APPENDIX INDEX

APPENDIX A:

Opinion of the Eleventh Circuit Court of Appeals (15 pages)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14511
Non-Argument Calendar

D.C. Docket No. 1:15-cv-01109-TCB

ANTHONY SHEELY, JR.,
FELICIA A. BOYD-SHEELY,

Plaintiffs - Appellants,

versus

BANK OF AMERICA, N.A.,
THE BANK OF NEW YORK MELLON,
f.k.a. The Bank of New York, as Trustee For the Certificate-Holders of CWALT, Inc.,
Alternative Loan Trust 2007-19 Mortgage Pass-Through Certificates, Series 2007-19,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(May 30, 2018)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Anthony Sheely and Felicia Boyd-Sheely (collectively, the "Sheelys") appeal the grant of summary judgment on their complaint against Bank of America, N.A. ("BANA") and the Bank of New York Mellon ("BNY") arising out of their attempts to obtain a modification of their mortgage loan. The Sheelys maintain that summary judgment was inappropriate because they presented sufficient evidence that BANA committed fraud during the modification process and that both BANA and BNY breached a provision of the security deed requiring notice of default and acceleration of the debt. Because we agree with the district court that no genuine issue of material fact exists in the record, we affirm.

I. Background

A. Factual Background

The Sheelys own a home in Ball Ground, Georgia. On May 7, 2007, Anthony took out a $461,000 loan from Countrywide Home Loans, Inc. ("Countrywide"), to refinance their mortgage. At the same time, the Sheelys executed a security deed, which was later assigned to BANA and then to BNY. The security deed allows the non-judicial foreclosure sale of the property in the event of an uncured default.

Soon after refinancing their home loan, the Sheelys began experiencing financial hardship. Anthony lost his entire trucking business when the automotive industry crashed in late 2007. When they contacted Countrywide in October 2007 about their financial difficulties, they were told they needed to be 90 days behind on their mortgage to qualify for assistance. So they stopped making their monthly payments, defaulted, and then called back in January 2008. Countrywide said they were eligible for modification but should wait to receive a letter and, in the meantime, could begin an interim repayment plan to avoid foreclosure. The repayment plan called for the Sheelys to make higher monthly payments over five months to make up the past-due amounts.

BANA began servicing the loan after Countrywide merged with BANA in early 2008. The Sheelys could not make the higher payments under the repayment plan, so they contacted BANA, which, like Countrywide, told them they needed to be 90 days behind to qualify for assistance. BANA also said that, because their past payments had been suspended by the repayment plan, the relevant 90-day period would not begin to run until the end of February 2008.

Because the Sheelys did not comply with the repayment plan, Countrywide sent them a notice of default and acceleration of the debt in January 2008. BANA

sent another notice of default and acceleration in April 2008.[1] To stave off the threatened foreclosure, the Sheelys attempted to make their normal payments a few times, but the payments were returned as insufficient. They have not made any payment on the loan since May 2008.

From 2008 to 2013, the Sheelys diligently attempted to obtain a loan modification. But, they maintain, BANA made it impossible for them to do so by repeatedly misrepresenting the status of their modification applications, losing documents, or otherwise stymying their efforts. BANA, for its part, asserts that it evaluated the Sheelys' loan for modification in good faith, and that it in fact approved the Sheelys for modification multiple times. However, according to BANA, modification was denied because the Sheelys failed to make the trial payments, failed to return documentation, or otherwise did not qualify for modification.

BANA supported its contentions before the district court with a declaration from Ryan Dansby, Operations Team Manager on the Mortgage Resolution Team for BANA, along with supporting documents. This evidence showed the following: BANA approved the Sheelys for a modification in July 2008 and sent

[1] The Sheelys' brief asserts repeatedly that they did not receive these notices, but that claim is at least partly contradicted by Felicia's own declaration, *see* Doc. 35 ¶¶ 11–12 (stating that they were sent the January 2008 letter by Countrywide and that they "attempted to make payments on April 9, 2008 and May 27, 2008 due to the threatening of foreclosure letters from Countrywide and BANA"). In any event, we find that this fact is not material to our resolution of the Sheelys' claims, as explained more fully below.

them an approval letter. BANA declined the modification in September 2008 after the Sheelys failed to return certain documents. Then, in March 2010, BANA approved the Sheelys for a trial modification under the Home Affordable Modification Program ("HAMP") and sent a letter stating that they needed to make three trial mortgage payments and return certain documents. Again, BANA denied the modification when the Sheelys did not make the trial payments or return the documents. Finally, in July 2012, BANA approved the Sheelys for a modification under a new program—through which they could obtain a principal reduction of over $250,000—created as a result of Department of Justice litigation against BANA and other servicers. In an approval letter dated July 11, 2012, BANA offered the modification and directed them to make three trial payments. BANA denied the modification when the Sheelys did not make any trial payments.

