247, 250 [1st Dept 2003]; see also CIBC Bank & Trust Co. (Cayman) Ltd. v Credit Lyonnais, 270 AD2d 138 [1st Dept 2000]; O'Donnell, Fox & Gartner, P.C. v R-2000 Corp., 198 AD2d 154, 154 [1st Dept 1993]). Likewise, pursuant to CPLR 3211 (a) (1), dismissal is warranted if the documentary evidence submitted "definitively dispose[s] of the claim" (Demas v 325 West End Ave. Corp., 127 AD2d 476, 477 [1st Dept 1987]; see also 150 Broadway N.Y. Assocs., L.R. v Bodner, 14 AD3d 1 [1st Dept 2004] [contract constituted documentary evidence warranting dismissal of complaint]), or "conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d 83, 88 [1994]; see also Fast Track Funding Corp. v Perrone, 19 AD3d 362 [2d Dept 2005]). The documentary evidence in this case demonstrates that plaintiffs' claims are not viable and are unsupportable.

The first, fourth, and fifth causes of action are all contract claims, based on Emigrant's allegations that the Bid Form and Emigrant's oral acceptance of UBS' bid constitute an enforceable agreement. To state a claim for a breach of contract, a plaintiff must allege an enforceable contract, plaintiff's performance and defendant's breach. As the party seeking to enforce a contract, ultimately the plaintiff has the burden of establishing the existence of a binding contract and proving the terms of that contract. (Allied Sheet Metal Works, Inc. v Kerby Saunders, Inc., 206 AD2d 166, 169 [1st Dept 1994]; see also Croman v Wacholder, 2 AD3d 140

[1st Dept 2003] [where there is no agreement, there can be no breach]).

The agreement upon which Emigrant relies for these claims is not binding for several reasons. First, the Bid Form, and Emigrant's oral acceptance of it, was an agreement to agree, because Emigrant expressly conditioned it on "a mutually acceptable Purchase and Sale Agreement, which will be subject to negotiation, but substantially in the form of the agreement posted to the Hanover site" (Exh A to Hickey Aff.), and UBS expressly conditioned the parties' agreement on "a mutually acceptable mortgage loan sale and servicing agreement [that] will be negotiated in good faith" (id.). Where, as here, the parties have clearly manifested an intent not to be bound until they have a mutually acceptable, executed written agreement, they cannot be bound without that agreement. (See Scheck v Francis, 26 NY2d 466, 469-70 [1970]; Prospect Street Ventures I, LLC v Eclipsys Solutions Corp., 23 AD3d 213 [1st Dept 2005] [agreement expressly conditioned on the "'execution of a definitive agreement satisfactory in form and substance'" to both sides is an unenforceable agreement to agree]; Kalimian v MTM Associates, 280 AD2d 275 [1st Dept 2001], lv dismissed 96 NY2d 822 [2001] [agreement unenforceable because, at most, it reflects intent to conduct further negotiations and not to be bound until execution of formal contract]; Hollinger Digital, Inc. v Looksmart, Ltd., 267 AD2d 77 [1st Dept 1999] [parties expressed intent not to be bound until they executed the stock purchase agreement and delivered all requisite consents]; LaRuffa v Fleet Bank, N.A., 260 AD2d 299 [1st Dept 1999] [parties expressed intent not to be bound to any understanding or agreement until reduced to writing and signed]; Chatterjee Fund Mgt., L.P. v Dimensional Media Assocs., 260 AD2d 159 [1st Dept 1999] [parties had no contract even if they orally agreed upon all terms because they did not intend to be bound until agreement reduced to writing and signed]; Prestige Foods, Inc. v

Whale Securities Co., L.P., 243 AD2d 281 [1st Dept 1997] [letter agreement expressly states that neither party had any legal obligation to other until both executed and delivered agreement]).

