

**Great Ajax Operating Partnership L.P. v PCG REO Holdings, LLC**

2020 NY Slip Op 30545(U)

February 25, 2020

Supreme Court, New York County

Docket Number: 651490/2017

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**GREAT AJAX OPERATING PARTNERSHIP L.P.,**

**Plaintiff,**

**-against-**

**PCG REO HOLDINGS, LLC and ROUNDPOINT  
MORTGAGE SERVICING CORPORATION,**

**Defendants.**

----- X  
**O. PETER SHERWOOD, J.:**

**DECISION AND ORDER**

**Index No.: 651490/2017**

**Mot. Seq. No.: 002**

Defendants PCG REO Holdings, LLC and Roundpoint Mortgage Servicing Corporation (Roundpoint) (collectively, Defendants) move for an order, pursuant to CPLR 3212, dismissing the complaint and awarding them reasonable attorneys' fees and costs pursuant to the governing Mortgage Loan and REO Purchase and Interim Servicing Agreement (the Agreement).

In this breach of contract action, plaintiff Great Ajax Operating Partnership L.P. (Great Ajax) purchased certain bank-owned properties (the REO Properties) and several dozen mortgage loans from defendants pursuant to the Agreement. Plaintiff claims defendants failed to timely transfer the deeds to the REO Properties, and completely failed to transfer a mortgage loan on a property known as 974 Closter Dock Road (the 974 Closter Dock Mortgage). Defendants contend plaintiff's claim regarding the REO Properties is barred by the terms of the Agreement both as untimely and for failure to give notice of breach. Defendants also argue the evidence establishes the transfer was timely. Defendants further urge that while it is undisputed that the 974 Closter Dock Mortgage identified the wrong property, the inadvertent error was remedied in an action in New Jersey brought by plaintiff and Roundpoint. Defendants contend the remaining causes of action duplicate the breach of contract claims, fail to state a claim, and that plaintiff fails to produce any evidence of damages.

Plaintiff contends defendants' motion is defective on its face for failure to submit an affidavit of a person with knowledge. It further contends its contract claims are not barred because the notice of breach requirement does not apply to defendants' breach, and there are fact issues as to whether delivery of the deeds satisfied the Agreement. Plaintiff also argues that defendants

breached by failing to transfer a valid mortgage loan and the New Jersey action did not resolve that issue.

### **BACKGROUND**

On February 17, 2015 (the Closing Date), the parties entered into the Agreement. Pursuant to the Agreement, plaintiff purchased a number of mortgage loans, including the 974 Closter Dock Mortgage, and the five REO Properties at issue in **this action** (NYSCEF Doc. No. 58, defendants' Rule 19-a statement at 1; NYSCEF Doc. No. 60, plaintiff's Rule 19-a counterstatement at 1 together hereafter SUMF at 1). The Agreement provided that **defendants would deliver** to plaintiff the "Asset File," defined as the file containing documents pertaining to each of the REO Properties, and the "Servicing File" containing documents regarding the origination and servicing for each mortgage loan, "promptly following the Servicing Transfer Date" (NYSCEF Doc. No. 39, Agreement § 1.01 at 1, 5; § 2.04[b] at 7). In the Agreement, plaintiff agreed each Servicing File contains only the items in defendants' possession, and defendants were not "responsible for curing or delivering any deficiencies or missing documents" and would have no obligation or liability for deficient or missing documents (*id.*). The Argument defined the "REO Deeds" as "[a]n original, special or limited warranty deed executed by the related Seller [defendants] . . . to [plaintiff] . . . in a form that is customary for commercial transactions, and sufficient for recording in the jurisdiction in which the REO Property is located" (*id.* at 4).

Pursuant to section 3.04(a), defendants' representations and warranties, including regarding the information in the asset schedule annexed as exhibits A and B to the Agreement, and regarding defendants' title to the mortgage loans and REO Properties, survived six months from the Closing Date (*id.* at 10). In section 3.04(b), the parties agreed that in the event of breach, plaintiff was required to send defendants written notice within 30 days of discovery and the notice was required to be delivered no later than six months after the Closing Date, August 17, 2015 (*id.*). Defendants then had a 90-day cure period or could elect to reimburse plaintiff an amount equal to the reduction in the affected mortgage loan value or REO Property based on the breach (*id.*). Thus, plaintiff's remedies in the event of a breach were limited to cure or repurchase (*id.*, Agreement § 3.04[f] at 12). Section 5.04 provided that "[i]n no event shall any party hereto be liable for any indirect damages, including consequential, incidental, exemplary or special damages, or any punitive damages (*id.* at 21). In the event of an action to enforce the Agreement, the parties agreed

that “the predominantly prevailing party” is entitled to recover reasonable attorneys’ fees and costs (*id.*, Agreement § 5.13 at 23).