The Sheelys deny receiving any of this correspondence, and they claim that BANA never intended to grant them a modification. Pointing to several years of phones calls and other correspondence with BANA, as relayed by Felicia in a declaration, they assert that BANA strung them along with false hope for a modification and so prevented them from taking other actions to save their home. According to the Sheelys, BANA represented that the Sheelys were eligible for modification, only to defer a decision repeatedly by claiming it needed more time

to process their application or that the Sheelys needed to resubmit their materials or restart the process altogether.

At some point, BANA referred the Sheelys' loan to a law firm to conduct a non-judicial foreclosure sale. In December 2012, the Sheelys received a notice of acceleration and foreclosure sale and a notice of sale under power from McCurdy & Candler, LLC. The notices identified BANA as the servicer and BNY as the secured creditor. Before the foreclosure sale occurred, however, another servicer took over from BANA, and it does not appear from the record that any foreclosure sale has since occurred.

B. Procedural History

In February 2015, the Sheelys sued BANA for breach of contract, fraud, wrongful foreclosure, and intentional infliction of emotional distress and BNY for breach of contract and wrongful foreclosure. The Sheelys also sought punitive damages, attorney's fees and costs, and injunctive relief against foreclosure. After removal of the complaint to federal court, the district court dismissed the claim for wrongful foreclosure and the request for injunctive relief.

In moving for summary judgment, the defendants relied mainly on Dansby's affidavit and supporting documentation. The Sheelys relied on Felicia's declaration. A magistrate judge issued a report and recommendation ("R&R") recommending that summary judgment be granted on the claims for fraud and

intentional infliction of emotional distress but denied on the claim for breach of contract. After both parties submitted objections to the R&R, the district court granted the defendants summary judgment in full. The Sheelys now appeal.

II. Standard of Review

We review a district court's grant of summary judgment *de novo*, viewing the evidence and drawing all reasonable inferences in favor of the non-moving party. *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1249 (11th Cir. 2015). "Summary judgment is proper where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quotation marks omitted). There is no genuine issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). But "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–250 (citations omitted). We may affirm the district court's judgment on any ground supported by the record, even if that ground was not relied upon by the district court. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012).

III. Discussion

The Sheelys challenge the grant of summary judgment on their claims for breach of contract and fraud. We address each in turn. They have abandoned their

claim for intentional infliction of emotional distress by failing to address it in their appellate briefs. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680–81 (11th Cir. 2014) (issues not raised on appeal are abandoned).

A. Breach of Contract

The district court concluded that the Sheelys' breach-of-contract claim failed because the defendants sent notices of default and acceleration in 2008 that complied with their obligations under the security deed. The Sheelys respond that the 2008 notices—which they deny receiving—are irrelevant and that the notices in late 2012 and early 2013 are non-compliant. We affirm the grant of summary judgment on this claim, but for different reasons than the district court.

To prove a claim for breach of contract under Georgia law, a plaintiff must show (1) a valid contract, (2) a material breach of its terms, and (3) resultant damages to the party who has the right to complain about the breached contract. *Bates v. JPMorgan Chase Bank, NA*, 768 F.3d 1126, 1130 (11th Cir. 2014).

In *Bates*, we explained that "a violation of a condition precedent to the power to accelerate and power of sale cannot, in and of itself, create contractual liability." *Id.* at 1132. Instead, for a mortgagor to succeed on a claim for breach of contract, "she must show that the premature or improper exercise of some power under the deed (acceleration or sale) resulted in damages that would not have occurred but for the breach." *Id.* at 1132–33. Put differently, where the defendant

has yet to exercise the power of sale, the plaintiff must trace back the harm to the allegedly unauthorized acceleration of the note. *Id.* at 1133.

We recognized in *Bates* that an unauthorized acceleration of the note "might give rise to damages in some circumstances," but we ultimately held that any such claim by Bates (the plaintiff) was negated by the security deed's "generous reinstatement provision." *Id.* That provision stated that the plaintiff had the right to be reinstated upon paying all amounts due, even after foreclosure proceedings had been initiated. *Id.* Thus, we held that because Bates could simply pay her outstanding debt, the defendant's "exercise of the power to accelerate the note could not have caused her harm, and therefore, she ha[d] failed to substantiate two important elements of her claim for breach of contract: causation and damages." *Id.* We therefore affirmed the grant of summary judgment against Bates. *Id.*

Bates controls here. Because there is no evidence that the power of sale has been exercised, the Sheelys must trace their harm back "to the allegedly unauthorized acceleration of the note." *See id.* But, like the plaintiff in *Bates*, the Sheelys "ha[ve] not set forth any contractual damages that could have been caused by the mere threat of exercising the power of sale." *See id.* at 1133 n.8. Moreover, the security deed in this case contains a reinstatement provision that is materially similar to the provision in *Bates*, which "negate[s]" the Sheelys' claim arising from

the allegedly unauthorized acceleration of the note.[2] *See id.* at 1133. Because the Sheelys could, even now, return to a pre-acceleration position by paying all outstanding payments and associated fees, the "exercise of the power to accelerate the note could not have caused [them] harm, and therefore, [they] ha[ve] failed to substantiate two important elements of [their] claim for breach of contract: causation and damages." *See id.*

Accordingly, summary judgment was properly granted against the Sheelys on their breach-of-contract claim. Because we affirm the grant of summary judgment on an alternative ground, we need not and do not address the Sheelys' arguments about whether the defendants can rely on the 2008 notices, whether those notices were actually sent or received, or whether evidence in the record establishes a legal relationship between BANA, BNY, and Countrywide.

