APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10238
Non-Argument Calendar

D.C. Docket No. 1:16-cv-04326-SCJ

[Filed March 27, 2020]

ROSETTA BULLUCK,

Plaintiff - Appellant,

versus

NEWTEK SMALL BUSINESS FINANCE, INC., d.b.a. Newtek Business Services, Inc., FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Global Commerce Bank,

Defendants - Appellees.

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

(March 27, 2020)

Before MARTIN, NEWSOM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Plaintiff Rosetta Bulluck appeals the district court's grant of summary judgment to Defendants Newtek Small Business Finance, Inc., and Federal Deposit Insurance Corporation, as receiver for Global Commerce Bank, on all of her claims related to an alleged wrongful foreclosure and eviction. After careful review, we affirm.

I. BACKGROUND

A. Factual Background

Plaintiff Rosetta Bulluck, as President of Bulluck's Best BBQ & Catering, Inc.[1], applied for and received a small business loan in the amount of $141,000 from Global Commerce Bank. Plaintiff and her now deceased husband guaranteed the loan in their individual capacities. The Small Business Administration ("SBA") also guaranteed the loan in accordance with the provisions of the Small Business Act, 15 U.S.C. § 631 et seq.

Plaintiff used the loan to purchase property in Conley, Georgia, to operate a restaurant Bulluck's Best

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[1] Although "Bulluck's Best BBQ & Catering, Inc.," applied for and received the loan, Plaintiff maintains the formal name is actually "Bulluck's Best BarBQ & Catering, Inc." The record reflects that Plaintiff used these spellings interchangeably, as more fully explained below.

BBQ & Catering, Inc. Global Commerce Bank received a security interest in the Property and recorded a Deed to Secure Debt.

The Georgia Department of Banking and Finance subsequently closed Global Commerce Bank and named Defendant Federal Deposit Insurance Corporation as Receiver ("FDIC-R"). FDIC-R engaged Defendant Newtek Business Services, LLC ("Newtek") to service the Loan.

At the time Newtek began servicing the loan, Plaintiff was in arrears and operating under a Chapter 13 bankruptcy plan. Eventually, Plaintiff would file a total of seven bankruptcy actions, all of which were dismissed for failure to comply with filing requirements or failure to make payments required by the bankruptcy court.

Plaintiff's failure to make timely payments continued after Newtek began servicing the loan. Consequently, FDIC-R obtained an order terminating the automatic stay generated by Plaintiff's pending bankruptcy case and allowing it to pursue foreclosure and dispossessory proceedings.

On June 27, 2014, FDIC-R sent a letter to Plaintiff and to Bulluck's Best BBQ & Catering, Inc., notifying them that the loan was in default and declaring the entire amount due. The letter also stated that FDIC-R intended to sell the property securing the loan on August 4, 2014, to cover the amounts due. FDIC-R conducted the noticed foreclosure sale and took title to the property pursuant to a credit bid.

However, FDIC-R did not record the deed because, on the day of the foreclosure sale, Plaintiff had filed another bankruptcy proceeding. The Bankruptcy Court dismissed that action on September 2, 2014 for failure to pay filing fees. Undeterred, Plaintiff filed yet another bankruptcy case on September 8, 2014. FDIC-R moved to dismiss, arguing that Plaintiff had filed successive bankruptcy cases in bad faith and had abused the Bankruptcy Code to prevent foreclosure. FDIC-R requested that the Bankruptcy Court confirm that no stay had been in effect on the date of the sale and that it could file the foreclosure deed and institute dispossessory proceedings. On October 22, 2014, the Bankruptcy Court granted the motion, dismissing the bankruptcy action and validating the foreclosure sale. However, Plaintiff did not vacate the property.

FDIC-R filed a dispossessory action in the Magistrate Court of Clayton County on February 27, 2015. The Magistrate Court granted FDIC-R a writ of possession for the property on March 23, 2015. Plaintiff appealed the dispossessory order to the Clayton County Superior Court but later dismissed the appeal.

Following Plaintiff's dismissal of her appeal, Defendants observed that it appeared the restaurant on its property had ceased operations and that Plaintiff had abandoned the property. On October 15, 2015, Defendants' counsel attempted to secure the property by having the locks changed. Plaintiff arrived on site while the locks were being changed and asserted that she remained in possession of the property. Defendants' counsel turned the property over to her,

gave her a key to the newly installed lock, and left the premises.

B. Procedural History

On November 3, 2015 Plaintiff filed a state court Complaint[2] against Defendant alleging several causes of action related to wrongful foreclosure, including negligence and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing. Plaintiff grounded those claims on an alleged breach of the SBA servicing guidelines governing her loan. Plaintiff also alleged wrongful eviction based on an unspecified violation of O.C.G.A. § 44-7-50 and trespass to realty under O.C.G.A. § 51-9-1. Defendants removed the case to the United States District Court for the Northern District of Georgia.

Defendants also sought and obtained a second Writ of Possession from the Clayton County Superior Court, commanding the Sheriff of Clayton County to remove Plaintiff from the property. Plaintiff responded by appealing to the Georgia Court of Appeals for emergency relief and filing her seventh bankruptcy petition. The appeal and bankruptcy petition were dismissed in short order and eviction was completed in May 2016.

Meanwhile, this civil case progressed in the district court. Following completion of discovery, the parties cross moved for summary judgment. The magistrate judge issued two reports, one recommending denial of

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[2] Although titled a "Verified Complaint," the Complaint contains no verification or affidavit.

Plaintiff's summary judgment motion and one recommending that Defendants' joint summary judgment motion be granted. The magistrate judge recommended that Plaintiff's claims for negligence and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing be dismissed as a matter of law because "no private right of action exists for a violation of the [Small Business] Act or the regulations." The magistrate judge further recommended that Plaintiff's claim for wrongful eviction be denied "[b]ecause Defendants filed a dispossessory action and obtained writs of possession as required under the Georgia statutory scheme." Finally, the magistrate judge recommended that Plaintiff's claim for trespass to realty be denied because there is no evidence that Defendants refused to leave the property or interfered with Plaintiff's possessory interest in the property.

The district court adopted the magistrate judge's recommendations over Plaintiff's objections. Plaintiff timely appealed.

II. DISCUSSION

A. Standard of Review

This Court reviews a district court's grant of summary judgment *de novo,* applying the same legal standards as the district court. *Chapman v. AI Transp.,* 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc). A grant of summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making this

determination, we view all evidence and make all reasonable inferences in favor of the non-moving party. *Chapman,* 229 F.3d at 1023.

