

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-003458

12/13/2006

HONORABLE BARRY C. SCHNEIDER

CLERK OF THE COURT
W. Yank
Deputy

FIRST NATIONAL BANK OF ARIZONA

STEVEN J LIPPMAN

v.

MID-ISLAND MORTGAGE CORPORATION

REBECCA K SETLOW

MINUTE ENTRY

The court has received and reviewed Plaintiff's Motion for Leave to File First Amended Complaint, Defendant's Response, and Plaintiff's Reply. Oral argument was requested.

The court notes oral argument has been requested. Pursuant to Rule 7.1(c)(2), Arizona Rules of Civil Procedure, the court determines that, in order to expedite its business, this matter shall be decided without oral argument. The court is fully informed of the issues.

IT IS ORDERED GRANTING Plaintiff's Motion for Leave to File First Amended Complaint.

Rule 15(a), A.R.C.P. provides that "Leave to amend shall be freely given when justice requires." To deny a motion to amend, the court must find "undue delay in the request, bad faith or a dilatory motive on the part of the movant, undue prejudice to the opposing party as a result of the amendment, or futility in the amendment." *Bishop v. State Dep't of Corr.*, 172 Ariz. 472, 474-475, 837 P.2d 1207, 1209-1210 (App. 1992) (citing *In re Estate of Torstenson v. Valley Nat'l Bank*, 125 Ariz. 373, 376-77, 609 P.2d 1073, 1076-77 (App.1980).

Defendant has presented three main arguments in opposition to the Motion for Leave to File First Amended Complaint:

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- 1) Plaintiff's amended complaint would be futile.
- 2) Plaintiff acted in bad faith by unduly delaying assertion of its additional claims.
- 3) Plaintiff's amended complaint would be unduly prejudicial to Defendant.

Defendant argues that leave to amend should be denied because the amendments would be futile since they could be defeated by a motion for summary judgment or a Rule 12(b)(6), A.R.C.P. motion. While *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991), provides support for this position, on the record before the court it appears that Plaintiff's amendments would survive a motion for summary judgment. Defendant contends that Plaintiff's negligence claims would be barred by both the statute of limitations and the economic loss rule. The negligence claims in Plaintiff's proposed amended complaint would not be time barred under the discovery rule. The discovery rule provides that a cause of action does not accrue until the plaintiff is, or should have been, aware of the conduct that gives rise to the cause of action. Because Plaintiff did not become aware of the alleged material misrepresentation concerning the properties used in calculating the appraisal value of the property until November, 2005, the statute of limitations would not bar these claims. Nor would the economic loss rule make these claims futile as the economic loss rule only applies to product liability and construction defect claims under Arizona law.

Defendant also contends that the amended complaint would be futile because Plaintiff has failed to specially plead the elements of promissory estoppel. "To prove promissory estoppel, [a plaintiff] must show that the defendants made a promise and should have reasonably foreseen that he would rely on that promise; [a plaintiff] must also show that he actually relied on the promise to his detriment. *Higginbottom v. State*, 203 Ariz. 139, 144, 51 P.3d 972, 977 (App. 2002). As required by *Higginbottom*, Plaintiff has specially pleaded the necessary elements. (Pl.'s Proposed First Amended Compl. ¶ 7, 8, 9, 31, 32, 39, 40, 41).

Next, Defendant argues that Plaintiff acted in bad faith by unduly delaying the assertion of additional claims in its proposed amended complaint. In dismissing this argument, the court simply notes that Plaintiff sought leave to amend its complaint less than five months after Defendant filed its answer to the initial complaint and before a trial date has been set in this matter.

Finally, Defendant argues that it would suffer undue prejudice from Plaintiff amending its complaint because it would have to defend against additional legal theories and a different broker agreement than the one specified in Plaintiff's original complaint. A motion to amend is not unduly prejudicial when it merely adds "a new legal theory allegedly supported by facts which would have been admitted in evidence under issues already raised." *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982). Because the factual basis of the dispute, i.e.

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the loan that Plaintiff funded, is the same regardless of which broker agreement governs the dealings between the parties or what legal theories are asserted, Defendant will not suffer undue prejudice as a result of the amendment.