B. Fraud

The Sheelys argue that a reasonable jury could find that BANA committed fraud based on "the long history of mixed-message communications from BANA, culminating in BANA's misrepresentation that it was considering the Sheelys' application for modification with principal-forgiveness in July 2012 when it had no apparent present intention to do so." Sheelys' Initial Br. at 14. They maintain that

[2] Before the district court, the Sheelys asserted that *Bates* was not controlling because their deed did not have a "generous reinstatement provision" like the deed in *Bates*. But for that assertion, they cited only the December 2012 foreclosure notice sent by McCurdy & Candler, not the deed itself. And a comparison between the two provisions at issue shows that they are materially similar. *Compare Bates*, 768 F.3d at 1133, *with* Doc. 1-3 at 8, ¶19.

a jury could find that "BANA never intended to give the Sheelys' modification application due consideration but instead intended to lure them so deep into default that foreclosure would be their only option." *Id.* According to the Sheelys, BANA did so by "advising them to fall further behind on their payments, misrepresenting the status of their modification applications of its review thereof, and continually and repeatedly deferring decision on those applications, until the arrears became too astronomical to cure." *Id.* at 17.

"Under Georgia law, which applies in this diversity action, the tort of fraud consists of five elements: (1) false representation by defendant; (2) scienter; (3) intent to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1027 (11th Cir. 2003) (quotation marks omitted). For a false representation by a defendant to be actionable, it "must relate to an existing fact or a past event. Fraud cannot consist of mere broken promises, unfilled predictions or erroneous conjecture as to future events." *Id.* (quotation marks omitted). Nevertheless, a promise made without a present intent to perform can be a material misrepresentation sufficient to support a cause of action for fraud. *Lumpkin v. Deventer N. Am., Inc.*, 672 S.E.2d 405, 408 (Ga. Ct. App. 2008).

We conclude that the district court properly granted summary judgment on the Sheelys' fraud claim.[3] The Sheelys' contention that BANA induced them to default through fraud—by instructing them that they needed to be 90 days behind to qualify for modification—is not supported by the record. There is no evidence that these statements were false or misleading. *See Ellis*, 318 F.3d at 1027. Nor were the statements coupled with a promise of modification, such that it could be inferred from BANA's later actions that it made a promise without a present intent to perform. *See id.* Rather, the instructions, as recounted in Felicia's declaration, were that the Sheelys would be eligible for modification after three months, not that they were guaranteed modification if they failed to pay for three months. In sum, no reasonable jury could conclude that BANA committed fraud by inducing the Sheelys to default.

As for the other evidence of misrepresentations, miscommunications, delays, lost documents, and the like, we agree with the district court that, even assuming these facts are true and drawing all reasonable inferences in the Sheelys' favor, "a fact-finder would have to rely on speculation and unfounded conjecture to find in favor of the Sheelys" on the fraud claim. Doc. 53 at 18.

[3] In reaching this conclusion, we assume, as the Sheelys contend, that the conversations with BANA representatives that are recounted in Felicia's declaration are fully admissible as statements of a party opponent. *See* Fed. R. Evid. 801(d)(2)(D). We therefore need not consider whether the district court improperly excluded some of this evidence as inadmissible hearsay.

Significantly, the Sheelys' fraud claim, as presented on appeal, rests on an inference that BANA never intended to grant a loan modification and that its various communications with the Sheelys about a loan modification were, in essence, all for show. But BANA presented evidence that it reviewed and approved the Sheelys for modification multiple times. BANA showed that it mailed letters notifying the Sheelys that they were approved to begin trial modifications on three separate occasions—in July 2008, March 2010, and July 2012—but that it denied the modifications when the Sheelys failed either to make the trial payments or to return the required documentation. BANA also presented evidence that it reviewed the Sheelys for modification in 2013 but that it determined that it could not alter the terms of their loan within allowable limits.

In response to this evidence, the Sheelys have not produced any "significantly probative" evidence of their own to support their belief that BANA misrepresented its willingness to consider them for a modification or that these modification offers were not genuine. *See Anderson*, 477 U.S. at 249–50; *Sec. & Exch. Comm'n v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014) ("Speculation or conjecture cannot create a genuine issue of material fact, and a mere scintilla of evidence in support of the nonmoving party cannot overcome a motion for summary judgment." (quotation marks omitted)).

First, although the Sheelys "vehemently deny" receiving BANA's modification offers, that denial does not create a genuine issue of fact about whether such correspondence was in fact sent. And whether or not the Sheelys received these letters does not bear on BANA's intent in sending them.