B. The District Court Properly Granted Summary Judgment to Defendants on Plaintiff's Negligence, Negligent Misrepresentation, Breach of Contract, and Breach of Implied Duty of Good Faith and Fair Dealing Claims

Plaintiff maintains the district court erred in entering summary judgment on her negligence and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing claims because Defendants breached a duty of care established by the Small Business Association loan servicing guidelines. The district court rejected that notion because no private right of action exists for a violation of the Small Business Act or regulations.

Plaintiff asserts that her claims are viable because a duty of care may be inferred from SBA Guidelines she states required Defendant to provide her loan information "after any 'Loan Action'." But we agree with the district court that "no private right of action exists for a violation of the [Small Business] Act or the regulations." *United States v. Fid. Capital Corp.*, 920 F.2d 827, 838 n.39 (11th Cir. 1991); *Tectonics, Inc. of Fla. v. Castle Const. Co., Inc.*, 753 F.2d 957, 960 (11th Cir. 1985) ("there was no intent to create civil rights of action in private persons" in the Small Business Act); *see also State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, Inc.*, 719 S.E.2d 597, 601 (Ga. Ct. App. 2011) ("[I]t is well settled that violating

statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof."). Moreover, contrary to Plaintiff's assertions, we see nothing in the Security Deed obligating Defendants to abide by SBA Guidelines that might provide an independent cause of action. Accordingly, we find Plaintiff's asserted grounds for negligence, breach of contract, and breach of implied covenant unpersuasive.

Plaintiff waived, abandoned, or never asserted in her Complaint other arguments made on appeal. To the extent Plaintiff bases her claims on an alleged breach of ordinary care under Georgia law she has abandoned or waived any such claim by failing to raise those arguments in response to Defendants' motions for summary judgment.[3] *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (claims raised for first time on appeal are waived); *Resolution Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.

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[3] Plaintiff devotes most of her reply brief to citing general statements from the record below she contends preserved an ordinary negligence claim. Even if the cited passages could be construed to relate to an ordinary negligence claim separate and apart from her claims based on the SBA Guidelines, they are insufficient to preserve that claim. The arguments raised on appeal in support of an ordinary negligence claim were not raised below and, consequently, the district court never had a chance to examine them. *Resolution Tr. Corp.*, 43 F.3d at 599 ("There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment."). We will not consider them for the first time on appeal. *Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000) ("Arguments raised for the first time on appeal are not properly before this Court.").

1995) ("grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned"). Though Plaintiff alleged violations of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605, in her response to Defendants' motions for summary judgment, she made no such allegations in her complaint and the district court correctly rejected that argument. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam) ("At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."). Accordingly, we will not consider Plaintiff's arguments based on "ordinary negligence" under Georgia law.[4]

Plaintiff similarly waived arguments regarding third-party beneficiary status afforded by 15 U.S.C. § 631 and O.C.G.A. § 9-2-20(b) which Plaintiff raised for the first time on appeal in arguing the viability of

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[4] Even if we considered Plaintiff's belated arguments, Georgia courts have declined to uphold breach of contract and negligence claims based on a failure to comply with federal statutory provisions, absent a plain intent to impose a legal duty and authorize a private action. *See U.S. Bank, N.A. v. Phillips*, 734 S.E.2d 799, 804 (Ga. Ct. App. 2012) ("[t]he provisions of [the federal Home Affordable Modification Program] do not plainly impose a legal duty intended to benefit homeowners, so as to authorize a private negligence cause of action"). In any event, Plaintiff's citation to unverified and conclusory allegations made in her Complaint regarding a breach of duty do not raise a genuine issue of fact for trial, especially when the documentary record demonstrates that Defendants provided loan information as requested by Plaintiff in accordance with SBA Guidelines.

her breach of contract and breach of implied covenant of good faith and fair dealing claims. The same is true for Plaintiff's arguments based on alleged violations of SBA SOP 50 57, which Plaintiff never cited below. Although Plaintiff's Complaint cites "SOP 50 50 4 – SBA Loan Servicing" as a basis for breach of contract, Plaintiff abandoned that argument on summary judgment. *Resolution Tr. Corp.*, 43 F.3d at 599 ("grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned").

For these reasons, we affirm the district court's grant of summary judgment for Defendants on Plaintiff's negligence and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing claims.

C. The District Court Properly Granted Summary Judgment to Defendants on Plaintiff's Wrongful Eviction and Foreclosure Claim

Plaintiff maintains that her wrongful foreclosure and eviction claims are viable because "the foreclosure and dispossessory proceedings were invalid in the first place." "Georgia law requires a plaintiff asserting a claim of wrongful foreclosure to establish a legal duty owed to it by the foreclosing party, a breach of that duty, a causal connection between the breach of that duty and the injury it sustained, and damages." *Heritage Creek Dev. Corp. v. Colonial Bank*, 601 S.E.2d 842, 844 (Ga. Ct. App. 2004). Similarly, the tort of wrongful eviction requires Plaintiff to demonstrate that Defendants did not properly institute a dispossessory action pursuant to O.C.G.A. § 44-7-50 et seq. *Steed v.*

Fed. Nat'l Mortg. Corp., 689 S.E.2d 843, 848 (Ga. Ct. App. 2009).

Here, it is undisputed that Plaintiff was in arrears when the FDIC-R conducted a foreclosure sale and took title to the property. It is further undisputed that Defendants received the bankruptcy court's approval to conduct a foreclosure sale, confirmed the validity of the foreclosure sale with the bankruptcy court, obtained two writs of possession, and waited for Plaintiff's appeal for emergency relief to be denied by the Georgia Court of Appeals before evicting Plaintiff. Plaintiff does not challenge the eviction proceedings other than to assert that the foreclosure sale preceding eviction was improper. Plaintiff asserts the foreclosure sale was invalid for two reasons.

First, Plaintiff maintains that deficiency letters and foreclosure notices sent by Defendants were ineffective because Defendants sometimes "misspelt the word 'Barbeque'" when noticing "Bulluck's Best BBQ & Catering, Inc." Plaintiff asserts Defendants noticed the wrong party because "[t]he formal name was actually 'Bulluck's Best BARBQ & Catering, Inc." We find this argument unpersuasive because the published notice of sale correctly identified the grantor under the Security Deed as "Bulluck's Best BBQ & Catering, Inc., a Georgia corporation a/k/a Bulluck's Best BARBQ & Catering, Inc." Moreover, Plaintiff used the various spellings interchangeably, indicating that she

understood notices using the "BBQ" spelling to apply to Bulluck's Best BARBQ & Catering, Inc.[5]

Second, undermining the notion that Defendants noticed the wrong corporate entity, Plaintiff asserts that Defendants notices were ineffective because both corporate entities were administratively dissolved before foreclosure, she was the sole owner of the property, and she "was never included in any of the foreclosure documents." Yet Defendants addressed the notice of default attached to Plaintiff's Complaint, not only to Bulluck's Best BBQ & Catering, Inc., but to Plaintiff individually. Moreover, Plaintiff admitted in her response to Defendant Newtek's Request for Admissions that she received a copy of that notice of default. Thus, that Plaintiff had notice of default and was informed of the foreclosure sale as stated in the notice of default is not genuinely disputed.

