

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-10570

Non-Argument Calendar

ENRIQUE J. DIAZ,
MARIA DIAZ,

Plaintiffs-Appellants,

versus

NATIONSTAR MORTGAGE, LLC,
d.b.a. Mr. Cooper,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

APPENDIX B

D.C. Docket No. 1:19-cv-22148-MGC

Before WILSON, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Enrique and Maria Diaz (collectively, the Diazes,), proceeding pro se, filed a second amended complaint against Nationstar Mortgage, LLC, d/b/a Mr. Cooper (Nationstar) alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. The district court dismissed the complaint with prejudice. The Diazes filed a timely notice of appeal.

On appeal, the Diazes argue that the district court improperly ignored the factual allegations supporting their breach of contract claim when it dismissed for failure to state a claim. Consequently, they argue, reversal of this error should also revive their claim for breach of the covenant of good faith and fair dealing. Finally, they perfunctorily argue that their complaint stated a claim for fraud. After careful review of the briefs and the record we **AFFIRM**.

I.

We review a district court's ruling on a Rule 12(b)(6) motion de novo, "accept[ing] the allegations in the complaint as true and constru[ing] them in the light most favorable to the plaintiff." *Henley v. Payne*, 945 F.3d 1320, 1326 (11th Cir. 2019). We may affirm a district court's judgment "on any ground supported by the

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record, regardless of whether that ground was relied upon or even considered by the district court.” *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012).

We hold “the allegations of a pro se complaint to less stringent standards than formal pleadings drafted by lawyers.” *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168 (11th Cir. 2014). That said, “this leniency does not give a court license to serve as *de facto* counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action.” *Id.* at 1168–69 (quotation marks omitted).

“[I]ssues not briefed on appeal by a *pro se* litigant are deemed abandoned.” *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). We will not address arguments advanced for the first time in an appellant’s reply brief. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 683 (11th Cir. 2014).

Rule 8 of the Federal Rules of Civil Procedure provides that “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “[T]his means that a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Est. of Bass v. Regions Bank, Inc.*, 947 F.3d 1352, 1358 (11th Cir. 2020) (quotation marks omitted). “A claim is facially plausible when the court can draw the reasonable inference that the defendant is liable for the misconduct alleged from the pled facts.” *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1326 (11th Cir. 2012) (quotation marks omitted).

Although we accept the factual allegations in the complaint as true, we are “not bound to extend the same assumption of truth to plaintiffs’ conclusions of law.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must identify with specificity which factual paragraphs are relevant to each individual claim. *See Est. of Bass*, 947 F.3d at 1356 n.5.

“For a breach of contract claim, Florida law requires the plaintiff to plead and establish: (1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach.” *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009). “In Florida, a breach of contract claim requires a party to show that *damages resulted from the breach.*” *Resnick*, 693 F.3d at 1325. (emphasis in original). We have held that, under Florida law, a breach of the implied covenant of good faith and fair dealing cannot be maintained absent an allegation that an express term of the contract has been breached. *Centurion Air Cargo v. UPS Co.*, 420 F.3d 1146, 1152 (11th Cir.2005).

Here, the Diazes have failed to demonstrate that the district court erred in dismissing the breach of contract claim for failure to state a claim. Claim I in the second amended complaint plainly reads: “Plaintiffs submit that the defendants actions constitute Breach of Contract under Florida Law and pursuant to *Centurion Air Cargo, Inc. v. U.P.S. Co.*, 420 F.3d 1146 (11th Cir. 2005).” This statement consists entirely of a conclusion of law that Nationstar

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breached the contract without any factual support, and therefore fails to satisfy Rule 8's requirement of a "short and plain" statement describing the claim's factual support. To determine which facts support the Diazes' claim would require the type of review from this court that we have previously deemed unacceptable. *See Est. of Bass*, 947 F.3d at 1358.

Even when reaching beyond the complaint to what the Diazes argue in their brief, the Diazes failed to demonstrate that Nationstar breached the mortgage contract. The Diazes argue that Nationstar's tardiness in handling the repair process breached the contract. However, paragraph 5 of the Mortgage contract makes clear that the promptness requirement only relates to Nationstar's undertaking of the final inspection rather than imposing a promptness requirement on the repair process as a whole. The lack of promptness alone, therefore, does not constitute a breach of contract.

Because the Diazes's breach of contract claim was properly dismissed, their claim for breach of the implied covenant of good faith and fair dealing was also properly dismissed.

II.