Second, while Felicia's declaration states that on July 20, 2012, during one of the purported trial periods, a BANA representative told them they needed to restart the application process, this evidence does not create a genuine issue of material fact. To be sure, the July 20 statements are inconsistent with the statements in the July 11 approval letter. But without some additional information, and even against the backdrop of previous communications, it's not reasonable to infer that the inconsistency is because BANA either lied about the prior approval or "lied . . . about the need to re-start the application process in order to cause them to become ineligible for the highly favorable modification program." Sheelys' Initial Br. at 38. On the current record, these inferences are much too speculative to create a genuine issue of material fact as to BANA's intent to deceive in misrepresenting the status of their modification. *See Monterosso*, 756 F.3d at 1333.

Finally, the Sheelys' attempt to bolster their claim by reference to the "public record" is unavailing. The Sheelys cite the declarations of six former BANA employees that were prepared for litigation in another case. Although these

declarations were attached to the complaint, they were not offered as evidence in this case, nor, even if they were, are they directly relevant to the Sheelys' interactions with BANA. Though these declarations may have given the Sheelys reason to suspect that BANA was not dealing with them fairly and in good faith, the Sheelys have not sufficiently supported that belief with evidence from which a reasonable jury could conclude that BANA strung them along with no intent to grant a permanent loan modification.

In sum, we cannot conclude that genuine issues of material facts exist as to whether BANA committed fraud as alleged by the Sheelys. We therefore affirm the district court's grant of summary judgment on this claim.

IV. Conclusion

For the reasons stated, we affirm the district court's grant of summary judgment on the Sheelys' complaint against BANA and BNY.

AFFIRMED.

APPENDIX B:

Opinion of the US District Court (22 pages)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANTHONY SHEELY, JR. and FELICIA A. BOYD-SHEELY, Plaintiffs, v. BANK OF AMERICA, N.A. and THE BANK OF NEW YORK MELLON, Defendants.	CIVIL ACTION FILE NUMBER 1:15-cv-1109-TCB

ORDER

This case comes before the Court on Magistrate Judge Alan J. Baverman's Final Report and Recommendation (the "R&R") [47], which recommends that the motion for summary judgment [33] filed by Defendants Bank of America, N.A. ("BANA") and the Bank of New York Mellon ("BNY") be granted in part and denied in part.

I. Scope of Review

This Court has a duty to conduct a "careful and complete" review of the R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam). The Court must make "a *de novo* determination of those

portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). Conversely, portions of the R&R to which no objections are made are reviewed only for clear error. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

Here, Plaintiffs and Defendants have each filed partial objections to the R&R: Defendants object to the recommendation that summary judgment be denied in part [50], and Plaintiffs object to the recommendation that summary judgment be granted in part [51]. Given the breadth of the parties' objections and the obligation to conduct a *de novo* review of all matters objected to, the Court effectively starts anew in its consideration of the motion for summary judgment.

The only exception is Plaintiffs' claim for intentional infliction of emotional distress. *See* [1-2] at ¶¶ 76–80. Plaintiffs have not objected to the R&R's recommendation that summary judgment be granted on this claim. *See* [47] at 22–26 (R&R's analysis of the emotional-distress claim); [51] (Plaintiffs' objections to the R&R, making no mention of that claim). The Court has reviewed that portion of the R&R for clear

error, and finding none in its legal conclusions or supporting factual findings, it will be adopted.

II. Factual Background

In May 2007, Plaintiffs Anthony Sheely, Jr. and Felicia Boyd-Sheely refinanced their home through a loan obtained from Countrywide Home Loans, Inc. The loan was evidenced by a promissory note executed in favor of Countrywide, and payment of the note was secured by a security deed granted to Mortgage Electronic Registration Systems, Inc. ("MERS") as Countrywide's nominee. In 2010, MERS assigned the Sheelys' security deed to BAC Home Loans Servicing, LP (then known as Countrywide Home Loans Servicing), which has since merged with and into Defendant BANA. In 2011, BAC Home Loans Servicing assigned the security deed to Defendant BNY, but BANA continued to service the loan until December 2013, when it transferred servicing rights to a third party.

Beginning in October 2007, after the onset of the economic recession, the Sheelys failed to make timely monthly payments and defaulted on their loan. Over the next six to seven months, they

attempted to remit partial payments, but those payments were returned to the Sheelys because the amounts were insufficient to cover the amount of default.

On January 16, 2008, Countrywide sent the Sheelys a notice of default and acceleration advising them that their loan was in default, that the amount required to reinstate the loan was $6,689.01, and that they could cure default by paying that amount on or before February 15.

A second notice was sent to the Sheelys by Countrywide on April 10, 2008, reflecting a new reinstatement amount of $13,097.25 and a new deadline to cure of May 10. Although the Sheelys did not cure their default, Defendants did not move forward with foreclosure.