#### **A. The REO Deeds**

In March 2015, the parties began working together to transfer the REO Deeds to plaintiff (*see* NYSCEF Doc. No. 40, March 2015 emails). On March 31, 2015, Roundpoint executed and delivered deeds concerning three of the five REO Properties (NYSCEF Doc. No. 58, ¶ 8; NYSCEF Doc. No. 60, ¶ 8; *see also* NYSCEF Doc. No. 41, March 2015 REO Deeds). On June 2, 2015, Roundpoint executed and delivered a deed concerning a fourth REO Property (NYSCEF Doc. No. 58, ¶ 9; NYSCEF Doc. No. 60, ¶ 9).

In August 2015, defendants delivered the deed for the fifth REO Property (*see* NYSCEF Doc. No. 43). By email dated August 21, 2015, plaintiff’s servicer, Gregory Funding LLC, sent a message to Roundpoint indicating they were trying to record the deeds, but that in order to record the deeds in New York

“we need to record QCD [quitclaim deed] within 30 days from QCD was issued otherwise, we will have to [pay] 5% of the tax amount for the first 5 months . . . Could you please issue[] us new QCDs for the six properties in NY? I apologize[] for the inconvenience cause[] and we appreciate all the help that you have given us so far”

(NYSCEF Doc. No. 43, Aug 21, 2015 email from Harline Chandra; *see also* NYSCEF Doc. No. 35, deposition of Harline Chandra [Chandra tr] at 19-20, 63-64, 69-70). Thus, plaintiff requested Roundpoint issue new deeds because it was seeking to save 5% on transfer taxes in recording the deeds (*see* NYSCEF Doc. No. 36, deposition of Jahni Troiano [Troiano tr] at 57). Roundpoint agreed to assist Plaintiff, offered to use its own title company to record the deeds, and plaintiff accepted the help (*see* NYSCEF Doc. No. 58, ¶ 14; NYSCEF Doc. No. 60, ¶ 14). New documents for each of the REO Properties were then prepared and re-executed (NYSCEF Doc. No. 44, REO Deeds). New Deeds for each of the REO Properties have been recorded (NYSCEF Doc. No. 58, ¶ 18; NYSCEF Doc. No. 60, ¶ 18). Plaintiff did not provide written notice of any breach by defendants.

#### **B. The Mortgage Loan**

On May 29, 1996, certain borrowers (the Borrowers) signed a \$200,000 note secured by a mortgage on real property located at 970 Closter Dock Road, Alpine, NJ (the 970 Mortgage). On

February 6, 1998, the same Borrowers signed a \$185,000 note secured by a mortgage on adjacent real property located at 974 Closter Dock Road (the 974 Mortgage). Due to a scrivener's error made at the time of the loan origination, the 974 Mortgage inadvertently referenced 970 Closter Dock, instead of 974 Closter Dock, but the property description annexed to the 974 Mortgage correctly contained a description of 974 Closter Dock (NYSCEF Doc. No. 58, ¶¶ 19-22; NYSCEF Doc. No. 60, ¶¶ 19-22). The Agreement provided, among other things, for plaintiff's purchase of a mortgage loan taken by the Borrowers in the initial principal amount of \$200,000 (the Contract Loan) allegedly secured by 974 Closter Dock (NYSCEF Doc. No. 58, ¶ 23; NYSCEF Doc. No. 60 ¶ 23). Rather than transfer the Contract Loan, Defendants mistakenly delivered loan documents concerning the 970 Mortgage (NYSCEF Doc. No. 58, ¶ 24; NYSCEF Doc. No. 63, affidavit of Adam Simms [Simms aff], ¶ 28). The 970 Mortgage was paid off on February 14, 2011, but as of the Closing Date the lien remained of record (NYSCEF Doc. No. 58, ¶ 25; NYSCEF Doc. No. 60, ¶ 25). Due to the mistake made at origination, the 974 Mortgage was mistakenly satisfied as opposed to the 970 Mortgage, and the original note for 974 Closter was mistakenly returned to the Borrowers (NYSCEF Doc. No. 58, ¶¶ 26-27; NYSCEF Doc. No. 60, ¶¶ 26-27).

On March 31, 2015, Roundpoint sent Borrowers a letter advising them servicing of the 974 Mortgage was being transferred to plaintiff's servicing agent Gregory Funding (NYSCEF Doc. No. 58, ¶ 29; NYSCEF Doc. No. 60, ¶ 29). On August 9, 2016, Roundpoint and Gregory Funding held a conference call to discuss the resolution of the issues with the 970 Mortgage and the 974 Mortgage and agreed to work together to institute a proceeding in New Jersey to reinstate the 974 Mortgage (NYSCEF Doc. No. 58, ¶¶ 30-33; NYSCEF Doc. No. 60, ¶¶ 30-33).