For example, in Aksman v Xiongwei Ju (21 AD3d 260 [1st Dept], lv denied 5 NY3d 715 [2005]), the court found that the parties' letter of intent was clearly a preliminary, non-binding proposal to agree and dismissed the plaintiff's breach of contract complaint. Specifically, the letter expressed the parties' intent to enter into a contract "'at a later date' and nowhere states that they intend to be legally bound until such future agreement is reached." (Id. at 261 [quoting letter of intent]). The letter of intent, that stated repeatedly that a contract would eventually replace the letter of intent, also reflects the parties' intent not to be bound until execution of that contract. (Id. at 261-62). Thus, the court concluded that the documentary evidence conclusively refuted the plaintiff's claim of an enforceable agreement. (Id. at 262).

Similarly, in Prospect Street Ventures I, LLC, the court found that a condition in the parties' letter agreement, that made the purchase dependent upon the "'execution of a definitive agreement satisfactory in form and substance'" to both parties and that the parties had not waived, precluded the formation of a contract in the form of the letter agreement. (23 AD3d 213, supra). Likewise, in Chatterjee Fund Mgt., L.P., the court found that the parties expressed an intent not to be bound until they reduced their agreement to writing and signed it. (260 AD2d 159, supra). Specifically, the language in the parties' written summary of intention indicated that any agreement was "'[s]ubject to legal and tax counsel' and to all of the requirements outlined under paragraph 20, including '[n]egotiation of a definitive agreement and documentation.'" (Id.). The court concluded that the parties did not have an enforceable contract. (Id.).

In this case, both parties expressed their intent not to bind themselves until they

negotiated and executed a mutually acceptable agreement. Contrary to Emigrant's contention, the confirmation UBS sent, that outlined its proposals for the deal, including newly added "Buy Up Percentage" and "Buy Down Percentage" provisions, as well as a host of other provisions, did not negate this condition. Because this confirmation contained provisions at variance with the Bid Form, the confirmation could be a further counteroffer by UBS or, at best, negotiations for a final agreement. Rather than negate the condition in the Bid Form, the confirmation also explicitly conditions the confirmation upon "execution of a Master Seller's Warranties, Purchase and Interest Servicing Agreement (the 'Agreement') between the Seller and the Purchaser mutually acceptable to both parties and their respective legal counsel." These conditions mirror those in the Bid Form.

The confirmation further stated, in the due diligence section, that UBS would conduct due diligence while the parties negotiated. Specifically, if due diligence revealed a material variance in the quality of the mortgage loans or in the overall characteristics of the pool and if the parties could not reach a mutually satisfactory agreement, UBS had the right to cancel any obligation without any liability to Emigrant. This language further supports the conclusion that the parties' proposed agreement was subject to a final purchase agreement. The UBS chart (Exh. F to Hickey Aff.), upon which Emigrant also relies, simply organizes some of the provisions in the Bid Form into a chart and does not negate the condition of signing a formal purchase agreement to bind the parties.

The cases that Emigrant cites are distinguishable and inapposite. Unlike this case, Emigrant's cases involve oral communications in which the court had to ascertain the parties' intent to determine if a contract existed. (See e.g. Metro-Goldwyn-Mayer, Inc. v Scheider, 40

NY2d 1069 [1976] [when parties had an oral agreement on substantially all essential terms and had begun performance with understanding that agreement on unsettled matter would follow, court finds and enforces contract]; Consarc Corp. v Marine Midland Bank, N.A., 996 F2d 568 [2d Cir 1993] [determining if parties intended to be bound by oral agreement followed by letters, without express intent not to be bound without written contract]). Thus, these cases are factually distinguishable. Here, the court need not piece together oral conversations to discern whether the condition existed because both the Bid Form and the confirmation required a mutually acceptable agreement. In addition, unlike the cases Emigrant cites, both parties communicated in writing an intent not to be bound until they achieved a mutually acceptable purchase agreement, and, under these circumstances, no amount of negotiation or oral agreement on specific terms will result in the formation of a binding contract. (Winston v Mediafare Entertainment Corp., 777 F2d 78 [2d Cir 1986]). Other cases Emigrant relies upon are inapposite. (See e.g. Lazard Freres & Co. v Protective Life Ins. Co., 108 F3d 1531 [2d Cir] cert denied 522 US 864 [1997] [court determines if defendant's fraudulent inducement defense is subject to summary judgment]).