The Sheelys applied for loan modifications on several occasions, including in March 2010. BANA sent correspondence dated March 5 and March 9 to the Sheelys informing them that in order to qualify for a modification, they had to make trial-period payments of $3,410 per month for three consecutive months. The Sheelys deny receiving those letters and did not make any trial-period payments. On May 21, 2010,

BANA informed the Sheelys that they were ineligible for a loan modification. The Sheelys deny receiving this letter as well.

The Sheelys continued to seek loan modifications, and in July 2012, BANA wrote to them advising that they were approved to begin a trial-period plan for a new loan modification program. Again, the Sheelys were required to make three monthly payments during the trial period, and again the Sheelys deny receiving BANA's letter, did not make the required payments, and were not granted a modification.

In July 2013, as the Sheelys continued to seek a loan modification, they were informed that their loan was "not eligible for modification because [BANA] cannot create an affordable payment without changing the terms of your loan beyond the limits of the program." [33-3] at 97. The Sheelys appealed, but BANA confirmed their ineligibility. BANA—without sending the Sheelys a new notice of default and acceleration—subsequently referred the Sheelys' loan to the law firm of McCurdy &

Candler, LLC to conduct a non-judicial foreclosure sale of the property.[1] However, no foreclosure sale has occurred to date.

In February 2015, the Sheelys initiated this action in the Superior Court of Fulton County.[2] Defendants timely removed the case to this Court and filed a motion to dismiss, which the Court granted in part and denied in part [19].

In addition to the Sheelys' claim for intentional infliction of emotional distress—as to which Defendants are entitled to summary judgment, as discussed above—they have brought claims against Defendants for fraud and breach of contract. The Sheelys claim that Defendants defrauded them by inducing them into missing mortgage payments and by misrepresenting that they were seriously considering the Sheelys for a loan modification. *See* [1-2] at ¶58.

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[1] The security deed grants MERS and its successors and assigns a power of sale on the property in the event of an uncured default.

[2] The Sheelys filed a previous suit against Defendants in January 2014, but those claims were dismissed (some without prejudice) in August 2014 after the case was removed to this Court. *See Sheely v. Bank of Am., N.A.*, No. 1:14-cv-441-TCB (N.D. Ga. removed Feb. 2014, dismissed Aug. 2014) ("*Sheely I*").

The Sheelys also allege that Defendants breached the terms of the security deed requiring Defendants to provide pre-acceleration notice to the Sheelys identifying the default, the action required to cure the default, and a date at least thirty days out by which the default must be cured. *Id.* at ¶¶64–65. Finally, the Sheelys assert derivative claims for punitive damages and costs and attorneys' fees pursuant to O.C.G.A. § 13-6-11.

Defendants have moved for summary judgment on all of the Sheelys' claims [33]. The R&R recommends that the motion be granted in part and denied in part. As noted above, it recommends granting summary judgment on the Sheelys' claim of intentional infliction of emotional distress, a recommendation that the Court will adopt. The R&R further recommends that summary judgment be granted as to the fraud claim but denied as to the Sheelys' claims for breach of contract and fees under O.C.G.A. § 13-6-11.

III. Discussion

A. Plaintiffs' Breach-of-Contract Claim

Count two of the Sheelys' complaint asserts a claim for breach of contract based on Defendants' alleged failure to comply with paragraph 22 of the security deed, which requires Defendants to provide pre-acceleration notice that specifies:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to [the Sheelys], by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by [the security deed] and sale of the Property.

[33-3] at 28 ¶22. There is no question that Georgia law recognizes a cause of action for breach of contract based on a foreclosing party's failure to comply with such a notice requirement. *Carter v. HSBC Mortg. Servs., Inc.*, 680 F. App'x 890, 893 (11th Cir. 2017).

Both the note and the security deed specify that notices required to be sent are deemed given when they are mailed. [33-2] at ¶¶35–36; [33-3] at 14 ¶ 7, 26 ¶15. Defendants adduced evidence, in the form of declaration testimony and copies of the correspondence in question,

tending to show that the required notices were mailed to the Sheelys on January 16 and April 10, 2008. *See* [33-3] at 5 ¶15, 57–60, 62–65.

The Sheelys offer no contradictory evidence, claiming instead only that they never *received* the letters. As the R&R correctly concludes, however, the fact that the Sheelys did not receive the notices does not, standing alone, create a genuine issue of material fact as to whether those notices were sent and "is not material to the question of whether [Defendants] complied with [their] obligations under the security deed." *Carter*, 680 F. App'x at 893.

The undisputed evidence therefore shows that Defendants complied with the obligations imposed by paragraph 22 of the security deed. *Id.* (affirming summary judgment and finding that the homeowner's "assertion that she did not in fact receive the notice does not create a genuine dispute of fact"); *see also Eason v. PNC Bank, N.A.*, 617 F. App'x 942, 944 (11th Cir. 2015) (affirming summary judgment based on a finding that notice was given when mailed, even though it was allegedly never received by the borrower); *Walker v. JPMorgan Chase Bank, N.A.*, 987 F. Supp. 2d 1348, 1352 (N.D. Ga. 2013) (granting

summary judgment to lender where lender mailed notice that complied with security deed and security deed specified that the act of mailing the letter constituted giving notice).