We further note that Plaintiff's many bankruptcy filings timed to thwart Defendants' attempts to collect, foreclose, and evict demonstrate that Defendants' foreclosure and eviction documentation sufficiently apprised Plaintiff of the status of her loan, the foreclosure sale, and the intent to evict despite Plaintiff's protestations to the contrary. No genuine dispute exists that Plaintiff had a full and fair opportunity to make payment on the loan or challenge the foreclosure and eviction proceedings in state and bankruptcy court. Accordingly, the record does not

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[5] For instance, Plaintiff filed at least three bankruptcy petitions in the name of Bulluck's Best BBQ and Catering, Inc., in addition to obtaining the loan in that name.

support an argument that Plaintiff was injured by any technical deficiency in Defendants' foreclosure documents. *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1253 (11th Cir. 2015) ("even if the notice did not fully comply with Georgia law, [plaintiff's] claim for wrongful foreclosure would still fail because [she] cannot show a causal connection between this breach and a resulting injury").

For these reasons, we affirm the district court's grant of summary judgment to Defendants on Plaintiff's claims for wrongful foreclosure and eviction.

D. The District Court Properly Granted Summary Judgment to Defendants on Plaintiff's Trespass to Realty Claim

Plaintiff bases her trespass to realty claim on Defendants' attempt to take possession of the property following foreclosure. Plaintiff contends that Defendants' counsel entered the property without her permission and changed the locks which "directly interfered with [her] possessory interest and right to exclude others." Although Defendants' counsel gave Plaintiff the new key, Plaintiff argues "the damage had already been done: it was the act of breaking the lock and entering the premises that unlawfully violated [her] exclusive right to the premises."

O.C.G.A. § 51-9-1 provides: "The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." To prove trespass under § 51-9-1, Plaintiff must show that a physical trespasser "refused

to leave the [property] after being asked to leave", or that a person "interfered with [Plaintiff's] possessory interest in the realty." *Udoinyion v. Re/Max of Atlanta*, 657 S.E.2d 644, 648 (Ga. Ct. App. 2008).

Here, it is undisputed that at the time of the alleged trespass, FDIC-R had owned the property for over a year, Plaintiff was a tenant at sufferance[6], and FDIC-R had obtained a Writ of Possession permitting Plaintiff's removal. Defendants' counsel entered the property after it appeared to be abandoned by Plaintiff. Defendants' counsel left the premises when Plaintiff requested that she do so. It is also undisputed that Plaintiff had full access to the property following counsel's departure because counsel provided her a key to the new lock. The only issue is whether entering the property and changing the lock interfered with Plaintiff's possessory interest in an actionable way.

We agree with the district court that Plaintiff failed to demonstrate an actionable trespass claim. Plaintiff has not cited any Georgia authority, and we are aware of none, holding a landowner, much less a landowner with a Writ of Possession authorizing eviction, liable for trespass when entering its own property to assess whether a tenant at sufferance has abandoned the property when there has been no forcible dispossession of the tenant. *See, e.g. Owens v. Barclays American/Mortg. Corp.*, 460 S.E.2d 835, 838 (Ga. Ct. App. 1995) ("If the owner forcibly [dispossesses] a

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[6] Where former owners of real property, like Plaintiff, remain in possession after a foreclosure sale, they become tenants at sufferance. *Steed*, 689 S.E.2d at 848.

tenant without following [the procedures in O.C.G.A. § 44–7–50], the owner is subject to an action for trespass." (first alteration in original) (internal quotation marks and citation omitted)). Rather than forcibly dispossess Plaintiff, Defendants' counsel left the property at Plaintiff's request and gave her a key to the new lock. Plaintiff failed to demonstrate how entering the property after obtaining a Writ of Possession and replacing the lock interfered with her possessory interest under O.C.G.A. § 51-9-1 when Defendants' counsel provided Plaintiff a key to the new lock, left the property when confronted by Plaintiff, and never deprived Plaintiff use of the property as a tenant at sufferance before obtaining a second Writ of Possession and conducting a formal eviction under the authority of the Clayton County Sheriff's Department.[7]

Accordingly, we affirm the district court's grant of summary judgment for Defendants on Plaintiff's trespass claim.

III. CONCLUSION

For the reasons explained above, we **AFFIRM** the decision of the district court granting summary judgment to Defendants on all of Plaintiff's claims related to her foreclosure and eviction.

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[7] *Navajo Construction*, the lone case cited by Plaintiff to support her argument that Defendants trespassed by violating her right to exclude, merely involved an action for ejectment filed by an actual landowner, not a tenant at sufferance, against an adjacent property owner that erected an encroaching structure. *See Navajo Const., Inc. v. Brigham*, 608 S.E.2d 732, 733 (Ga. Ct. App. 2004).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10238

District Court Docket No.
1:16-cv-04326-SCJ

[Filed March 27, 2020]

ROSETTA BULLUCK,	)
	)
Plaintiff - Appellant,	)
	)
versus	)
	)
NEWTEK SMALL BUSINESS FINANCE, INC., d.b.a. Newtek Business Services, Inc., FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Global Commerce Bank,	)
	)
Defendants - Appellees.	)

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: March 27, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna H. Clark

APPENDIX B

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

CIVIL ACTION NO. 1:16-CV-4326-SCJ

[Filed December 21, 2018]

ROSETTA BULLUCK,	)
	)
Plaintiff,	)
	)
v.	)
	)
NEWTEK SMALL BUSINESS FINANCE, INC. d/b/a NEWTEK BUSINESS SERVICES, INC. and FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Global Commerce Bank,	)
	)
Defendants.	)

ORDER

This matter appears before the Court on the August 24, 2018, and August 28, 2018, Final Report and Recommendations ("R&Rs") of the Honorable Walter E. Johnson, United States Magistrate Judge. Doc. Nos.

[77]; [80]. The Magistrate Judge recommended that the Court deny Plaintiff Rosetta Bulluck's ("Plaintiff") Motion for Summary Judgment (Doc. No. [54]) and grant Defendants Newtek Small Business Finance, Inc. ("Newtek") and Federal Deposit Insurance Corporation as Receiver for Global Commerce Bank's ("FDIC-R") (collectively, the "Defendants") Motion for Summary Judgment (Doc. No. [55]). On September 10, 2018, Plaintiff filed objections to the R&R.[1] Doc. No. [82]. This matter is now ripe for review.