Further, the court rejects Emigrant's assertion that UBS' indication that they had a "trade" proves a binding agreement. This expression is insufficient to bind parties who have reserved the right to be bound by a written, mutually acceptable purchase agreement. (See e.g. Ciaramella v Reader's Digest Assn., 131 F3d 320, 325 [2d Cir 1997] [words "[w]e have a deal" were not a waiver of express signature requirement]; R.G. Group, Inc. v Horn & Hardart Co., 751 F2d 69, 76 [2d Cir 1984] [handshake agreement was not a waiver of requirement that contract be in writing]; Spencer Trask Software and Information Servs. LLC v RPost Intl. Ltd., 383 F Supp 2d 428 [SDNY 2003] [admission of an "agreement on terms" and handshake on oral agreement does

not establish intent to be bound]; Davidson Pipe Co. v Laventhol & Horwath, 1986 WL 2201, at *5 [SDNY 1986] [statement "we have a deal" is not sufficient to bind parties who reserved right to be bound only by executed contract]).

In addition, for a court to enforce a promise, the promise "must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves." (Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109 [1981]). Thus, vagueness or uncertainty is insufficient because there must be definiteness as to the material terms. (Id.; see also Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d 475, 482 [1989], cert denied 498 US 816 [1990]; Metro-Goldwyn-Mayer v Scheider, 40 NY2d 1069, supra). While parties need not fix all terms of a contract with complete certainty, an agreement in which a material term is left for future negotiations is not enforceable. (Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d at 109; Express Indus. and Terminal Corp. v New York State Dept. of Transp., 93 NY2d 584, 589-90 [1999]).

Here, the complaint alleges that the parties entered into an agreement when Emigrant orally accepted UBS' conditional bid (Complaint, ¶ 14), but, even after that, throughout June 2005, the parties had not agreed to key contractual terms. Both sides clearly contemplated and specifically provided for in the Bid Form, negotiation and execution of a "mutually acceptable" Purchase and Sale or mortgage loan sale and servicing agreement. (Exh. A to Complaint and to Hickey Aff.). The draft purchase agreement, that was 37 single-spaced pages and that the parties negotiated and amended, did not yet exist. (Exh. E to Eisenberger Affirm.; see Complaint, ¶ 15).

This draft agreement, that the parties never finally agreed to or signed, contained numerous provisions regarding the purchase that were not in the Bid Form or in Emigrant's acceptance. For example, the draft agreement contained provisions about transferring the servicing obligations on the mortgage loans; a key provision on a purchase of over 340 residential mortgage loans; a provision about early payment defaults; an indemnification provision and provisions regarding termination.

Most importantly, the documentary proof the parties submitted shows that they negotiated two essential, material terms – price and the composition of the Portfolio – for weeks after they allegedly entered into the purported contract. (Exh. C to Eisenberger Affirm.). UBS submitted an email, dated June 28, 2005, from Hanover to Emigrant, with copies to various UBS employees, that indicates that a meeting was needed "to determine the feasibility of moving forward." Specifically, the email lists issues about certain corporate loans (corporate borrowers on the residential mortgages), a pledged loan account, and a representations and warranties agreement. The email also states that the parties needed to confirm and agree on the final pool composition and pricing. (Id.).

Emigrant admits that, after May 26, 2005, the parties changed the price because fewer of the loans in the portfolio carried prepayment penalties than originally represented. (Hickey Aff., ¶ 18). UBS then discovered other discrepancies in the characteristics of certain loans, resulting in some loans being removed and others added. (Id., ¶ 19). Thus, the parties negotiated "price adjustments" after the Bid Form and confirmation letter. (Id.). The parties negotiated the "Buy Up" and "Buy Down" provisions after the Bid Form, and these provisions could not address some of the adjustments. The lack of agreement on these material terms warrants the conclusion

that the parties did not reach an enforceable agreement. (See Donaldson Acoustics Co. v NAB Construction Corp., 273 AD2d at 192-93 [where, after accepting bid, the parties were still negotiating its terms, including a critical issue, no complete agreement on essential terms was reached]; Ciaramella v Reader's Digest Assn., 131 F3d at 325 [no agreement on settlement because substantive material terms were unsettled]; Cleveland Wrecking Co. v Hercules Constr. Corp., 23 F Supp 2d 287, 296 [EDNY 1998], affd 198 F3d 233 [2d Cir 1999] [while price was initially agreed upon, once it significantly changed, the concordance dissolved]; Time, Inc. v Kastner, 972 F Supp 236, 239 [SDNY 1997] [contract lacking essential term of price is unenforceable]).