The Sheelys next urge the Court to deny summary judgment because the notices provided by Defendants were sent too far in advance. This too is unavailing. A security deed is a contract, and "its provisions are controlling as to the rights of the parties thereto and their privies." *Gordon v. S. Cent. Farm Credit, ACA*, 446 S.E.2d 514, 515 (Ga. Ct. App. 1994). The security deed in this case required only that the notice of default be sent in advance of the acceleration; it does not "impose any restrictions on how far in advance." *Carr v. U.S. Bank, N.A.*, 534 F. App'x 878, 881 (11th Cir. 2013).

The fact that the amount required to cure the default had changed does not alter this conclusion. *See Chadwick v. Bank of Am., N.A.*, No. 1:12-cv-3532-TWT, 2014 WL 4449833, at *6 (N.D. Ga. Sept. 9, 2014) (holding that where bank sent pre-acceleration notice then accepted a partial payment from the plaintiff, it was not thereafter required to send a new pre-acceleration notice before foreclosing). The Sheelys cite

no legal authority supporting their argument that the 2008 notices of default had become stale such that Defendants were required to send new notices before foreclosing in 2013.

Equally unpersuasive is the Sheelys' argument that because the 2008 notices of default were sent by Countrywide, Defendants—one of which is Countrywide's successor in interest—were required to send their own notices before foreclosing. The Sheelys cite no case law—and the Court has found none—holding that a note holder cannot rely on a pre-acceleration notice sent by its predecessor. This argument is particularly weak in light of the concession that the Sheelys knew of the relationship between Countrywide and BANA,[3] eliminating the risk that they might not have known who to contact about their loan.

The undisputed record evidence shows that notices of default were mailed in 2008 to the address identified in the security deed as the

[3] *See* [35] (Declaration of Felicia Boyd-Sheely) at, *e.g.*, ¶¶11 ("In the following month, February 2008, Countrywide merged with BANA, and we started receiving correspondence from BANA."), 12 (referring to "letters from Countrywide and BANA" that threatened foreclosure), 13 (stating that the Sheelys knew by February 2008 that BANA was servicing their loan), 15 ("We do recall requesting assistance from BANA as early as February 2008, immediately after Countrywide merged with BANA.").

Sheelys' notice address. The Sheelys' non-receipt of the notices is immaterial, at least in the absence of evidence that would support an inference that they were not in fact mailed. And the Court is unpersuaded that Defendants were required to send new notices prior to foreclosing in 2013. For these reasons, the Court respectfully disagrees with the R&R's recommendation that summary judgment be denied on the Sheelys' claim for breach of contract.[4]

The Court will therefore sustain Defendants' partial objection to the R&R and reject the recommendation that summary judgment be denied as to the Sheelys' claim for breach of contract.

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[4] This aspect of the R&R's recommendation relied to a significant extent on its finding that Defendants had omitted certain factual assertions contained in the affidavit of Ryan Dansby from their statement of material facts ("SOMF"). *See* [47] at 21–22. True, Defendants could have done a better job of highlighting these facts, but the SOMF does state that "BANA sent all correspondence via first class mail to" the Sheelys' notice address, and it cites to paragraph 15 of Dansby's affidavit, wherein he states that the notices were mailed to the Sheelys via First Class Mail on January 16 and April 10, 2008.[33-2] at ¶37; [33-3] at ¶15. Moreover, now that these issues have been further briefed in response to the R&R, any risk that the Sheelys were prejudiced by any omission from Defendants' SOMF is eliminated. To exclude consideration of paragraph 15 of Dansby's affidavit under these circumstances, even if this Court's local rules would permit it, would be to elevate form over substance and permit a claim to proceed to trial even though the material facts supporting it are not genuinely in dispute.

B. Plaintiffs' Fraud Claim

In count one of their complaint, the Sheelys bring a claim for fraud against Defendant BANA.[5] The R&R recommends granting summary judgment to Defendants on this claim, which it analyzed as predominantly being based on an allegation that BANA fraudulently induced the Sheelys into missing three months of mortgage payments so that they could qualify for a loan modification. [47] at 9–20.

In their objections, the Sheelys object that the R&R misconstrues their fraud claim, which in fact is based on "BANA's actions in representing to [the Sheelys] that BANA was processing the documents that [the Sheelys] sent in for review when BANA was not in fact reviewing their documents for a modification." [51] at 2. Although the magistrate judge's interpretation of the Sheelys' fraud claim was reasonable based on the issues presented in the parties' briefs,[6] this

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[5] The Sheelys never expressly state that their fraud claim is brought against only BANA, but the averments therein relate only to BANA's conduct, and the Court previously dismissed with prejudice their claim for fraud against Defendant BNY. *See Sheely I*, No. 1:14-cv-441-TCB (N.D. Ga. Aug. 15, 2014) (order on motion to dismiss [15]).