Rule 9 of the Federal Rules of Civil Procedure requires a party alleging fraud to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). In order to survive a motion to dismiss, the plaintiff must plead "(1) the precise statements, documents, or misrepresentations made; (2) the

time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiff[]; and (4) what the defendants gained by the alleged fraud.” *Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1216 (11th Cir. 2020) (quotation marks omitted, alteration in original).

Here, the Diazes have forfeited review of this issue by only perfunctorily raising it in their initial brief. Their general assertion that their amended complaint sufficiently pled the circumstances constituting fraud without any supporting argument is insufficient to warrant review. Nor can they revive the claim by expanding on it for the first time in their reply brief. *See Sapuppo*, 739 F.3d at 683.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-22148-Civ-COOKE/GOODMAN

MARIA DIAZ, *et al.*,

Plaintiffs,

vs.

NATIONSTAR MORTGAGE, LLC
d/b/a MR. COOPER,

Defendant.

ORDER GRANTING MOTION TO DISMISS SECOND AMENDED COMPLAINT

THIS MATTER is before the Court on Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint (the "Motion") (ECF No. 82). Plaintiffs, Maria Diaz and Enrique Diaz (collectively, "Plaintiffs") filed a response in opposition to the Motion on September 29, 2020. ECF No. 89. As such, the Motion is fully briefed and ripe for adjudication. For the following reasons, the Court grants the Motion and dismisses Plaintiff's Second Amended Complaint without leave to amend.

BACKGROUND

Plaintiffs' home sustained damage in 2017 resulting from Hurricane Irma. Plaintiffs allege their lender, Nationstar Mortgage, LLC ("Defendant") is improperly withholding insurance proceeds in violation of their mortgage agreement.

On May 28, 2019, Plaintiffs, appearing *pro se*, filed a complaint against Defendant, alleging tortious interference, unjust enrichment, negligence, and conversion. On August 16, 2019, Plaintiffs filed an amended complaint, adding allegations of breach of contract and breach of the implied covenant of good faith and fair dealing. ECF No. 30. On August 30, 2019, Defendant filed a motion to dismiss the amended complaint. ECF No. 34. On September 16, 2019, Plaintiffs filed a response in opposition, stating they were dismissing several of their tort claims. ECF No. 36. On December 20, 2019, the Court granted Defendant's Motion and dismissed Plaintiffs' Amended Complaint as an impermissible shotgun pleading. ECF No. 59.

APPENDIX C

Plaintiffs filed a second amended complaint on January 14, 2020, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud. Defendant now moves to dismiss the Second Amended Complaint with prejudice.

LEGAL STANDARD

A complaint may be dismissed for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To state a claim, a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The complaint must “give the defendant fair notice of what the...claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). This “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* Although a *pro se* litigant’s pleadings are construed more liberally than pleadings drafted by attorneys, “this leniency does not give the court license to serve as *de facto* counsel for a party ... or to rewrite an otherwise deficient pleading in order to sustain an action.” *GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998) (citations omitted).

DISCUSSION

Plaintiffs have failed to state a claim for breach of contract. Under Florida law, to maintain an action for breach of contract, Plaintiffs must plead: “(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach.” *Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. 2nd DCA 2006). Even accepting all factual allegations in the complaint as true, Plaintiffs have failed to establish Defendant breached the terms of the Mortgage.

Pursuant to paragraph 5 of the Mortgage (ECF No. 19-1 at 8), because Plaintiffs did not maintain insurance coverage on the home, Defendant obtained a homeowner’s policy on their behalf. ECF No. 62 at 4. After the property sustained damages from the hurricane, the insurer issued a check made out to Ms. Diaz and Defendant jointly for \$35,108.00 in October 2018. *Id.* at 3. Pursuant to their agreement, Ms. Diaz endorsed the check and mailed it to Defendant. *Id.* Defendant instructed Ms. Diaz to choose a contractor and submit an estimate for repairs to the roof. *Id.* at 5. The contractor provided an estimate in November 2018, calling for an initial payment of \$9,918.00. *Id.* at 5. Defendant issued the payment of \$9,918.00 to Ms. Diaz approximately four months later. *Id.* at 6-7. The

contractor refused to repair the roof until they were paid the full amount of \$15,670.00. *Id.* at 7. Plaintiff requested an additional payment from Defendant. *Id.* Defendant informed Plaintiff that after the roof was repaired, Defendant would inspect the property before issuing another payment. *Id.* Ms. Diaz informed Defendant on March 15, 2019, that the initial repairs were completed and requested an inspection.