Moreover, the court cannot supply the essential terms of price and portfolio composition through an objective method of determination, such as industry custom and usage. (See Cobble Hill Nursing Home, Inc. v Henry and Warren Corp., 74 NY2d 475, supra). When the parties have manifested an intent to be bound, a price term may be sufficiently definite if the court can determine it objectively without further expressions of the parties. For example, where the agreement sets forth a method for determining the missing term or commercial practice or trade usage can supply the missing term, the court may resort to this evidence. (Id. at 483; see also Metro-Goldwyn-Mayer v Scheider, 40 NY2d 1069, supra [industry custom and usage to fill in the blanks in a contract]). Evidence of industry custom and usage, however, must establish that the omitted term is fixed in the industry. (Cooper Square Realty, Inc. v A.R.S. Management, Ltd., 181 AD2d 551 [1st Dept 1992]). In this case, Emigrant fails to provide any objective way of determining the price or portfolio composition. Its reference to industry custom and usage is not as a gap filler. Instead, Emigrant refers to industry custom and usage in connection with its

claim that the terms "trade" and "trade date" meant that the parties had an agreement and intended to waive the condition for a written purchase and sale agreement. Emigrant fails to provide any cases to support use of industry custom to establish the making of a contract when the parties have expressed their intent not to be bound without a final agreement. Nor has the court found any cases to support Emigrant's contention.

Emigrant also relies on the case Teachers Ins. Annuity Assn. of Am. v Tribune Co. (670 F Supp 491 [SDNY 1987] [Tribune]) to urge that there was a preliminary agreement to negotiate in good faith. At issue in Tribune was the nature of the obligations that arose out of a loan commitment letter agreement between the parties when the letter specifically provided that it was a "binding agreement." Defendant Tribune contended that the letter agreement was an undertaking to negotiate and not binding. The plaintiff argued that, while the commitment letter was not a loan agreement, it was a binding commitment that obligated both parties to negotiate in good faith toward a final contract. It argued that the open terms in the letter were of minor significance. (Id. at 496-97).

The Tribune court recognized that there is a strong presumption against finding binding obligations in agreements when the parties expressly anticipate future negotiation, preparation and execution of contract documents and when the agreements include open terms. The Tribune court then went on to find a binding preliminary agreement to negotiate in good faith because the parties' letters contained express language of "firm commitment" and the terminology of a binding contract. (Id. at 499-506). In making that determination, the court distinguished two types of informal preliminary contracts that bind parties in different ways. (Id. at 498; see also Adjustrite Sys. v GAB Business Servs., Inc., 145 F3d 543, 547-48 [2d Cir 1998] [applying New

York law]). First, there are fully binding preliminary agreements, where the parties agree on all major negotiable points, including whether to be bound, but wish to memorialize their agreement in a more formal document. (Teachers Ins. and Annuity Assn. of Am. v Tribune Co., 670 F Supp at 498). This "Type I" agreement is preliminary in form only and is fully enforceable, binding both parties to their ultimate contractual objective. (Id.). The second type of preliminary agreement, referred to as a "binding preliminary commitment," occurs when the parties agree on certain major terms but contemplate further negotiations over other terms. (Id; see also Adjustrite Sys. v GAB Business Servs., Inc., 145 F3d at 547-48). These "Type II" contracts are binding only in the sense that the parties "'accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement.'" (Id. at 498 [citation omitted]). If, however, the parties did not intend that the preliminary writing was binding at all, the writing is a mere proposal, and the parties do not have an obligation to negotiate further. (See Adjustrite Sys. v GAB Business Servs., Inc., 145 F3d at 548). The key is the intent of the parties.