[6] *See, e.g.*, [38] at 6–7 (the Sheelys arguing, in opposition to Defendants' motion for summary judgment on their fraud claim, that they "were told to be

Court's *de novo* review of the fraud claim will begin by analyzing the claim as the Sheelys now characterize it. Then, out of an abundance of caution, the Court will review the R&R's analysis of any claim based on an allegation that BANA fraudulently induced the Sheelys into defaulting on their loan.

1. Fraud Based on BANA Misrepresenting the Status of Plaintiffs' Modification Application

"Under Georgia law the tort of fraud consists of five elements: (1) false representation by defendant; (2) scienter; (3) intent to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." *Smith-Tyler v. Bank of Am., N.A.*, 992 F. Supp. 2d 1277, 1282 (N.D. Ga. 2014) (ellipses omitted) (quoting *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1027 (11th Cir. 2003)).

As to the first element, "[a]ctionable fraud does not result from a mere failure to perform promises made; otherwise, any breach of contract would amount to fraud. Fraud does occur, however, when a

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behind on their mortgage" on two separate occasions and that they "relied on BANA's advice to be behind to qualify for a modification and failed to make future payments").

party enters into a contract with no present intention of performing his promises." *Brock v. King*, 629 S.E.2d 829, 834 (Ga. Ct. App. 2006); *see also Hayes v. Hallmark Apts., Inc.*, 2017 S.E.2d 197, 199 (Ga. 1974) (noting that a misrepresentation as to a future event is actionable "if, when the misrepresentation is made, the defendant knows that the future event will not take place").

As noted, the Sheelys allege that BANA defrauded them by falsely representing that it would consider their application for a loan modification when in reality it had no intention of doing so. In support of its motion for summary judgment, BANA relies on the declaration testimony of Ryan Dansby, an assistant vice president with BANA who is the operations team manager on BANA's mortgage resolution team. In his declaration, Dansby testifies in pertinent part as follows:

- "[A]s early as June of 2008, BANA began reviewing the [Sheelys'] Loan for modification." [33-3] at ¶20;
- "Plaintiffs were approved for a modification in July of 2008," but that "modification was declined on September 3, 2008 after Plaintiffs failed to return required signed documentation." *Id.* at ¶21;
- "Plaintiffs were again reviewed for modification . . . in April of 2009, but did not qualify." *Id.* at ¶22;

- "Plaintiffs were reviewed for [other] workout options beginning in March of 2010." *Id.* at ¶23;
- BANA provided the Sheelys with notice in March 2010 about the need to make trial-period payments in order to qualify for a loan modification, but the Sheelys made no such payments. *Id.* at ¶¶24–26;
- In July 2012, the Sheelys were again notified of the need to comply with a trial-period plan in order to be eligible to modify, and again the Sheelys did not make the payments and were denied modification. *Id.* at ¶¶ 29–30;
- BANA reviewed the Sheelys for a loan modification in good faith, "reviewed all documents received from Plaintiffs at or near the time received," and "did not discard any documents submitted by Plaintiffs." *Id.* at ¶¶35–36; and
- "The decision to deny Plaintiffs' requests for a loan modification were [sic] based on Plaintiffs' failure to make required trial period payments, failure to execute and return required documents, or Plaintiffs' inability to qualify for an available modification program." *Id.* at ¶38.

In response, the Sheelys do not cite to any testimony from a BANA employee tending to show that BANA did not consider their modification requests. Nor do the Sheelys point to any documents or interrogatory answers suggesting that BANA deliberately misled them into believing they were being considered for a modification when in fact they were not. Indeed, the Sheelys appear to have taken no depositions and engaged in no written discovery in connection with this

litigation. Thus, the only evidence they rely on in opposition to Defendants' motion is the declaration testimony of Felicia Boyd-Sheely.

This is problematic for a number of reasons, including that her declaration is rife with hearsay and it substantially conflicts in many respects with both her deposition testimony and averments in the Sheelys' verified complaint, which has never been amended even as significant misstatements contained therein have come to light. For example, Boyd-Sheely details numerous conversations that she and her husband allegedly had with BANA's employees, and the Sheelys suggest that from those conversations a reasonable juror could conclude that BANA was misrepresenting its actions vis-à-vis the Sheelys' modification requests. The R&R correctly concludes that these conversations with unspecified BANA employees are inadmissible hearsay, and the Sheelys' objections otherwise are unpersuasive, as discussed below.

But more importantly, and what is fatal to the Sheelys' claim of fraud, is that Boyd-Sheely's declaration does not actually rebut Dansby's testimony that BANA did consider the Sheelys for a loan

modification. Even giving full credit to the conversations and processes detailed therein and construing that evidence in the light most favorable to the Sheelys, a fact-finder would have to rely on speculation and unfounded conjecture to find in favor of the Sheelys on this claim. Similarly, Boyd-Sheely lacks any personal knowledge to support her conclusory assertion that she and her husband "were never honestly reviewed for a modification." [35] at ¶29.