On January 16, 2018, Roundpoint and plaintiff jointly commenced an action, entitled *RoundPoint Mortgage Servicing Corp. and US Bank National Association, As Indenture Trustee on Behalf of And With Respect To Ajax Mortgage Loan Trust 2015-B, Mortgage Backed Notes Series 2015-B v McCaffrey et al.*, Sup Court, **New Jersey Bergen County Docket No. C-15-18** (the New Jersey Action) seeking to (1) **rescind the satisfaction of mortgage**; (2) **reinstate the note**; and (3) reform the loan documents to correctly reference 974 Closter Dock Road (NYSCEF Doc. No. 58, ¶ 34; NYSCEF Doc. No. 60, ¶ 34). The Borrowers contested with affirmative defenses and a counterclaim. On August 14, 2018, after a full briefing and over the Borrowers' objections, the New Jersey court granted the relief Roundpoint and Plaintiff sought. In the decision and order, the New Jersey court held that due to a scrivener's error at the time of origination, the 974

Mortgage inadvertently referenced 970 Closter Dock Road, the 974 Mortgage was intended to encumber 974 Closter Dock Road, Roundpoint inadvertently recorded the satisfaction of the 974 Mortgage instead of the 970 Mortgage, the 974 Mortgage should be corrected and reformed to properly reflect that it encumbers 974 Closter Dock Road, and the 974 Mortgage is valid and enforceable collateral security instrument (NYSCEF Doc. 53).

On March 22, 2017, plaintiff commenced this action. The amended complaint asserts eight causes of action: (1) breach of contract for defendants' failure to timely and properly transfer the REO Properties; (2) breach of the implied covenant of good faith regarding the transfer the REO Properties; (3) negligence; (4) breach of contract against Roundpoint for failing to transfer a valid mortgage loan for 974 Closter Dock Road; (5) breach of the covenant of good faith regarding the transfer of the 974 Mortgage; (6) fraud in connection with the transfer of the 974 Mortgage; (7) fraud in connection with the transfer of the REO Properties; and (8) attorneys' fees and costs as the prevailing party (NYSCEF Doc. No. 54). Defendants answered the complaint, the parties completed discovery, and plaintiff filed a Note of Issue (NYSCEF Doc. Nos. 55-56).

Defendants move for summary judgment dismissing the complaint. They assert that both of plaintiff's breach of contract claims must be dismissed because they are barred by the Agreement, which clearly provides that defendants' representations and warranties would only survive six months after the Closing Date and requires plaintiff to give written notice within 30 days of discovery. It is undisputed that plaintiff failed to give timely notice much less written notice. In addition, they contend plaintiff's claims for money damages are barred by the Agreement, which explicitly limits remedies in the event of breach to cure or repurchase and prohibits incidental or consequential damages. It is undisputed plaintiff did not demand repurchase, nor did it demand cure, and the deeds have been delivered and recorded. Defendants further argue that the undisputed evidence demonstrates they timely transferred the REO Properties, and any delay in recording did not affect the validity of the transfer which occurred upon signing the Agreement. Defendants assert that the fourth claim for breach of contract for failure to transfer a valid loan is not only barred by plaintiff's failure to demand cure or repurchase, but plaintiff is estopped from asserting this claim based on the successful prosecution of the New Jersey Action.

Defendants further contend the breach of the covenant of good faith, negligence and fraud claims are all barred as duplicative of the contract claims and fail to state a claim. Defendants

argue plaintiff is also estopped from asserting the sixth claim for fraud in connection with the 974 Mortgage, based on both parties' assertions in the New Jersey Action that the error was a scrivener's error and a mutual mistake. This judicial admission bars any fraud claim. With respect to the seventh cause of action, for fraud, plaintiff asserts defendants fraudulently represented their intentions to transfer the properties in order to induce plaintiff to refrain from exercising its rights under the Agreement. Defendants contend these alleged misrepresentations are disproven by the evidence that the properties were effectively transferred as of the Closing Date, and, in any event, four of the deeds for the REO Properties were delivered as of June 2, 2015 and the final deed was delivered no later than August 21, 2015 (NYSCEF Doc. Nos. 41, 42 and 43). Thus, none of the correspondence plaintiff identified could have induced plaintiff to forego exercising its rights since defendants already performed their obligation to transfer the properties.