The Tribune court identified four factors to use to analyze "Type I" agreements: (1) whether there is an express reservation of the right not to be bound until there is a written and executed contract; (2) whether there has been partial performance of the contract; (3) whether all terms have been agreed upon or if there are open terms; and (4) whether the agreement is of the type that parties normally commit to writing. (670 F Supp at 497-506; see also Adjustrite Sys. v GAB Business Servs., Inc., 145 F3d at 549; Winston v Mediafare Entertainment Corp., 777 F2d at 80). The factors the court applies to "Type II" agreements are the same except to add the context of the negotiations. (Tribune, 670 F Supp at 500-501; see Arcadian Phosphates, Inc. v Arcadian Corp., 884 F2d 69, 72 [2d Cir 1989]).

In applying these factors to the facts before it, the Tribune court determined that the commitment letter represented a "Type II" binding preliminary agreement, that obligated the parties to negotiate in good faith to resolve the additional open terms, and that the defendant could not abandon the transaction without so negotiating. (Tribune, 670 F Supp 491, supra). As to the intent factor, the court emphasized that the commitment letters were "replete with the terminology of binding contract," that demonstrated an "intention to create mutually binding contractual obligations" and that the parties stated this intent with "unmistakable clarity." (Id. at 499). In considering the context of the negotiations, the court found it significant that the defendant advised the plaintiff by letter that it wanted a "firm commitment." (Id. at 500). The court also pointed out that the defendant's lawyers, recognizing that the commitment letters expressly committed Tribune to a "binding" obligation, warned the defendant of the consequences of signing it, and, yet, the defendant did not raise any question about the binding agreement language. (Id.). As to the open terms factor, the court found that there was "no absence of agreement on the basic terms of the mortgage." (Id. at 501). The Tribune court also found significant partial performance by the plaintiff in allocating the funds it had committed to loan the defendant, specifically reserving them for the Tribune loan. (Id. at 502). Finally, the court found that it was customary in the relevant business community to accord binding force to the type of informal, preliminary commitment in that case. (Id. at 503).

This case is distinguishable from Tribune in several important respects. First, both parties expressed an intent not to bind themselves and conditioned the purchase and sale on a mutually acceptable agreement in the Bid Form. The confirmation further supports this expression of intent by also expressly providing that the transaction was subject to the execution

of a purchase and servicing agreement. (See Prospect Street Ventures I, LLC v Eclipsys Solutions Corp., 23 AD3d 213, supra; Kalimian v MTM Associates, 280 AD2d 275, supra). Even if these express provisions were not considered conclusive evidence of an express reservation, "where there is no clear indicia, 'the presumption rests with an intent not to be bound.'" (Cleveland Wrecking Co. v Hercules Constr. Corp., 23 F Supp 2d at 296 [citation omitted]; see also Beekman Investment Partners, L.P. v Alene Candles, Inc., 2006 WL 330323 [SDNY 2006] [letter of intent is not a Type II agreement for the same reason it is not a Type I agreement – the parties' explicit statement of their intent not to be bound]). Second, the Bid Form or the confirmation did not contain any language about a "binding" obligation or a "firm commitment." Third, as discussed above, there were essential open terms of price, portfolio composition and servicing of the loans, and these open terms, unlike the "open secondary terms" in Tribune (670 F Supp at 502), support the conclusion that the parties did not intend to bind themselves.

Emigrant cannot find much support in its claim of partial performance, because partial performance requires actual performance of the contract and Emigrant must have conferred something of value upon UBS. (Cleveland Wrecking Co. v Hercules Constr. Corp., 23 F Supp 2d at 296-97). Emigrant's performance consisted simply of taking the portfolio off the Hanover web site and not selling it to another party while UBS conducted its due diligence. This is not a performance of the contract and did not necessarily confer something of value on UBS. (cf. Goodstein Constr. Corp. v City of New York, 67 NY2d 990 [1986] [part performance existed where plaintiff performed all terms and conditions that the designation agreements imposed and expended substantial sums in negotiating with a third party, but defendant, without cause and for

improper motives, de-designated plaintiff]).

