SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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NEW PENN FINANCIAL, LLC,

Plaintiff,

- v -

360 MORTGAGE GROUP, LLC,

Defendant.

INDEX NO. 653668/2018

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 45, 49, 50, 51, 52, 53, 63, 64, 65, 66, 73, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

On July 23, 2018, plaintiff New Penn LLC (Penn) initiated this action for breach of contract, or, in the alternative, for mutual mistake. (NYSCEF Doc. No. [NYSCEF] 2.) Defendant, 360 Mortgage LLC (360M) moves, to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7). (NYSCEF 9.)

The applicable standard for determining a CPLR 3211 (a)(7) motion is whether, within the four corners of the complaint, any cognizable cause of action has been stated. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The court must "liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion." (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144,152 [2002].) On a CPLR 3211 (a)(1) motion, "dismissal is warranted 'only if the documentary evidence submitted conclusively

establishes a defense to the asserted claims as a matter of law.'" (*Id.* quoting *Leon v Martinez*, 84 NY2d 83, 88 [1984].)

Penn alleges the following facts that the court accepts as true. On March 5, 2018, Penn's parent, nonparty New Residential Investment Corp., signed a preliminary and non-binding Letter of Intent (LOI) with 360M to purchase for Penn, the mortgage servicing rights (MSRs) on $5.1 billion in mortgage loans guaranteed by the Government National Mortgage Association (GNMA). (NYSCEF 2, Complaint at ¶¶1, 3.). The MSRs were to be priced based on a multiple of the "net servicing fees." (*Id.* at ¶2). Net servicing fees are the "gross servicing fees" payable to the servicer of the loans, less the fees payable to GNMA. (*Id.*) GNMA is paid a fee for guaranteeing the loan by the servicer (360M before and Penn after the transaction closed) from the servicing fees it receives. (*Id.* at ¶18.) Penn and 360M documented the transaction in two substantially identical sets of agreements. (NYSCEF 14, April 23, 2018 Agreement; NYSCEF 15, May 8, 2018 Agreement.) For each sale, the parties executed a Bulk Agreement for the Purchase and Sale of Mortgage Servicing Rights (MSRPA) and an Assignment Agreement (NYSCEF 16, 17) that attached, as Annex A, a schedule setting forth the purchase price for each MSR sold.

Penn asserts that the actual purchase price it paid was improperly based on "gross servicing fees," instead of the "net servicing fees," resulting in an overpayment by Penn of $10,571,707.74 that 360M refuses to return. (NYSCEF 2, Complaint at ¶¶8, 11.) Because 360M prepared the Annex A schedules with the gross rather than net servicing fees, 360M allegedly violated the agreements which required it to provide accurate information to Penn.

In addition, Penn asserts two other violations arising from materially inaccurate schedules in violation of sections 2.02, 4.10, 4.12.21, and 6.13 of the MSRPAs. First, 360M was required to provide data tapes containing accurate information about the mortgage loans before each sale and to update them after each sale. (Complaint at ¶¶52-58.) For each sale, detailed schedules of the mortgage loans that 360M provided listed as zero the GNMA guarantee fee for virtually all the mortgages, while in fact, a guarantee fee would be owed to GNMA for each of the mortgage loans.

Second, after each sale, 360M was required to provide a "Reconciliation Report" to correct any errors in purchase price calculations and to refund any overpayment. (Complaint at ¶¶59-62.) Penn alleges that these reports perpetuated the error 360M had made with the Annex A schedules by again using the gross, rather than net servicing fees to calculate the purchase price.

Breach of contract requires proof of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].) Where parties to a breach of contract action dispute the intended meaning of the agreement, the court looks to the contract itself to determine if the terms are unambiguous, giving the words of the contract their "plain meaning." (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014].) "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself and concerning which there is no reasonable basis for a difference of opinion.'" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [citation omitted].)