In opposition, plaintiff contends defendants' entire motion is defective because it is only supported by an affirmation of counsel who lacks personal knowledge. Plaintiff contends the breach of contract claim based on the REO Deeds is not a breach based on defendants' representations and warranties, so the time period and notice requirements in section 3.01 through 3.03 of the Agreement do not apply. Instead, plaintiff argues the breach is the failure to timely and properly transfer the properties, and delivery of the deeds between March 2015 and August 2015 in recordable form. Plaintiff contends defendants were obligated to complete transfer tax forms, which plaintiff needed in order to avoid paying an additional transfer tax, in order to meet their obligations under the Agreement. Plaintiff asserts its breach of contract claim based on the 974 Mortgage is based on proof that it paid the consideration for the mortgage, but no valid loan was transferred because the loan was satisfied. It argues the New Jersey Action does not bar this claim because it did not address the validity of the transfer or whether the commingling of the loan accounts, which plaintiff asserts was apparent in defendants' loan files back in 2012 (NYSCEF Doc. No. 64), had been actively concealed or fraudulent. Plaintiff argues the New Jersey Action is not identical, and defendants have failed to provide plaintiff with an assignment of the 974 Mortgage.

Plaintiff further argues it is permitted to plead negligence claim in the alternative and that defendants failed to promptly deliver all REO Deeds, which deprived plaintiff of the benefit of the bargain, was in breach of defendants' duty of good faith, and the delay in delivery of the deeds resulted in changes in conditions of the properties, causing plaintiff damages. Plaintiff submits

the affidavit of Adam Simms in support of its damages claim (NYSCEF Doc. No. 63). With respect to the fraud claim based on the 974 Mortgage, plaintiff asserts its claim is premised on allegations that defendant misrepresented pertinent facts about the loan, including that the loan files had been improperly comingled, and took no action to rectify this or inform plaintiff (NYSCEF Doc. No. 64). It also contends the lost profits damages it seeks are not barred by section 5.04 of the Agreement because they are general damages, not special or consequential, and the delay damages were not within the parties' contemplation when they entered into the contract.

On reply, defendants assert their motion is properly supported by documentary and deposition evidence. They contend the Agreement did not specify a deadline for delivery of the REO Deeds, and the transfer was effective on the Closing Date or at the latest, on August 21, 2015, when all five deeds were undisputedly delivered. Also, plaintiff submits no evidence that the delivered REO Deeds were rejected by the recording office, and no evidence of the damages it claims except for a conclusory affidavit by Mr. Simms. The fraud claim is not only duplicative, plaintiff is estopped based on the New Jersey Action, and fails to present any evidence that defendants fabricated documents or engaged in a cover-up. As to damages, the Simms affidavit is unsupported, fails to state when the damages occurred, defendants' actions are not alleged to be the cause of the junior liens on the properties on which plaintiff foreclosed, and repairs and lost profits are consequential damages barred by the Agreement.

### **DISCUSSION**

Defendants' motion is granted, and the complaint is dismissed.

First, plaintiff's arguments that defendants' motion is procedurally defective are unavailing. Defendants submitted deposition testimony of various party and non-party witnesses as well as documentary evidence, which evidence is sufficient to support their motion. While plaintiff contends certain deposition transcripts were not signed, defendants submit proof that they sent notices pursuant to CPLR 3116, requesting corrections and signatures (*see* exhibits 1 and 2 to affirmation of Timothy W. Salter, dated Aug. 5, 2019), 60 days passed and the transcripts were not signed and returned (*id.*, ¶ 5). This satisfied the requirement and Defendants may use the transcripts as if fully signed (*see Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 51 [2d Dept 2014]).

### A. Breach of Contract

The first cause of action for breach of contract fails as a matter of law based on the Agreement. To recover damages for breach of contract, the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach, and resulting damages (*Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891, 893 [2d Dept 2017]; *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58 [1<sup>st</sup> Dept 2013]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1<sup>st</sup> Dept 2010]). The plaintiff must identify the specific provisions of the contract that the defendant breached (*see Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d at 893; *Feld v Apple Bank for Savings*, 116 AD3d 549, 550 [1<sup>st</sup> Dept 2014]; *Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 751 [2d Dept 2011]).

Plaintiff's first cause of action alleges defendants breached an unspecified provision of the Agreement from February 2015 through January 2017 by failing to "timely and properly" transfer the REO Properties (compl. ¶¶ 15, 17). Transfer of title to real property occurs upon the delivery of an executed deed, not the recording of the transfer (*see Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d 370, 372 [1974] [transfer is accomplished by delivery of executed deed]; *Castelli v Burns*, 158 App Div 913, 913 [1<sup>st</sup> Dept 1913] [title transferred upon delivery of deed, recording not essential to vesting title]; *Lee v Beagell*, 174 Misc 6, [Sup Ct, Broome County 1940] [title vested upon execution and delivery of deed, not signing agreement or recording transfer]). The Agreement provides in section 2.04 (b) that the Asset Files, which are defined as the documents pertaining to each REO Property, must be delivered "promptly." It also provides that defendants are not responsible to cure or deliver any deficiencies or missing documents from their Servicing Files. "When a contract does not specify time of performance, the law implies a reasonable time" (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]; *Matter of Shubert Org. Inc. v Tax Commn. of the City of N.Y.*, 170 AD3d 453, 454 [1<sup>st</sup> Dept 2019]).

The Agreement did not provide a specific deadline for the delivery of the deeds (*see* Agreement §§ 1.01, 2.04[b]). Defendants presented prima facie proof that they began providing the deeds in March 2015 and, by August 2015, they provided all five of the REO Deeds (NYSCEF Doc. Nos. 41-44). This is not disputed by plaintiff and this performance appears to be within a reasonable time. Instead, plaintiff claims the deeds delivered by August 2015 were not sufficient for recording, but fails to provide any evidence, or even a specific allegation, to support its claim that the deeds were inadequate. Plaintiff has failed to meet its burden. The emails from plaintiff's

servicer, Gregory Funding, clearly show plaintiff had received all the quitclaim deeds for the REO Properties by August 21, 2015, and that they asked for defendants' help get newly issued quitclaim deeds in order to record those deeds within 30 days of issue so as to avoid having to pay the transfer tax, and that defendants were provided such help (NYSCEF Doc. No. 43). In addition, any delay in recording the deeds did not affect the validity of the transfer since the transfer occurred upon delivery of the deeds (*see Manhattan Life Ins. Co. v Continental Ins. Cos.*, 33 NY2d at 372).

Plaintiff contends defendants were obligated to provide the transfer tax forms and failed to do so, and therefore, were in breach of their obligations. The Agreement, however, provides in section 4.04(c) that should any transfer tax be required to be paid, and any transfer tax forms be required to be prepared, in connection with the recording of the REO Deeds, defendants and plaintiff "shall reasonably cooperate upon becoming aware that such Transfer Tax is owed . . . and to prepare any related forms" (NYSCEF Doc. No. 39, Agreement § 4.04[c] at 18-19). Plaintiff fails to present any evidence of defendants' lack of cooperation. Indeed, the August 2015 emails between the parties demonstrate that defendants cooperated, even offered their own title company's services to record the deeds (NYSCEF Doc. No. 43). In section 5.03, the parties agreed that plaintiff as the purchaser "shall bear any and all costs and expenses incurred in connection with . . . transferring title to the Mortgage Loans from [defendants] to [plaintiff], including, without limitation, any transfer, filing and recording fees, taxes, costs and expenses" (*id.* at 21). Plaintiff's contention that defendants were solely responsible for the transfer tax forms and were obligated to pay the transfer taxes is belied by this provision.

Moreover, whether the deeds defendants provided were sufficient falls within defendant's representations and warranties regarding the REO Properties it was selling. Under section 3.02(b), defendants represented they had good and marketable title. Section 3.04 provides the representations and warranties only survive for a period of six months from the Closing Date, August 17, 2015. Then, plaintiff had 30 days from the discovery of any breach to deliver a notice of breach to defendants, and defendants could either cure within 90 days or repurchase. It is undisputed that plaintiff failed to serve any notice of breach. Further, plaintiff seeks damages that are explicitly prohibited for such breach. Section 3.04(f) provides that cure or repurchase are the sole remedies for breach of sections 3.01 and 3.02 (*id.*, Agreement § 3.04 at 10-12). Therefore, the first claim for breach of contract shall be dismissed.

The fourth cause of action alleges breach of contract based on defendants' failure to transfer a valid mortgage loan for the 974 Closter Dock Road property. Plaintiff is estopped from asserting this claim because this issue had been resolved in the New Jersey Action in which Plaintiff joined with defendant Roundpoint to seek rescission and reformation based on a mutual mistake.

Under the doctrine of judicial estoppel, a party is prohibited from asserting a position in a legal proceeding that is inconsistent with a position previously taken by that party in a prior legal proceeding (*Kalikow 78/79 Co. v State of New York*, 174 AD2d 7, 11 [1<sup>st</sup> Dept 1992]; see *Bates v Long Is. R. R. Co.*, 997 F2d 1028, 1037 [2d Cir 1993], *cert denied* 510 US 992 [1993]). The elements of judicial estoppel are (1) the party against whom the estoppel is asserted must have asserted the inconsistent position in the prior action or proceeding, and (2) that inconsistent position must have been successful, that is, adopted by the court in some way (see *Kalikow 78/79 Co. v State of New York*, 174 AD2d at 11; *Bates v Long Is. R. R. Co.*, 997 F2d at 1038; *Montefiore Med. Ctr. v Crest Plaza LLC*, 24 Misc 3d 1201(A), \* 16, 2009 NY Slip Op 51215[U] [Sup Ct, Westchester County 2009], *affd* 83 AD3d 1016 [2d Dept 2011]; *Matter of 67 Vestry Tenants Assn. v Raab*, 172 Misc 2d 214, 219 [Sup Ct, NY County 1997]).

Here, plaintiff asserts a position, that defendants failed to transfer a valid mortgage with respect to the 974 Closter Dock Road property, which is inconsistent with its position as a plaintiff in the New Jersey Action. There plaintiff, as owner and holder of the 974 Mortgage, asserted there was an inadvertent scrivener's error in the 974 Mortgage at the time of origination, and it was a valid mortgage loan. Over the Borrowers' objection (NYSCEF Doc. No. 48), and after full briefing on the issues (NYSCEF Doc. Nos. 49-52), plaintiff's prevailed. By order entered on August 14, 2018, the New Jersey Court affirmed the 974 Mortgage was valid and enforceable. Specifically, it ordered that: the mortgage for 974 Closter Dock inadvertently referenced the 970 Closter Dock Road property due to a scrivener's error; the mortgage for 974 Closter Dock was intended to encumber the 974 Closter Dock Road property; Roundpoint inadvertently recorded the satisfaction of the mortgage for 974 Closter Dock instead of the mortgage for 970 Closter Dock Road; the mortgage for 974 Closter Dock Road should be reformed and corrected to properly reflect that it encumbers 974 Closter Dock Road; and the mortgage for 974 Closter Dock Road is a valid and enforceable collateral security instrument (NYSCEF Doc. No. 53, New Jersey Court order and decision). The New Jersey court order establishes that defendant Roundpoint transferred

a valid loan to plaintiff. Thus, plaintiff is judicially estopped from contending here that defendants breached the Agreement in failing to transfer a valid mortgage for 974 Closter Dock.

Further, even if plaintiff were not estopped, this claim would constitute a violation of defendants' representations and warranties under the Agreement (*see* NYSCEF Doc. No. 39, Agreement § 3.02 at 9), which specifies plaintiff must provide defendants with a written notice of breach within 30 days of discovery of the breach and no later than six months after the Closing Date. Plaintiff's contentions that it purchased a \$200,000 mortgage secured by 974 Closter Dock (*see id.*, exhibit A, "Asset Schedule"), but received a \$185,000 mortgage, falls within defendants' representations and warranties under section 3.02(a) for the mortgage loans described on the Asset Schedule (*id.*, Agreement § 3.02[a] at 9). Moreover, plaintiff's only remedies for such alleged breach are demanding defendants either cure or repurchase (*id.*, Agreement § 3.04 at 10-12). It is undisputed that Plaintiff failed to do so. The fourth cause of action for breach of contract is dismissed as a matter of law.

#### **B. Breach of the Implied Covenant of Good Faith and Fair Dealing**

The second and fifth causes of action for breach of the covenant of good faith and fair dealing are dismissed as a matter of law. The second claim is based on assertions defendants failed to timely and properly transfer the REO Properties, and the fifth claim is based on defendants' failure to transfer a valid loan regarding 974 Closter Dock Road.

Within every contract is an implied covenant of good faith and fair dealing (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Tapps of Nassau Supermarkets v Linden Blvd.*, 269 AD2d 306, 307 [1<sup>st</sup> Dept 2000]). This covenant is breached when a party acts in a manner that deprives the other party of the right to receive benefits under their agreement (*511 West 232nd Owners Corp.*, 98 NY2d at 153). Where it arises from the same facts as the breach of contract claim (*see MBI Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1<sup>st</sup> Dept 2011]), or the relief sought in such a claim is "intrinsically tied to the damages allegedly resulting from [the] breach of contract," there is no separate distinct claim for breach of the implied covenant (*MBI Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 420 [1<sup>st</sup> Dept 2011] [internal quotation marks and citation omitted]; *Hawthorne Group v RRE Ventures*, 7 AD3d 320 [1<sup>st</sup> Dept 2004]; *see Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1<sup>st</sup> Dept 1995]; *MBI Ins. Corp. v Royal Bank of Can.*, 28 Misc 3d 1225[A], \* 43, 2010 NY Slip Op 51490[U] [Sup Ct, Westchester County 2010]).

The facts on which Plaintiff premises its breach of the implied covenant claims are identical to the facts underlying its breach of contract claims, and the obligations alleged to have been breached are the obligations expressly provided for in the parties' Agreement. In addition, the damages sought are identical. Therefore, these claims do not provide separate causes of action from the insufficient contract claims, and accordingly, are dismissed as duplicative (*see Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 489 [1<sup>st</sup> Dept 2018]; *Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1<sup>st</sup> Dept 2014] [breach of contract and of covenant of good faith claims need not be identical in all respects, it is enough that they arise from the same operative facts] *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1<sup>st</sup> Dept 2010]).

### C. Negligence

The third cause of action alleges that defendants "negligently failed to have the required transfer documents and paperwork [for the REO Deeds] properly and competently drafted, executed and filed for more than twenty (20) months," and plaintiff suffered damages as a result (compl, ¶ 28).