Simply put, the Sheelys speculate that BANA misrepresented its willingness to consider them for a loan modification, but there is no evidence from which a reasonable fact-finder could so conclude. The Sheelys' fraud claim therefore fails on the first element for lack of an actionable misrepresentation. It also fails on the second essential element, because the evidence before the Court does not evince any reckless representation or intent to deceive on BANA's part. *See Smith-Tyler*, 992 F. Supp. 2d at 1282–83 (noting that scienter can be shown by a reckless representation and an intent to defraud).

"Speculation or conjecture cannot create a genuine issue of material fact, and a 'mere scintilla of evidence' in support of the

nonmoving party cannot overcome a motion for summary judgment." *SEC v. Moneterosso*, 756 F.3d 1326, (11th Cir. 2014) (quoting *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004)). Because there is "a complete failure of proof concerning an essential element of the nonmoving party's case," BANA is entitled to summary judgment on any fraud claim premised on its alleged misrepresentations about its willingness to consider the Sheelys for a modification. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

2. Fraud Based on BANA Inducing Plaintiffs into Defaulting on Their Loan

Finally, the R&R analyzed the Sheelys' fraud claim based on the allegation that BANA fraudulently induced them into defaulting on their loan by telling them they had to be three months behind to qualify for a loan modification. The Sheelys have arguably abandoned this claim by contending they never in fact brought a fraud claim on this theory. *See* [51] at 2 ("Plaintiffs never alleged that that statement by BANA was fraudulent"), 10–11 (objecting to the R&R's mischaracterization of their fraud claim). However, out of an abundance of caution, the Court has nevertheless given *de novo* review to this

aspect of the R&R. Having done so, it finds no error in the R&R's factual findings or legal conclusions.

The Sheelys object to the R&R's conclusion that the statements in Boyd-Sheely's declaration about the Sheelys' conversations with BANA representatives are inadmissible hearsay. *See* [47] at 9–13; [51] at 3–10. The R&R correctly analyzed this issue in detail that does not need to be fully repeated here. The Court finds Judge May's analysis in *Funderburk v. Fannie Mae*, No. 1:13-cv-1362-LMM, 2015 WL 11216690 (N.D. Ga. Nov. 16, 2015), *aff'd*, 654 F. App'x 476 (11th Cir. 2016)—which is quoted at length in the R&R—squarely on point. Boyd-Sheely's declaration simply does not contain sufficient facts to lay a foundation for the admission of the alleged conversations and statements contained therein.

The Court has given careful *de novo* review to the R&R's treatment of the Sheelys' fraud claim, the parties' objections thereto, and the record evidence. Having done so, the Court concludes that the Sheelys have failed to show that BANA made any actionable misrepresentation or that it did so with the requisite scienter. These are

essential elements of a claim of fraud. Accordingly, even though the R&R did not fully address the Sheelys' contentions, its conclusion recommending that summary judgment be granted to BANA on the Sheelys' fraud claim is correct.

C. Plaintiffs' Claims for Punitive Damages and Attorneys' Fees Under O.C.G.A. § 13-6-11

Finally, because Defendants are entitled to summary judgment on the Sheelys' claims for breach of contract, fraud, and intentional infliction of emotional distress, they are likewise entitled to summary judgment on the Sheelys' derivative claims for punitive damages and attorneys' fees under O.C.G.A. § 13-6-11. *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1304–05 (11th Cir. 2009) ("Because the court has concluded that Taser Defendants are entitled to summary judgment with respect to all the Plaintiffs' substantive claims, the claim for punitive damages cannot survive."); *Perkins v. Thrasher*, ___ F. App'x ___, 2017 WL 3049355, at *4 (11th Cir. July 19, 2017) ("Perkins's Georgia state law claims for punitive damages . . . and attorney's fees under O.C.G.A. § 13-6-11 are derivative . . . and thus require an underlying claim.").

IV. Conclusion

For the foregoing reasons, the Court adopts in part and rejects in part the R&R [47], grants Defendants' motion for summary judgment [33] in its entirety, and directs the Clerk to close this case.

IT IS SO ORDERED this 8th day of September, 2017.

Timothy C. Batten, Sr.
United States District Judge

APPENDIX C:

Order Denying Petition for Panel Rehearing

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 16, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-14511-GG
Case Style: Anthony Sheely, Jr., et al v. Bank of America, N.A., et al
District Court Docket No: 1:15-cv-01109-TCB

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joe Caruso, GG/lt
Phone #: (404) 335-6177

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14511-GG

ANTHONY SHEELY, JR.,
FELICIA A. BOYD-SHEELY,

Plaintiffs - Appellants,

versus

BANK OF AMERICA, N.A.,
THE BANK OF NEW YORK MELLON,
f.k.a. The Bank of New York, as Trustee For the Certificate-Holders of CWALT, Inc.,
Alternative Loan Trust 2007-19 Mortgage Pass-Through Certificates, Series 2007-19,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: WILSON, JORDAN, and ROSENBUAM, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellants is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41