I. BACKGROUND

The Court incorporates by reference the facts and legal standards set forth in the R&Rs. See Doc. Nos. [77]; [80]. In summary, on November 3, 2015, Plaintiff filed suit against Defendants, alleging that they wrongfully foreclosed on her restaurant (the "Property"). See Doc. No. [1-2], p. 3, ¶1. In her Complaint, Plaintiff asserts claims for negligence and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and faith dealing, based on an alleged breach by Defendants of the loan servicing guidelines issued by the Small Business Act ("SBA"). Id. at pp. 8, 10–11; ¶¶39, 41, 56, 61. Plaintiff also asserts claims for wrongful eviction for a failure to comply with O.C.G.A. § 44-7-50 and

[1] Plaintiff has only filed objections to the magistrate's R&R granting Defendants' Motion for Summary Judgment (Doc. No. [80]). See Doc. No. [82].

trespass to realty in violation of O.C.G.A. § 51-9-1.[2] Id. at pp. 13–14, ¶¶ 72, 76.

On July 1, 2018, both Plaintiff and Defendants moved for summary judgment. See Doc. Nos. [54]; [55]. On August 24, 2018, the Magistrate Judge recommended that Plaintiff's Motion for Summary Judgment be denied due to Plaintiff's noncompliance with the Court's Local Rules. See Doc. No. [77]. Four days later, on August 28, 2018, the Magistrate Judge recommended that Defendants' Motion for Summary Judgment be granted. See Doc. No. [80]. Specifically, the Magistrate Judge found that Plaintiff's claims for negligence and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing, fail as a matter of law because "no private right of action exists for a violation of the [Small Business] Act or the regulations." Id. at p. 7 (citing United States v. Fid. Capital Corp., 920 F.2d 827, 838 n.39 (11th Cir. 1991); see also Techtonics, Inc. of Fla. V. Castle Const. Co., 753 F.2d 957, 960 (11th Cir. 1985) ("We think the purpose [of the Small Business Act] was public in character, viz., the preservation and expansion of full and free competition to insure the Nation's economic well-being and security, and that there was no intent to create civil rights of action in private persons.") (citation omitted). The Magistrate Judge also found that Plaintiff's claim for wrongful eviction fails as a matter of law "[b]ecause Defendants filed a dispossessory action and obtained writs of possession as required under the Georgia

[2] Plaintiff's claims for punitive damages and injunctive relief were previously dismissed by this Court. See Doc. No. [40].

statutory scheme." Id. at p. 13. Finally, the Magistrate Judge found that Plaintiff's claim for trespass to realty fails as a matter of law because there is no evidence that Defendants refused to leave the Property or interfered with Plaintiff's possessory interest in the Property. Id. at p. 17.

II. LEGAL STANDARD

In reviewing the R&R, 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); see also Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988) (citation omitted). At the conclusion of the Court's review, it "may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court may also "receive further evidence or recommit the matter to the magistrate judge with instructions." Id.

III. DISCUSSION

Plaintiff raises several objections to the magistrate's R&R, all of which are meritless. See Doc. No. [82]. The vast majority of Plaintiff's objections state that the Magistrate Judge "failed to take into account"

allegations from Plaintiff's prior bankruptcy proceedings or "failed to thoroughly review the record and the pleadings." Id. Yet the Court need not consider all of Plaintiff's objections in turn because, as Defendants point out, Plaintiff still fails to "set forth any facts or [cite] any legal authorities to support a private cause of action for any alleged violations of SBA regulations." Doc. No. [83], p. 3. Consequently, the Magistrate Judge correctly found that Plaintiff's claims for negligence and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing—all of which are premised on Defendants' alleged breach of the SBA regulations or guidelines—fail as a matter of law. See Techtonics, 753 F.2d at 960 ("[I]t is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof.").

The Magistrate Judge also correctly found that Plaintiff's claims for wrongful eviction and trespass to realty fail as a matter of law. The undisputed material facts show that Plaintiff was not evicted from the Property until after Defendants secured two writs of possession, as required under O.C.G.A. § 44-7-50, and the Georgia Court of Appeals denied Plaintiff's request for emergency relief. See Doc. No. [55-2], pp. 10–13; ¶¶ 40–49; see also Steed v. Fed. Nat'l Mortg. Corp., 689 S.E.2d 343, 848 (Ga. Ct. App. 2009) ("The exclusive method whereby a landlord may evict a tenant is through a properly instituted dispossessory action filed pursuant to O.C.G.A. § 44-7-50."). Further, there is also no evidence that Defendants refused to leave the Property or interfered with Plaintiff's possessory

interest in the Property. See Goia v. CitiFinancial Auto, 499 F. Appx' 930, 937 (11th Cir. 2012) (per curium) ("For a plaintiff to raise a claim for trespass under § 51-9-1, they must show that the trespasser refused to leave the house or realty after being asked to leave or that they interfered with the plaintiff's possessory interest in the realty.") (citation omitted).

The remainder of Plaintiff's objections suggest that the Magistrate Judge erred by failing to consider Plaintiff's unspecified new fraud claims. See Doc. No. [82], p. 8, ¶20. Plaintiff's fraud claims were not alleged in her Complaint and were raised by Plaintiff for the first time in her Response in Opposition to Defendants' Motion for Summary Judgment. See Doc. No. [70-2], p. 18. Accordingly, the Magistrate Judge correctly declined to consider them. See Gilmour v. Gates, McDonald and Co., 382 F.3d 1312, 1315 (11th Cir. 2004) ("At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").

IV. CONCLUSION

For the reasons discussed above, Plaintiff's objections to the R&Rs (Doc. No. [82]) are **OVERRULED**. The R&Rs (Doc. Nos. [77]; [80]) are **ADOPTED** as the Orders of this Court. Accordingly, Plaintiff's Motion for Summary Judgment (Doc. No. [54]) is **DENIED** and Defendants' Motion for Summary Judgment (Doc. No. [55]) is **GRANTED**. As there are no further issues outstanding, the Clerk is hereby **DIRECTED** to **CLOSE THIS ACTION**.

IT IS SO ORDERED this 21st day of December, 2018.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

CIVIL ACTION FILE
NO. 1:16-CV-4326-SCJ-WEJ

[Filed August 28, 2018]

ROSETTA BULLUCK,	)
	)
Plaintiff,	)
	)
v.	)
	)
NEWTEK SMALL BUSINESS FINANCE, INC. *d/b/a Newtek Business Services, Inc.* and FEDERAL DEPOSIT INSURANCE CORPORATION, *as Receiver for Global Commerce Bank*,	)
	)
Defendants.	)
	)

FINAL REPORT AND RECOMMENDATION

Now pending before this Court is a joint Motion for Summary Judgment [55] filed by Defendants Federal Deposit Insurance Corporation ("FDIC") and Newtek Small Business Finance, Inc. ("Newtek"). For the

reasons explained below, the undersigned **RECOMMENDS** that said Motion be **GRANTED**.

I. INTRODUCTION

In support of their Motion for Summary Judgment, Defendants as movants filed a Statement of Material Facts as to Which There is no Genuine Issue to be Tried [55-2] ("DSMF"). See N.D. Ga. Civ. R. 56.1 B.(1). As required by Local Rule 56.1 B.(2)a., Plaintiff submitted a response. (See Pl.'s Am. Resp. in Opp'n to Stats. of Mat. Facts by Defs. [70-2] ("PR-DSMF").) As allowed by Local Rule 56.1 B.(2)b., Plaintiff submitted "Additional Statements of Material Fact Which Demonstrate Sufficient Genuine Issues to be Tried" ("PSAMF"). (See PR-DSMF at 14-30, ¶¶ 1-37.) As required by Local Rule 56.1 B.(3), Defendants submitted objections and responses to PSAMF. (See Defs.' Obj. & Resp. to Pl.'s Resp. to DSMF [74], Part II, at 6-13, ¶¶ 1-37 ("DR-PSAMF").)

Local Civil Rule 56.1 governs the filing of summary judgment motions in this Court. Rule 56.1 B.(1) provides as follows:

> A movant for summary judgment shall include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately and supported by a citation to evidence proving such fact. The court will not consider any fact: (a) not supported by a citation to evidence (including page or paragraph number); (b) supported by a citation

> to a pleading rather than to evidence; (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant's statement of undisputed facts.

N.D. Ga. Civ. R. 56.1 B.(1).

The Local Civil Rules then impose the following requirements upon the Ms. Bulluck in submitting a response to the movant's statement of undisputed material facts:

> (1) This response shall contain individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts.
>
> (2) This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1 B.(1).
>
> (3) The court will deem the movant's citations supportive of its facts unless the

> respondent specifically informs the court to the contrary in the response.

N.D. Ga. Civ. R. 56.1 B.(2)a.

Finally, if the respondent elects to submit a statement of additional facts which she contends are material and present a genuine issue for trial, then that separate statement must meet the requirements set out in Local Civil Rule 56.1 B.(1) (e.g., the Court cannot consider any proposed fact not supported by a citation to evidence, including page or paragraph number).

Defendants raise a significant number of objections to PR-DSMF and to PSAMF. Specifically, Defendants show that many of PR-DSMF violate the above-quoted Local Civil Rules, thus requiring this Court to disregard the deficient responses and deem the Defendants' proposed facts admitted. (See DR-PSAMF, Part I, at 2-6, addressing numerous paragraphs of PR-DSMF.) Defendants further show that, because many of PSAMF violate the Local Civil Rules, this Court must disregard them as well. (See DR-PSAMF, Part II, at 6-13, addressing numerous paragraphs of PSAMF.)

The Court need not consider these objections at length. Many of Plaintiff's claims fail as a matter of law because she has no private right of action for alleged violations by Defendants of regulations or guidelines issued by the Small Business Administration ("SBA"). This makes many of the proposed facts immaterial. As for those claims which may have a legal basis, Plaintiff has either admitted the relevant proposed facts, admitted them (followed by an argumentative

response, which is not allowed under the above-quoted Local Civil Rules), or denied them without providing any evidentiary support. Thus, the facts that the Court includes infra when discussing certain claims are undisputed.[1]

II. SUMMARY JUDGMENT STANDARD

The "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." Rice-Lamar v. City of Fort Lauderdale, Fla., 232 F.3d 836, 840 (11th Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary

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[1] Plaintiff makes a two-page, argumentative "Omnibus" objection (which includes a one-half page footnote) that she incorporates into "Each and Every Paragraph Below." (See PR-DSMF, at 2-3 & n.1.) However, as shown in the above-quoted excerpts from the Local Rules, only nonargumentative responses are permitted. Moreover, there is no provision for an "omnibus" objection. Thus, the Court disregards this introductory portion of PR-DSMF.

judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324 (quotation marks omitted). Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). If in response the non-moving party does not sufficiently support an essential element of her case as to which she bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840. "In determining whether genuine issues of material fact exist, [the Court] resolve[s] all ambiguities and draw[s] all justifiable inferences in favor of the non-moving party." Id. (citing Anderson, 477 U.S. at 255).

In deciding a summary judgment motion, the court's function is not to resolve issues of material fact but rather to determine whether there are any such issues to be tried. Anderson, 477 U.S. at 249-50. The applicable substantive law will identify those facts that are material. Id. at 248. Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. For factual issues to be "genuine," they must have a "real basis in the record." Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (quotation marks

omitted). When the record as a whole could not lead a rational trier of fact to find for the non-movant, there is no "genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. ANALYSIS

In her Complaint [1-2], Plaintiff alleges claims for (A) negligence and negligent misrepresentation (Count I); (B) breach of contract (Count II); (C) breach of the implied covenant of good faith and fair dealing (Count III); (D) wrongful eviction (Count V); and (E) trespass to realty (Count VI). The Court considers each claim separately below.

A. Plaintiff's Negligence Claims

Plaintiff bases her claims for negligence and negligent misrepresentation upon an alleged breach by defendants of SBA loan servicing guidelines. (Compl. ¶¶ 39-52.) However, as defendants correctly point out, even if Plaintiff could establish that such a breach had occurred, "no private right of action exists for a violation of the [Small Business] Act or the regulations." United States v. Fid. Capital Corp., 920 F.2d 827, 838 n.39 (11th Cir. 1991); see also Tectonics, Inc. of Fla. v. Castle Const. Co., 753 F.2d 957, 960 (11th Cir. 1985) ("We think the purpose [of the Small Business Act] was public in character, viz., the preservation and expansion of full and free competition to insure the Nation's economic well-being and security, and that there was no intent to create civil rights of action in private persons.") (citation omitted); Crandal v. Ball, Ball & Brosamer, Inc., 99 F.3d 907, 909 (9th Cir. 1996) ("Other circuits that have

considered the question have unanimously agreed that the Small Business Act does not create a private right of action in individuals.").