A simple claim for breach of contract will not be considered an independent tort, such as for negligence, unless a legal duty independent of the contract has been violated (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 711 [2018]). "[W]here plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory" (*id.* [internal quotation marks and citation omitted]).

Here, the negligence allegations in the third cause of action are simply a restatement, though in slightly different language, of the contractual obligations asserted in plaintiff's insufficient breach of contract claims. In fact, the factual allegations are identical, except that the third claim suggests that defendants negligently failed to comply with their contractual obligations (compl, ¶ 29). Plaintiff simply is seeking to enforce the parties' bargain. This claim is dismissed as a matter of law.

### D. Fraud

The sixth and seventh causes of action allege fraud based on defendants' failure to transfer a valid mortgage for \$200,000 secured by 974 Closter Dock Road, and their delays regarding the REO Deeds. Specifically, in the sixth claim, plaintiff asserts defendants intentionally fabricated

documents to cover up the discrepancies between the 970 Mortgage and the 974 Mortgage and intended to fraudulently create a doctored loan file that they sold to plaintiff (compl, ¶¶ 56-60).

The seventh claim asserts defendants repeatedly reassured plaintiff any outstanding issues regarding the REO Deed transfers and recording would be properly and promptly be resolved, and that these assurances were false. It asserts that they were intended to induce plaintiff's reliance, and that plaintiff relied on the promises in not exercising its right of rescission within the six-month time frame required under the Agreement (*id.*, ¶¶ 62-82).

To establish a claim for fraud, the plaintiff must show that: (1) the defendant made a material representation that was false; (2) the defendant knew the statement was false and intended to deceive the plaintiff; (3) the plaintiff reasonably relied on the representation and justifiably acted in reliance on it, and was deceived; and (4) the plaintiff was damaged (*Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 [1999]; *U.S. Express Leasing, Inc. v Elite Tech. (NY), Inc.*, 87 AD3d 494, 497 [1<sup>st</sup> Dept 2011]). Where a fraud claim duplicates a claim for breach of contract it must be dismissed (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63 & n 8 [1<sup>st</sup> Dept 2017]; *Community Counseling & Mediation Servs. v Chera*, 115 AD3d 589, 591 [1<sup>st</sup> Dept 2014]; *Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557 [1<sup>st</sup> Dept 2012]; *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 [1<sup>st</sup> Dept 2010] [fraud and related tort claims arising from same provisions alleged to have been breached in the contract claims, and seeking same damages, dismissed as duplicative]; *see also Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 684 [2d Dept 2016]).

The complaint fails to specify defendants' particular misrepresentations and the fraud claims arise out of the same facts as the first and fourth claims for breach of contract. The fourth cause of action for breach of contract alleges defendants sold plaintiff the 974 Mortgage, but, unbeknownst to plaintiff, this loan "never existed," so plaintiff **could not receive payment from the Borrowers** nor could it foreclose on it, and that defendants had comingled two separate loans (compl, ¶¶ 36-38). The sixth cause of action similarly alleges comingling of the two separate loans for 970 and 974 Closter Dock Road, and that defendants fabricated documents and records to conceal the discrepancies between the two mortgage loans at issue (*id.*, ¶¶ 56-59). These fraud allegations, however, are not collateral to the contract, rather, they are directly related to the specific provisions of the Agreement regarding defendants' sale of the mortgage loans and the Asset Schedule (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d at 63 n.8). In addition,

plaintiff submits no proof to raise a triable issue regarding its allegations of fabricated documents and records. Moreover, plaintiff completely fails to address its joining with defendant Roundpoint in the New Jersey Action to represent to that court that a scrivener's error had been made on the mortgage loan, which was a mutual mistake, and that it sought and obtained a rescission of the satisfaction of the mortgage, correction of the loan documents, and reinstatement of the mortgage. Thus, as discussed above, plaintiff is judicially estopped from asserting this as a fraud. Further, the fraud claim does not assert any damages that would not be recoverable under a contract measure of damages (*see id.*; *see also Crossbeat N.Y., LLC v LIIRN, LLC*, 169 AD3d 604, 604 [1<sup>st</sup> Dept 2019]). Therefore, this claim is dismissed as a matter of law.

Similarly, the seventh cause of action arises out of the same facts as the first claim asserting breach of contract based on defendants' failure to timely and properly transfer the REO properties. These actions are directly required by the Agreement and are not collateral to it. In addition, defendants have submitted documentary evidence that the **REO Deeds concerning four of the REO Properties** were delivered by June 2, 2015 (NYSCEF Doc. Nos. 41, 42), and the final deed was delivered no later than August 21, 2015 (NYSCEF Doc. No. 43). Since defendants delivered the deeds before the six-month rescission period expired, it is unclear how defendants' correspondences and reassurances concerning preparation of the deeds were false. In any event, both fraud claims are duplicative of plaintiff's breach of contract claims. Thus, they are dismissed as a matter of law.