The pricing for each of the MSRs in the MSRPAs and Assignment Agreements is based on the following definitions:

> "Purchase Price" for each MSR is defined as "the product of the principal balance of the related Mortgage Loan as of the Sale Date and the applicable Purchase Price Percentage." (NYSCEF 14, April 23, 2018 MSRPA Article I: Definitions and Construction at p. 10.)
>
> "Purchase Price Percentage" is defined as "the pricing rate as set forth in the related Assignment Agreement, which shall be based on the applicable 'multiple' set forth in Schedule 3.01." (*Id.*)

However, "pricing rate" is undefined.

> The "Servicing Rights," are defined as "[w]ith respect to an Eligible Loan, collectively, (i) the rights and obligations to service, administer, collect payments for the reduction of principal and application of interest thereon, collect payments on account of taxes and insurance, pay taxes and insurance, remit collected payments, provide foreclosure services, provide full escrow administration, (ii) any other obligations required by any Agency or Insurer in, of, for or in connection with such Eligible Loan pursuant to the applicable Servicing Agreement, (iii) the right to possess any and all documents, files, records, Mortgage File, servicing documents, servicing records, data tapes, computer records, or other information pertaining to such Eligible Loan or pertaining to the past, present or prospective servicing of such Eligible Loan, (iv) the right to receive the Servicing Compensation and any Ancillary Fees arising from or connected to such Eligible Loan and the benefits derived from and obligations related to any accounts arising from or connected to such Eligible Loan, (v) the right to be reimbursed for Advances, (vi) subject to Section 6.04, the exclusive right to commercialize relationships with the Mortgagors and (vii) all rights, powers and privileges incident to any of the foregoing, subject, in each case, to any rights, powers and prerogatives retained or reserved by the applicable Agencies."

(*Id.* at p. 11.)

> "Servicing Compensation" is defined as "[t]he annual aggregate amount payable to Servicer under the applicable Servicing Agreement related to an Eligible Loan as consideration for servicing such loan, expressed as a percentage of the unpaid principal balance thereof, and excluding Ancillary Fees."

(*Id.* at 11.)

The "Agency" and "Agencies" referred to in clauses (ii) and (vii) of the Servicing Rights definition includes GNMA. *(Id.* at p. 2.)

360M argues that the breach of contract claim must be dismissed because the "Servicing Rights" refers to the gross servicing fees. 360M maintains that to calculate the "Purchase Price Percentage," the Servicing Rights must be a percentage value, but only the "Servicing Compensation" can be reduced to a percentage. Further, 360M relies on the word "include" in the definition of "Servicing Rights" and the term "aggregate" fees payable to the servicer, which would not exclude the fees due to GNMA. Likewise, 360M notes that because "Servicing Compensation" does not exclude fees payable to GNMA, the price for the MSRs is not based on the net servicing fees.

The court cannot conclude, as a matter of law, based on the documentary evidence, that the purchase price should be calculated using gross servicing fees not net servicing fees. "The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning." (*Brooke Grp. v JCH Syndicate* 488, 87 NY2d 530, 534 [1996] [citation omitted].) Further, "[i]t is an elementary rule of contract construction that clauses of a contract should be read together contextually in order to give them meaning." (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [1st Dept 2001] [citation omitted].) First, the definition of the Servicing Rights begins with the word "collectively", and thus, the definition of Servicing Rights includes all the sub-clauses within it. However, 360M's argument references only sub-clause (iv), ignoring the plain meaning of the word "collectively" to

define Servicing Rights. Second, when all the other sub-clauses are considered, the GNMA fee may be subtracted.

Accordingly, the court declines Penn's invitation to consider industry practices or the March 21, 2018 draft settlement statement for the closing in which 360M's broker calculated the Purchase Price using the net serving fees. In this pre-answer motion to dismiss, it is premature to address ambiguity. Resort to either of these extrinsic facts is inappropriate until the court makes a finding as ambiguity. *(American Express Bank, Ltd. v Uniroyal, Inc.,* 164 AD2d 275, 277-78 [1st Dept, 1990].)