In her Response, Plaintiff does not address this settled law, but changes her theory and seeks to base these claims on alleged violations by Defendants of the Real Estate Settlement Procedures Act ("RESPA"). (See Pl.'s Am. Resp. Br. [70-1] 23-26.) This is an entirely new claim, not raised in the Complaint; thus, the Court cannot consider it now. See Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam) ("At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").[2]

However, even assuming this claim had been alleged in the Complaint, it makes no difference, as RESPA only applies to a "person who makes a federally related mortgage loan." 12 U.S.C. § 2605(a). A "federally related mortgage loan" is defined by 12 U.S.C. § 2602(1)(A) as a loan "secured by a first or subordinate lien on residential real property." There was no loan secured by residential real property here. Plaintiff borrowed money to open a barbeque restaurant. Thus, Plaintiff cannot raise any claim for

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[2] In her Response Brief, Plaintiff also accuses Defendants of fraud. (See Pl.'s Am. Resp. [70-2] 12-18.) No fraud claim was alleged in the Complaint and the Court will not consider it at this late stage in these proceedings.

negligence or negligent misrepresentation based on any alleged violations of RESPA by Defendants. See Lingo v. City of Albany Dep't of Cmty. & Econ. Dev., 195 F. App'x 891, 893 (11th Cir. 2006) (per curiam) (RESPA does not apply to business loan secured by a mortgage on owner's business property). Therefore, summary judgment should be entered for Defendants on Count I of the Complaint.

B. Plaintiff's Breach of Contract Claim

Plaintiff also bases her breach of contract claim on alleged violations by defendants of SBA loan servicing guidelines. (Compl. ¶¶ 54-58.) However, as already discussed, there is no private right of action for violation of SBA regulations. Moreover, in that portion of her Brief dealing with this claim, Plaintiff makes no effort to show why this Court should disregard the above-cited case authorities. (Pl.'s Am. Resp. Br. [70-1] 20-23.) Thus, summary judgment should be entered for Defendants on Count II of the Complaint.

C. Plaintiff's Breach of the Implied Covenant Claim

Plaintiff makes no substantive response to Defendants' argument that her claim for breach of the implied covenant of good faith and fair dealing, which is also based on alleged violations of SBA regulations, lacks merit. Instead, in a response that is barely one paragraph long, she refers the Court back to her RESPA argument (see Pl.'s Am. Resp. Br. [70-1] 26), which, as already discussed, has no merit. Accordingly, summary judgment should be entered for Defendants on Count III of the Complaint.

D. Plaintiff's Wrongful Eviction Claim

Plaintiff alleges that Defendants took possession of the property after a foreclosure sale without complying with O.C.G.A. § 44-7-50. (Compl. ¶¶ 31, 72.)[3] "The exclusive method whereby a landlord may evict a tenant is through a properly instituted dispossessory action filed pursuant to O.C.G.A. § 44-7-50 et seq." Steed v. Fed. Nat'l Mortg. Corp., 689 S.E.2d 843, 848 (Ga. Ct. App. 2009). A landlord who forcibly evicts a tenant without filing a dispossessory action and obtaining a writ of possession is subject to damages in tort for the wrongful eviction. Id.

The undisputed material facts here show that the FDIC as receiver conducted a foreclosure sale and took title to the property. (DSMF ¶ 37.) After Ms. Bulluck refused to vacate the property after the foreclosure, the FDIC as receiver filed a dispossessory action in the Magistrate Court of Clayton County, Georgia on February 27, 2015. (Id. ¶ 40.) After a hearing, the Magistrate Court granted the FDIC as receiver a writ of possession for the property on March 23, 2015. (Id.) Ms. Bulluck appealed the dispossessory order to the Superior Court of Clayton County, Georgia. (Id. ¶ 41.) The case was set for a hearing on June 24, 2015, but Ms. Bulluck's attorney dismissed the appeal the day before the hearing. (Id.)

On September 18, 2015, Plaintiff hired new counsel, who filed a "Refiling De Novo Appeal from Magistrate

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[3] A former owner of real property who remains in possession after a foreclosure sale becomes a tenant at sufferance. Bellamy v. Fed. Deposit Ins. Corp., 512 S.E.2d 671, 675 (Ga. Ct. App. 1999).

Court." (DSMF ¶ 42.) On November 3, 2015, that counsel (KaRon Grimes, Esq.) filed the instant action on Plaintiff's behalf in the Superior Court of Clayton County, Georgia (which was later removed here). (Id.) On December 6, 2015, the FDIC as receiver filed a motion in the dispossessory proceedings seeking to require Ms. Bulluck to pay rent and utilities into the registry of the court. (Id. ¶ 43.) The court granted that motion and ordered Ms. Bulluck to make payments of imputed rent to the FDIC as receiver for the time that she had remained in possession of the property. (Id.)

On January 27, 2016, the Superior Court of Clayton County, Georgia issued a second writ of possession in favor of FDIC as receiver. (DSMF ¶ 44.) Two days later, Ms. Bulluck filed a pro se notice of appeal to the Georgia Court of Appeals. (Id.) Attorney Grimes filed a motion to withdraw from the dispossessory action (but not the instant case) on February 2, 2016. (Id.)

On February 3, 2016, Ms. Bulluck filed bankruptcy for the seventh time. *In re Bulluck,* United States District Court for the Northern District of Georgia, Petition No. 16-52163-mgd ("Seventh Bankruptcy"). This time, Ms. Bulluck filed the action on behalf of herself individually and "d/b/a Bulluck's Best Barbeque & Catering." (DSMF ¶ 45.) The FDIC as receiver moved for an order confirming that no automatic stay was in effect as a result of this petition. (Id. ¶ 46.) The court granted the motion on February 24, 2016. (Id.) The Seventh Bankruptcy was dismissed for failure to correct filing deficiencies on March 14, 2016. (Id.)

The FDIC as receiver filed a motion in the Clayton County Superior Court seeking to confirm that the

pending appeal to the Georgia Court of Appeals would not operate as a supersedeas that would prevent immediate enforcement of the writ of possession. (DSMF ¶ 47.) The Court granted the motion on April 27, 2016. (Id.) The FDIC as receiver proceeded to schedule the eviction. (Id. ¶ 48.) The day before the eviction was to proceed, Ms. Bulluck filed a Rule 40(b) Emergency Motion with the Georgia Court of Appeals. (Id.) The Court of Appeals denied the motion the next morning, and the eviction proceeded as scheduled. (Id.) Ms. Bulluck's initial appeal from the dispossessory proceedings was dismissed a few days later by the Georgia Court of Appeals. (Id.)

The undisputed material facts show that Plaintiff was not evicted from the property until after issuance of two writs of possession and the denial by the Georgia Court of Appeals of an emergency motion Plaintiff filed to try to stop the eviction. Because Defendants filed a dispossessory action and obtained writs of possession as required under the Georgia statutory scheme, there is no basis for Plaintiff to claim wrongful eviction. See Steed, 689 S.E.2d at 848. Therefore, summary judgment should be entered for Defendants on Count V of the Complaint.

E. Plaintiff's Trespass to Realty Claim

In Count VI, Plaintiff alleges that an unspecified Defendant "wrongfully interfered with Plaintiff's right of exclusive use and benefit of her Property without authority in violation of O.C.G.A. § 51-9-1." (Compl. ¶ 76.) This claim relates to ¶¶ 36-37 of the Complaint, which alleges entry on to the property by Defendants'

counsel (Elizabeth T. Young, Esq.) on October 15, 2015.[4]

Ms. Young submitted an Affidavit [56] in which she avers that, in August and September 2015, on more than one occasion, she drove by the location of the property at issue in this case, located at 4594 Highway 42, Conley, GA 30288. (Young Aff. ¶ 3.) She observed that the restaurant on the property did not appear to be open for business, and there were no signs of activity in the building or the parking lot. (Id. ¶ 4.) It appeared to Ms. Young that the restaurant had ceased operations and that it had been shut down for quite some time. (Id. ¶ 5.) On October 15, 2015, after consultation with her clients, Ms. Young went to the property with a locksmith to determine whether it had been abandoned and, if so, to secure the property on behalf of her clients. (Id. ¶ 6.) When she looked through the windows, it did not appear that the restaurant had been operating as a going concern for quite some time. (Id. ¶ 7.) With the assistance of the locksmith, Ms. Young gained access to the premises and walked through the dining room and kitchen. (Id. ¶ 8.) She observed that the kitchen was in a state of general disorder, but there was no sign that it had been recently used to serve customers. There was no food in the refrigerator. The freezer had what appeared to be

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[4] Plaintiff claims that Ms. Young will be a fact witness, that she should be disqualified as Defendants' counsel for that reason, and that all pleadings she filed should be stricken from the record. (Pl.'s Am. Resp. Br. [70-1] 19-20 n.16.) The Court will not entertain a Motion found in a footnote. Moreover, the "motion" is without merit.

some very old looking frozen meats that appeared to be unfit for consumption. She also did not see any fresh fruits or vegetables anywhere in the kitchen. (Id. ¶ 9.) Based on these observations, Ms. Young felt certain that the property had been abandoned. Therefore, she instructed the locksmith to change the locks on the property. (Id. ¶ 10.)

Ms. Young further avers that, as the locksmith was working on the locks and she was standing in the parking lot, she observed a person on the neighboring property watching them and making a phone call. (Young Aff. ¶ 11.) Not long thereafter, Ms. Bulluck arrived in the parking lot. She asked what Ms. Young and the locksmith were doing, and Ms. Young explained why they were there. Ms. Young asked Ms. Bulluck if she was asserting that she remained in possession of the property, and she answered affirmatively. (Id. ¶ 12.) Based on Ms. Bulluck's assertion that she remained in possession of the property, Ms. Young instructed the locksmith to stop what he was doing. After verifying that they worked to open the door, Ms. Young handed the new keys to the property to Ms. Bulluck. (Id. ¶ 13.) Ms. Young then left the Property. She did not take anything with her and did not at any time remove any items or objects from the property. (Id. ¶ 14.)

In responding to Requests for Admission propounded to Plaintiff by Newtek, Ms. Bulluck stated as follows:

> 15. Admit that when you appeared at the property on October 15, 2015, you asserted possession of the Property.

RESPONSE: Admitted.

16. Admit that after you appeared and asserted possession of the Property, Ms. Young provided you with keys to the Property.

RESPONSE: Admitted.

17. Admit that the keys provided to you by Ms. Young provided you with access to the interior of the Property.

RESPONSE: Admitted.

(DSMF ¶ 50.)[5]

Given these undisputed facts, there is no violation of O.C.G.A. § 51-9-1 ("The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie."). "[A] trespass claim under § 51-9-1 requires a showing that a physical trespasser refused to leave the property upon request, or that a person interfered with the

[5] Despite the above admissions, Plaintiff's counsel asserts that Ms. Young changed the locks and never gave Ms. Bulluck the new keys. (Pl.'s Am. Resp. Br. [70-1] 19.) Although Plaintiff's counsel cites Ms. Bulluck's "Certification" [70-3] as factual support for these assertions, that document fails to do so. Moreover, Plaintiff's counsel argued that his client had a claim under O.C.G.A. § 17-7-21, which is the criminal trespass statute, and not the statute alleged in the Complaint. Finally, Plaintiff's counsel repeatedly asserts that only Plaintiff's defunct corporation and not the Plaintiff received notices of foreclosure regarding the property. However, the foreclosure notice that Plaintiff attached to the Complaint (Pl.'s Ex. D. [1-3] 18-20) clearly shows that it was sent both to the corporation and to Ms. Bullock individually.

Plaintiff's 'possessory interest' in the realty." Wilson v. Nationstar Mortg., LLC, No. 1:14-CV-3540-CC-GGB, 2015 WL 11622466, at *5 (N.D. Ga. June 24, 2015), R. & R. adopted, No. 1:14-CV-3540-CC, 2015 WL 11622467 (N.D. Ga. Sept. 2, 2015) (citing Goia v. CitiFinancial Auto, 499 F. App'x 930, 937 (11th Cir. 2012) (per curiam)). Because there is no evidence here that Ms. Young refused to leave the property or that she interfered with Ms. Bulluck's possessory interest in the property, Plaintiff has no claim for trespass under O.C.G.A. § 51-9-1. See Udoinyion v. Re/Max of Atlanta, 657 S.E.2d 644, 648 (Ga. Ct. App. 2008). At all times Plaintiff had keys to enter the property. Therefore, summary judgment should be entered for Defendants on Count VI of the Complaint.

IV. CONCLUSION

For the reasons set forth above, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment [55] be **GRANTED**.

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

SO RECOMMENDED, this 28th day of August, 2018.

/s/Walter E. Johnson
WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

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

CIVIL ACTION FILE NO. 1:16-CV-4326-SCJ-WEJ

[Filed August 24, 2018]

ROSETTA BULLUCK,	)
	)
Plaintiff,	)
	)
v.	)
	)
NEWTEK SMALL BUSINESS FINANCE, INC. *d/b/a Newtek Business Services, Inc.* and FEDERAL DEPOSIT INSURANCE CORPORATION, *as receiver for Global Commerce Bank*,	)
	)
Defendants.	)
	)

REPORT AND RECOMMENDATION

This matter is before the Court on a "Motion for Summary Judgment Against Defendants," filed by Plaintiff, Rosetta Bullock. Because Plaintiff's Motion fails to conform to this Court's Local Rules, the

undersigned **RECOMMENDS** that Plaintiff's Motion for Summary Judgment [54] be **DENIED**.

Local Civil Rule 56.1 governs the filing of summary judgment motions in this Court. Rule 56.1B.(1) clearly provides as follows:

> A movant for summary judgment shall include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately and supported by a citation to evidence proving such fact. The court will not consider any fact: (a) not supported by a citation to evidence (including page or paragraph number); (b) supported by a citation to a pleading rather than to evidence; (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant's statement of undisputed facts.

See N.D. Ga. Civ. R. 56.1B.(1).

Plaintiff filed a Statement of Material Facts for Which There is no Genuine Issue to be Tried [54-3]. However, Plaintiff failed to support any of her proposed facts with citation to evidence proving such fact.[1] Under the above quoted Local Civil Rule, the undersigned cannot consider any proposed fact not supported by a citation to evidence (including page or

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[1] Defendants objected to Plaintiff's non-compliance with the Local Rules. (See Defs.' Resp. to Pl.'s Stat. of Mat. Facts as to Which There is no Gen. Issue to be Tried [58-17].)

paragraph number) or any fact set out only in the brief and not in the movant's statement of undisputed facts. Given this non-compliance with the Local Civil Rules, Plaintiff has failed to provide factual support for her Motion for Summary Judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (the moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.") (quoting Fed. R. Civ. P. 56(c)).

Because the party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact, see Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999), and Plaintiff has failed to carry that burden through her non-compliance with the Local Civil Rules, the undersigned **RECOMMENDS** that Plaintiff's Motion for Summary Judgment [54] be **DENIED**.

SO RECOMMENDED, this 24th day of August, 2018.

/s/Walter E. Johnson
WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

12 U.S.C. § 2605

(a) DISCLOSURE TO APPLICANT RELATING TO ASSIGNMENT, SALE, OR TRANSFER OF LOAN SERVICING

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) NOTICE BY TRANSFEROR OF LOAN SERVICING AT TIME OF TRANSFER

(1) NOTICE REQUIREMENT

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) TIME OF NOTICE

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by–

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) CONTENTS OF NOTICE The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan

does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) NOTICE BY TRANSFEREE OF LOAN SERVICING AT TIME OF TRANSFER

(1) NOTICE REQUIREMENT

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) TIME OF NOTICE

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by–

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing
The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) CONTENTS OF NOTICE
Any notice required under paragraph (1) shall include the information described in subsection (b)(3).

(d) TREATMENT OF LOAN PAYMENTS DURING TRANSFER PERIOD
During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who

should properly receive payment) before the due date applicable to such payment.

(e) DUTY OF LOAN SERVICER TO RESPOND TO BORROWER INQUIRIES

(1) NOTICE OF RECEIPT OF INQUIRY

(A) In general
If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 5 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that–

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) ACTION WITH RESPECT TO INQUIRY Not later than 30 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall–

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes–

(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes–

(i) information requested by the borrower or an explanation of why the information

requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) PROTECTION OF CREDIT RATING
During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of Title 15).

(4) LIMITED EXTENSION OF RESPONSE TIME
The 30-day period described in paragraph (2) may be extended for not more than 15 days if, before the end of such 30-day period, the servicer notifies the borrower of the extension and the reasons for the delay in responding.

(f) DAMAGES AND COSTS Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) INDIVIDUALS In the case of any action by an individual, an amount equal to the sum of–

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000.

(2) CLASS ACTIONS In the case of a class action, an amount equal to the sum of–

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $2,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of–

(i) $1,000,000; or

(ii) 1 percent of the net worth of the servicer.

(3) COSTS
In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) NONLIABILITY
A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if,

within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) ADMINISTRATION OF ESCROW ACCOUNTS

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due. Any balance in any such account that is within the servicer's control at the time the loan is paid off shall be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the same lender.

(h) PREEMPTION OF CONFLICTING STATE LAWS

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of

application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

(i) DEFINITIONS For purposes of this section:

(1) EFFECTIVE DATE OF TRANSFER
The term "effective date of transfer" means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) SERVICER The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include–

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by–

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) SERVICING

The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) TRANSITION

(1) ORIGINATOR LIABILITY

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) SERVICER LIABILITY

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the

servicer to perform any duty under subsection (b), (c), (d), or (e) that arises before the regulations referred to in paragraph (3) take effect.

(3) REGULATIONS AND EFFECTIVE DATE
The Bureau shall establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2).

(k) SERVICER PROHIBITIONS

(1) IN GENERAL A servicer of a federally related mortgage shall not–

(A) obtain force-placed hazard insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance;

(B) charge fees for responding to valid qualified written requests (as defined in regulations which the Bureau of Consumer Financial Protection shall prescribe) under this section;

(C) fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties;

(D) fail to respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan; or

(E) fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter.

(2) FORCE-PLACED INSURANCE DEFINED
For purposes of this subsection and subsections (l) and (m), the term "force-placed insurance" means hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage.

(l) REQUIREMENTS FOR FORCE-PLACED INSURANCE
A servicer of a federally related mortgage shall not be construed as having a reasonable basis for obtaining force-placed insurance unless the requirements of this subsection have been met.

(1) WRITTEN NOTICES TO BORROWER A servicer may not impose any charge on any borrower for force-placed insurance with respect to any property securing a federally related mortgage unless–

(A) the servicer has sent, by first-class mail, a written notice to the borrower containing–

(i) a reminder of the borrower's obligation to maintain hazard insurance on the property securing the federally related mortgage;

(ii) a statement that the servicer does not have evidence of insurance coverage of such property;

(iii) a clear and conspicuous statement of the procedures by which the borrower may demonstrate that the borrower already has insurance coverage; and

(iv) a statement that the servicer may obtain such coverage at the borrower's expense if the borrower does not provide such demonstration of the borrower's existing coverage in a timely manner;

(B) the servicer has sent, by first-class mail, a second written notice, at least 30 days after the mailing of the notice under subparagraph (A) that contains all the information described in each clause of such subparagraph; and

(C) the servicer has not received from the borrower any demonstration of hazard insurance coverage for the property securing the mortgage by the end of the 15-day period beginning on the date the notice under subparagraph (B) was sent by the servicer.

(2) SUFFICIENCY OF DEMONSTRATION

A servicer of a federally related mortgage shall accept any reasonable form of written confirmation from a borrower of existing insurance coverage, which shall include the existing insurance policy number along with the identity of, and contact information for, the insurance company or agent, or as otherwise required by the Bureau of Consumer Financial Protection.

(3) TERMINATION OF FORCE-PLACED INSURANCE
Within 15 days of the receipt by a servicer of confirmation of a borrower's existing insurance coverage, the servicer shall–

(A) terminate the force-placed insurance; and

(B) refund to the consumer all force-placed insurance premiums paid by the borrower during any period during which the borrower's insurance coverage and the force-placed insurance coverage were each in effect, and any related fees charged to the consumer's account with respect to the force-placed insurance during such period.

(4) CLARIFICATION WITH RESPECT TO FLOOD DISASTER PROTECTION ACT
No provision of this section shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to section 4012a(e) of Title 42.

(m) LIMITATIONS ON FORCE-PLACED INSURANCE CHARGES
All charges, apart from charges subject to State regulation as the business of insurance, related to force-placed insurance imposed on the borrower by or through the servicer shall be bona fide and reasonable.