#### **E. Damages**

Plaintiff's sole proof of damages is the affidavit of Adam Simms, a portfolio manager for Thetis Asset Management LLC and Gregory Funding LLC, operating affiliates of plaintiff (NYSCEF Doc. No. 63). Mr. Simms states **plaintiff incurred damages** between the Closing Date, February 17, 2015, and the "actual transfer of the properties," which he asserts is when the REO Deeds were recorded in December 2016/January 2017. These damages are: costs incurred in foreclosing on certain junior lienholders of one REO Property; roof and other repairs needed for some of the properties; roof and water damage which resulted in a sale of one of REO Properties at a significantly reduced price; and other unspecified damages in the amount of \$200,000, along with rental income loss of \$300,000 to another REO Property (*id.*, ¶ 42). The affidavit is not supported by any documentary evidence, such as appraisals, repair bills, or even estimates, substantiating the claims. Conclusory testimony is insufficient to establish the losses plaintiff

claims (*see Lodato v Greyhawk N. Am., LLC*, 39 AD3d 494, 496 [2d Dept 2007] [“[u]nsubstantiated testimony, without documentation, is insufficient to establish lost earnings”]; *Home Boys Shopping Network v Lloyds N.Y. Ins. Co.*, 237 AD2d 164, 164 [1<sup>st</sup> Dept 1997] [plaintiff’s conclusory assertion of repair costs without any repair receipts insufficient to oppose summary judgment]; *IPFS Corp. v Berrosa Auto Corp.*, 2018 NY Slip Op 33254[U], \* 3 [Sup Ct, NY County 2018]).

In addition, Simms does not specify when the damages occurred, and seeks damages beyond the period of the Agreement. For example, he asserts damages until the REO Deeds were actually recorded. The Agreement, however, does not **obligate defendants** to actually record the deeds, only to deliver deeds “sufficient for **recording in the jurisdiction** in which the REO Property is located” (NYSCEF Doc. No. 39, Agreement at 4; *see also* exhibit C annexed thereto).

Moreover, the Agreement specifically prohibits recovery of any incidental or consequential damages. In section 5.04, the Agreement clearly provides no party shall be liable “for any indirect damages, including consequential, incidental, exemplary or special damages, or any punitive damages” (*id.*, Agreement § 3.04[f] at 12, § 5.04 at 21). Damages in the form of repairs are either incidental or consequential damages (*see Williams v Planet Motor Car*, 190 Misc 2d 22, 29 [Civ Ct, Kings County 2001]). Further, plaintiff fails to make any showing that defendants’ alleged inactions was the proximate cause of the alleged repair costs.

#### **F. Attorneys’ Fees and Costs**

In the eighth cause of action, plaintiff seeks recovery of its attorneys’ fees and costs pursuant to section 5.13 of the Agreement as the predominantly prevailing party. Defendants seek summary judgment in their favor on this claim dismissing plaintiff’s request for such fees and awarding defendants their attorneys’ fees and costs in enforcing the provisions of the Agreement. Section 5.13 of the Agreement provides

“[i]n the event that any party finds it necessary to employ an attorney to enforce any provision of this Agreement, the predominantly prevailing party will be entitled to recover from the other parties its reasonable attorneys’ fees and costs incurred in connection therewith (including the costs of collection)”

(NYSCEF Doc. No. 39, Agreement § 5.13 at 23). Defendants’ request is granted on liability only. Defendants clearly are the predominantly prevailing party and are entitled to such fees and costs

in defending this action. The issue of the amount of such fees and costs shall be referred to a special master to hear determined at an assessment.

Accordingly, it is

**ORDERED** that defendants' motion for summary judgment is granted in favor of defendants PCG REO Holdings, LLC and Roundpoint Mortgage Servicing Corporation and the complaint is dismissed against Great Ajax Operating Partnership .LP., with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and it is further

**ORDERED** that that portion of the Defendants' motion that seeks recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees that Defendants may recover against the Plaintiff Great Ajax Operating Partnership, L.P. is referred to a Special Referee to hear and report; and it is further

**ORDERED** that counsel for the Defendants shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,<sup>1</sup> upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

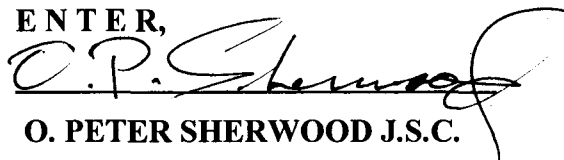
**ORDERED** that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

**ORDERED** that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

**DATED: February 25, 2020**

**ENTER,**



**O. PETER SHERWOOD J.S.C.**

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<sup>1</sup> Available on the Court's website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) under the "References" link on the navigation bar.