With regard to the fourth factor, a contract of this magnitude and complexity is of a type usually committed to writing. (See Adjustrite Sys. v GAB Business Servs., Inc., 145 F3d at 549-51). As to the additional factor for a Type II agreement, the context of the negotiations, this factor suggests the preliminary nature of the parties' agreement. The Bid Form was the first formal negotiation, and the parties operated under the limited time given for the bids, with the resultant agreement being predicated on additional negotiations and UBS's due diligence. (See Cleveland Wrecking Co. v Hercules Constr. Corp., 23 F Supp 2d at 298). In contrast, in Tribune, during the negotiations, the defendant sought a "firm commitment" from the plaintiff and did not raise any questions about the "binding agreement" language, notwithstanding its counsel's warnings. Accordingly, Emigrant's contention that the Bid Form with the confirmation was a preliminary agreement to purchase the Portfolio (a Type I agreement) or a preliminary agreement to negotiate in good faith (a Type II agreement) fails under the analysis in Tribune. Therefore, Emigrant fails to state a claim for relief for either a breach of contract or a breach of the duty to negotiate in good faith (the first and fifth causes of action).

The court also dismisses the claim for breach of the implied duty of good faith. The allegations underlying this claim go to the heart of the alleged agreement between the parties and are inseparable from the insufficient breach of contract claim. It is redundant of the first and fifth causes of action and, therefore, the court dismisses it. (See National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp., 25 AD3d 309, 310 [1st Dept], lv dismissed 7 NY3d 886 [2006]; Triton Partners LLC v Prudential Securities Inc., 301 AD2d 411 [1st Dept 2003]; Shilkoff, Inc. v 885 Third Ave. Corp., 299 AD2d 253 [1st Dept 2002]).

The legal insufficiency of the contract claims also requires dismissal of the promissory estoppel claim, because the inclusion of the condition, that the transaction was subject to a mutually acceptable purchase and sale agreement, precludes the element of detrimental reliance. (See Prospect Street Ventures I, LLC v Eclipsys Solutions Corp., 23 AD3d at 214; Chatterjee Fund Mgt., L.P. v Dimensional Media Assocs., 260 AD2d 159, supra; Hollinger Digital, Inc. v Looksmart, Ltd., 267 AD2d 77, supra; Prestige Foods, Inc. v Whale Securities Co., L.P., 243 AD2d 281, supra). In addition, this claim fails because a breach of contract claim may not be considered a tort unless there is a violation of a legal duty independent of the contract, and there is no legal duty here. (See Brown v Brown, 12 AD3d 176 [1st Dept 2004] [promissory estoppel claim dismissed because it fails to allege a legal duty independent of the contract]). The "failure of the parties' complex business negotiations did not . . . give rise to a claim for damages." (NGR, LLC v General Elec. Co., 24 AD3d 425 [2d Dept 2005]; see Wiscovitch Assocs., Ltd. v Philip Morris Cos., 193 AD2d 542 [1st Dept 1993]).

Similarly, the negligent misrepresentation claim is insufficient because it merely duplicates the insufficient breach of contract (see River Glen Assocs., Ltd. v Merrill Lynch Credit Corp., 295 AD2d 274 [1st Dept 2002]), and the conventional business relationship between Emigrant and UBS is not of a confidential or fiduciary nature (id.). Moreover, as with the promissory estoppel claim, Emigrant cannot allege reasonable reliance upon the claimed representations. (Id.).

Finally, with respect to the claim for specific performance, as UBS correctly contends, there is no separate cause of action for specific performance. Because the claims for breach of contract are dismissed above, there is no basis for this relief. In addition, specific performance is

not appropriate where money damages would adequately protect the interests of the injured party. (See Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409 [2001]). These mortgage loans have a market value, and there is no allegation that they are unique. Therefore, the court dismisses the sixth cause of action.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 14, 2007

ENTER:

J.S.C.