Defendant scheduled the inspection for the morning of April 1, 2019. *Id.* at 8. As Ms. Diaz was not available that morning, Ms. Diaz rescheduled the inspection to occur on April 24, 2019. *Id.* Following this inspection, on May 1, 2019, Nationstar sent Ms. Diaz an additional progress payment of \$6,297.50. *Id.* at 9. The contractor again refused to conduct the repairs. *Id.* On May 13, 2019, Ms. Diaz returned the \$6,297.50 check to Defendant and informed it that she would be filing a lawsuit. *Id.*

Plaintiffs allege that Defendant's failure to act promptly in overseeing the repair process, Defendant's payment formula used to make disbursements, Defendant's requirement that all contractors execute a Waiver of Lien, and Defendant's refusal to speak directly with Ms. Diaz, constitute material breaches of paragraph 5 of the mortgage. Paragraph 5 of the mortgage states, in relevant part:

If Borrower fails to maintain any of the coverages described above, Lender may obtain Insurance coverage, at Lender's option, and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the Insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained.

...

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying Insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed.

ECF No. 19-1.

The Court agrees with Defendant that the allegations do not establish Defendant failed to comply with the terms in paragraph 5 of the mortgage. First, according to the terms of the mortgage above, during the repair and restoration period, Defendant had the right to hold the insurance proceeds until the Defendant had an opportunity to inspect the property to ensure the work had been completed to Defendant's satisfaction. Here, Defendant disbursed a portion of the insurance proceeds even before the inspection. And while such inspection was required to occur promptly, the Plaintiffs have not established that Defendant failed to act promptly by scheduling the inspection for April 1, 2019, only 17 days after the initial work was completed on March 15, 2019. Second, contrary to Plaintiffs assertion that Defendant's disbursement of partial payments violates the terms of the Mortgage, paragraph 5 allows Defendant to disburse proceeds for the repairs and restoration in a series of progress payments as the work is completed. Finally, Plaintiffs have not identified any provision in the mortgage that prohibits Defendant from requiring contractors to execute a Waiver of Lien or speak to its borrowers through a third party. As a result, even under the relaxed pleading standard afforded to *pro se* litigants, the Court must dismiss Count I under Rule 12(b)(6).

As Plaintiff has failed to establish a breach of an express term of the Mortgage, the Court must also dismiss Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing in Count II of the Second Amended Complaint. *See Burger King Corp. v. Weaver*, 169 F.3d 1310, 1317-18 (11th Cir. 1999) ("[A] cause of action for breach of the implied covenant cannot be maintained... in the absence of breach of an express term of the underlying contract.").

Finally, Count III of the Second Amended Complaint fails to state a claim for fraud. Plaintiffs allege that "defendants' actions/inactions set forth in paragraphs #31-#37 constitute fraud." ECF No. 62 at 16. This conclusory allegation fails to satisfy Rule 9(b), which requires a party alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b).

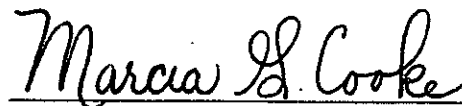
The Court will not allow Plaintiffs to file another amended complaint. This is Plaintiffs' third attempt to make a legally cognizable claim against Defendant related to payment of the insurance proceeds. The Court is not required to give Plaintiffs unlimited opportunities to amend their complaint. *See Cornelius v. Bank of Am., NA*, 585 F. App'x 996,

1000 (11th Cir. 2014) (affirming dismissal of a pro se complaint with prejudice where the district court provided prior opportunities to amend, and there was "no indication that, given a third bite at the apple, [the plaintiff] would correct the numerous deficiencies in his complaint.").

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion to Dismiss Second Amended Complaint (ECF No. 82). Plaintiffs' Second Amended Complaint (ECF No. 62) is **DISMISSED with prejudice**. The Clerk shall **CLOSE** this case. All pending motions are **DENIED as moot**.

DONE and ORDERED in Chambers, at Miami, Florida, this 25th day of January 2021.



MARCIA G. COOKE

United States District Judge

Copies furnished to:
Jonathan Goodman, U.S. Magistrate Judge
Counsel of record
Plaintiffs, appearing pro se

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10570-AA

ENRIQUE J. DIAZ,
MARIA DIAZ,

Plaintiffs - Appellants,

versus

NATIONSTAR MORTGAGE, LLC,
d.b.a. Mr. Cooper,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: WILSON, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellants Enrique J. Diaz and Maria Diaz is

DENIED.

APPENDIX A