The second breach of contract claim is based on the MSRPA which requires 360M to provide accurate data tapes ("Data Tapes") in the form of excel spreadsheets before each sale containing detailed information about the mortgage loans and to update this data after the sales ("Updated Data Tapes"). (Complaint at ¶¶ 6, 7, 10.) Penn alleges that the Data Tapes and the Updated Tapes are materially inaccurate and include false and misleading statements regarding the guarantee fee that would be payable to GNMA because they listed the GNMA fee as zero for most loans when, in fact, it was non-zero for all loans. (Complaint at ¶9.) Penn claims that 360M's errors on the Data Tapes and Updated Data Tapes equate the gross and net servicing fees. (*Id.*) Penn insists that 360M's multiple errors combined to conceal the basis for the calculation of the purchase price for the MSRs using the gross servicing fees.

360M relies on excel sheets electronic spreadsheets to show that they are not materially inaccurate, and that Penn relied on the wrong column. The court rejects Penn's argument that the excel sheets are not proper documentary evidence. Section

11.07 of the MSRPA provides that, "the Exhibits and Schedules are part of this Agreement." Further,

> "[j]udicial records, such as judgments and orders, would qualify as 'documentary', as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence." To qualify as "documentary," the paper's content must be "essentially undeniable and . . ., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based. (Neither the affidavit nor the deposition can ordinarily qualify under such a test.)"

(*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 (1st Dept 2014]) citing David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22.)

While permissible documentary evidence, the Data Tapes and Updated Data Tapes are inconclusive to determine whether they are inaccurate and misleading or not. (*Thomas A. Sbarra Real Estate, Inc. v Lavelle-Tomko*, 84 AD3d 1570, 1571 [3d Dept 2011] [conflicting interpretations of the settlement agreement demonstrated dismissal is premature and need to further develop record].) The court cannot determine accuracy simply by looking at them. Accordingly, 360M's motion seeking dismissal of the first cause of action for breach of contract is denied.

Alternatively, Penn seeks reformation of the contract based on mutual mistake in the second cause of action. (Complaint at ¶¶78-81.) To maintain an action for reformation of a contract based upon mutual mistake, plaintiff must allege a mistake, that it is mutual and that it is one made by all the parties to the agreement, so that the intention of neither is expressed. (*Christopher & Tenth Street R.R. Co. v Twenty-Third St. Ry. Co.*, 149 NY 51, 58 [1896].) In the case of mutual mistake, it must be alleged that "the parties have reached an oral agreement and, unknown to either, the signed

writing does not express that agreement." (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986] [citation omitted].) Penn claims that the MSRPAs do not reflect the parties' agreement as to how to calculate the purchase price, because of a drafting error. (Complaint at ¶79).

360M argues that Penn fails to allege a prior agreement that was not expressed in the final MSRPAs. On the contrary, Penn relies on the LOI. (Complaint at ¶79.) While not binding, it may evidence the parties' agreement or an offer. Further, the court rejects 360M's argument that Penn fails to allege that 360M was mistaken based on paragraph 80 of the Complaint.

360M also argues that Penn's claim is barred by its own conduct. While Penn cannot avoid its own negligence by invoking mutual mistake (*PK Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201 [1st Dept 1996]), 360M's argument is premature as evidenced by its reliance on cases addressing summary judgment.

Finally, 360M's reliance on the merger clause is misplaced. "Reformation may be appropriate remedy, despite a merger clause, in the case of mutual mistake." (*K.I.D.E. Assoc. v Garage Estates Co.*, 280 AD2d 251, 253 [1st Dept 2001].)

Accordingly, it is hereby,

ORDERED that 360M's motion to dismiss is denied and 360M shall serve and file an answer within 30 days.; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 242, 60 Centre Street, on August 1, 2019, at 10AM.

6/26/19
DATE

HON. ANDREA MASLEY

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE