APPENDIX

USDC - Magistrate Order and Report Recommendation – Case 14-cv-02819 - 09/09/14 – App. 1

Case 1:14-cv-02819-CC Document 3 Filed 09/09/14 Page 1 of 11

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

Civil Action No. : 1:14-CV-02819-CC-JCF

ALTHEA MILEY

Plaintiff, :

v.

THORNBURG MORTGAGE HOME LOANS et al., :

Defendants. :

ORDER and REPORT AND RECOMMENDATION

This case is before the Court on Plaintiff's application to proceed *in forma pauperis*. (Doc. 1). After consideration of Plaintiff's affidavit in support of her request to proceed *in forma pauperis* (Doc. 1), the Court **GRANTS** Plaintiff's request pursuant to 28 U.S.C. § 1915(a), and Plaintiff shall be allowed to proceed with this action without prepayment of filing or United States Marshal Service fees.

However, because Plaintiff's Complaint (Doc. 1-1) fails to state a federal claim on which relief may be

granted, the undersigned **RECOMMENDS** that plaintiff's federal claims be **DISMISSED** and that the Court decline to exercise its supplemental jurisdiction over her state law claims.

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Discussion

I. Applicable Standards

Having concluded that Plaintiff may proceed *in forma pauperis*, the Court must determine whether Plaintiff's claims may proceed, in light of 28 U.S.C. § 1915(e)(2)(B)(i) & (ii). Pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) & (ii), the Court is required to dismiss an *in forma pauperis* complaint at any time if the Court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. Rule 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* FED. R. CIV. P. 8(a)(2).

A claim is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). To state a claim that can survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 678-79.

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To be plausible, the complaint must contain "well-pleaded facts" that "permit the court to infer more than the mere possibility of misconduct." *Id.* at 679.

"Additionally, because Plaintiff [is] acting pro se, [her] 'pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed.' " *Shields v. Bank of Am.*, No. 2:11-CV-00267-RWS, 2012 U.S. Dist. LEXIS 30183, at * 3 (N.D. Ga. Mar. 6, 2012) (quoting *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir.1998). 'This leniency, however, does not require or allow courts to rewrite an otherwise deficient pleading in order to sustain an action.' " *Id.* (quoting *Thomas v. Pentagon Fed. Credit Union*, 393 Fed. Appx. 635, 637 (11th Cir. 2010).

II. Plaintiff's Claims

Plaintiff asserts several claims arising from a mortgage loan transaction and subsequent bankruptcy, foreclosure, and eviction proceedings. (*See generally* Doc. 1-1). The claims include the following: four state law fraud claims (Counts I, II, III, and IX); a claim pursuant to 11 U.S.C. § 362 for violation of an automatic stay (Count IV); a state law breach of contract claim (Count V); a state law breach of fiduciary duty claim (Count VI); a claim for "unfair deceptive acts or practices" in which she references the Federal Trade Commission (Count VII); and a claim for violations of the National Housing Act, 12 U.S.C. § 1701 (Count VIII).

A. Federal Claims

debtor has filed a third bankruptcy case in a one-year period, the automatic stay never goes into effect." *In re Bates*, 446 B.R. 301, 304 (B.A.P. 8th Cir. 2011) (listing cases).

Plaintiff had already filed two bankruptcy cases which were dismissed less than a year prior to her September 2007 filing, i.e., in November 2006 and April

[1] That exception is not at issue here.

2007 (*see* Doc. 1-1 at ¶¶ 47, 50, 51, 53), and therefore, when she filed her third bankruptcy case in September 2007, no automatic stay was in effect. *See, e.g.*, *Benefield*, 438 B.R. at 709 ("In this case, the stay never came into effect due to the two previous cases dismissed within a year of the filing of this case. Section 362(c)(4)(A)(i) is unambiguous on this issue."); *In re Evans*, No. 08-71204-CMS-07, 2009 Bankr. LEXIS 1054, at *8 (Bankr. N.D. Ala. Mar. 27, 2009) (finding that because the debtor in that case had had two cases dismissed within the preceding year, the automatic stay "did not go into effect upon the filing of the Debtor's current case" (citing 11 U.S.C. § 362(c)(4)A)(i)); *In re Erby*, No. 07-72742, 2007 Bankr. LEXIS 4603, at *7-9 (Bankr. N.D. Ga. Nov. 15, 2007) (finding that "the foreclosure that took place following the filing of this [bankruptcy] case was not barred by the automatic stay" because the plaintiff had filed two previous bankruptcy petitions that were dismissed less than a year before filing the third case).

1. Violation Of Automatic Stay, 11 U.S.C. § 362 (Count IV)

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Although the basis for this claim is somewhat unclear, Plaintiff appears to allege that Defendants McCalla Raymer, LLC and its attorneys violated the automatic stay provisions of 11 U.S.C. § 362(a) by pursuing foreclosure proceedings while Plaintiff's bankruptcy proceedings were pending. (*See* Doc. 1-1 at ¶¶ 143-152). Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition automatically operates as a stay against enumerated creditor activities, including foreclosure proceedings. Section 362(k) provides for the recovery of damages for violations of the automatic stay provision. 11 U.S.C. § 362(k).

Here, Plaintiff alleges that after she became unable to make her mortgage payments in 2006, "Defendants THML/Cenlar employed the services of McCalla Raymer to initiate a non-judicial foreclosure on or about October 5, 2006 by mailing a notice of default." (Doc. 1-1 at ¶ 35, 42). A Notice of Sale Under Power was published on October 12, 2006, with the pending foreclosure sale scheduled for November 2006. (*Id.* at ¶ 46).

Plaintiff then filed a Chapter 13 bankruptcy on November 4, 2006 (*id.* at ¶ 47), which automatically stayed the foreclosure proceedings. McCalla Raymer filed a motion for relief from the stay on February 2, 2007, and Plaintiff's bankruptcy case "was dismissed on

or about February 5, 2007 due to filing deficiencies and no record of payments of mortgage." (*Id.* at ¶¶ 48, 50).

Plaintiff failed to allege any action on the part of McCalla Raymer or any

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other defendant which violated the stay in effect by virtue of her November 4, 2006 bankruptcy filing.

Plaintiff filed a second bankruptcy case on April 2, 2007, which again stayed Defendants' foreclosure activities. (*Id.* at ¶¶ 51-52). That case was dismissed on July 13, 2007 "due to filing deficiencies and no record of payment to [sic]mortgages." (*Id.* at ¶ 53). Again, Plaintiff does not allege that McCalla Raymer or any Defendant took any action that violated the automatic stay while her April 2007 bankruptcy case was pending.

In August 2007, after the April 2007 bankruptcy case was dismissed, another Notice of Default was sent to Plaintiff with notice of foreclosure scheduled for September 4, 2007. (*Id.* at ¶ 55). Plaintiff then filed her third bankruptcy petition on September 3, 2007, which, according to Plaintiff, "invoke[ed] the stay that offers lien protection for property of the estate." (*Id.* at ¶ 57).

She further alleges that in spite of notifying McCalla Raymer of her bankruptcy petition, McCalla Raymer persisted in foreclosure and eviction proceedings on the instruction of attorney Robert Michael Sheffield, who instructed [McCalla Raymer] to proceed with the

foreclosure citing the stay was not in effect because of the third Bankruptcy filing." (*Id.* at ¶¶ 57, 60, 61).

Plaintiff obtained a stay of the execution of a Warrant to Evict on October 29, 2007; she does not allege that Defendants took any action in

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violation of that stay. (*Id.* at 63). Plaintiff then abandoned her third bankruptcy action, and the case was closed on December 7, 2007. (*Id.* at ¶ 64).

Thus, it appears that Plaintiff's claim rests on McCalla Raymer's foreclosure and/or eviction activity between September 3, 2007, when Plaintiff filed her third bankruptcy petition, and October 29, 2007, when a stay of the dispossessory proceedings was issued. Plaintiff's claim fails, however, because the bankruptcy stay "does not come into effect automatically 'if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed.' " *In re Benefield*, 438 B.R. 706, 709 (Bankr. D. N.M. 2010) (quoting 11 U.S.C. § 362(c)(4)(A)(i)). 11 U.S.C. § 362(c)(4)(A)(i) provides: if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)1, the stay under subsection (a) shall not go into effect upon the filing of the later case. "Many courts have concluded that § 362(c)(4(A)(i) is unambiguous, and . . . courts have universally held that under § 362(c)(4)(A)(i), where a

debtor has filed a third bankruptcy case in a one-year period, the automatic stay never goes into effect." *In re Bates*, 446 B.R. 301, 304 (B.A.P. 8th Cir. 2011) (listing cases).

Plaintiff had already filed two bankruptcy cases which were dismissed less than a year prior to her September 2007 filing, i.e., in November 2006 and April

[1] That exception is not at issue here.

2007 (*see* Doc. 1-1 at ¶¶ 47, 50, 51, 53), and therefore, when she filed her third bankruptcy case in September 2007, no automatic stay was in effect. *See, e.g.*, *Benefield*, 438 B.R. at 709 ("In this case, the stay never came into effect due to the two previous cases dismissed within a year of the filing of this case. Section 362(c)(4)(A)(i) is unambiguous on this issue."); *In re Evans*, No. 08-71204-CMS-07, 2009 Bankr. LEXIS 1054, at *8 (Bankr. N.D. Ala. Mar. 27, 2009) (finding that because the debtor in that case had had two cases dismissed within the preceding year, the automatic stay "did not go into effect upon the filing of the Debtor's current case" (citing 11 U.S.C. § 362(c)(4)A)(i)); *In re Erby*, No. 07-72742, 2007 Bankr. LEXIS 4603, at *7-9 (Bankr. N.D. Ga. Nov. 15, 2007) (finding that "the foreclosure that took place following the filing of this [bankruptcy] case was not barred by the automatic stay" because the plaintiff had filed two previous bankruptcy petitions that were dismissed less than a year before filing the third case).

Plaintiff has not alleged facts that show that an automatic stay was in effect when Defendants pursued foreclosure and/or eviction proceedings after she filed her third bankruptcy case in September 2007. Therefore, Plaintiff has failed to state a claim under 11 U.S.C. § 362 for violation of an automatic stay. *See, e.g.*, *Paszek v. Froehlich*, No. 08-455 (WJM), 2008 U.S. Dist. LEXIS 63152, at *5-6 (D. N.J. Aug. 18, 2008) (finding that mortgagor failed to state a claim for violation of automatic stay where she had two bankruptcy cases dismissed within the

previous year, and therefore pursuant to § 363(c)(4)(A)(i), "no automatic stay went into effect upon Plaintiff's filing of the third bankruptcy petition").

2. Unfair Deceptive Acts Or Practices (Count VII)

Plaintiff alleges that Defendants engaged in "unfair deceptive acts or practices" and this count refers to the Federal Trade Commission. While the caption of this count contains a reference to 15 U.S.C. 5(A), the statute empowering the Federal Trade Commission to declare certain practices unlawful is 15 U.S.C. § 45(a), so it appears Plaintiff mislabeled the claim. Yet no claim for "deceptive acts or practices" related to the "Federal Trade Commission" may be brought here. As there is no private right of action available under 15 U.S.C. § 45, to the extent Plaintiff's claim is based on this statute, it fails as a matter of law. *See, e.g., Taylor v. Johnson & Freedman, LLC*, No. 1:09-CV-0485-CAM-JFK, 2009 U.S. Dist. LEXIS 130825, at * 27-28 (N.D. Ga. Aug. 4, 2009) ("Courts have uniformly held that the FTCA does not provide individuals with a private right of

those regulations. Federal courts throughout the country have repeatedly rejected similar attempts by borrowers to bring claims under the National Housing Act and its implementing regulations." (listing cases)). Therefore this claim fails as well.

Because Plaintiff's Complaint does not state a federal law claim on which relief can be granted, the undersigned **RECOMMENDS** that Plaintiff's federal

claims—violation of the automatic stay provisions of 11 U.S.C. § 362 (Count IV), unfair and deceptive practices (Count VII), and violation of the National Housing Act (Count VIII)—be **DISMISSED**. The undersigned acknowledges that where a "more carefully drafted complaint might state a claim," the court must allow a *pro se* plaintiff "at least one chance to amend the complaint before the district court dismisses the action with prejudice," unless amendment would be futile. *Lee v. Alachua Cnty.*, 461 Fed. Appx. 859, 860 (11th Cir. 2012) (unpublished decision).

The undersigned finds that amendment would be futile in this case because all of Plaintiff's federal claims fail as a matter of law and no factual enhancements could cure the deficiencies which impair these claims.

Therefore, the undersigned further **RECOMMENDS** that dismissal of Plaintiff's federal claims be **with prejudice**.

B. State Law Claims

DEBORAH J. BURNS,
SCOTT TURLINGTON,
CENLAR FSB,
(Cenlar),
JOSEPH LOOTS, et al.,
Defendants-Appellees.

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

(August 21, 2015)

Before MARCUS, WILSON, and WILLIAM PRYOR,
Circuit Judges.
PER CURIAM:

Althea Miley, proceeding pro se, appeals the district court's sua sponte dismissal of her complaint for failure to state a claim. In the court below, Miley alleged that Thornburg Mortgage Home Loans and other parties (collectively, creditors) violated a bankruptcy court stay when they foreclosed on her house. On appeal, she argues that, because she could request a stay within 30 days of filing, there was a temporary 30-day stay in effect after she filed her third bankruptcy petition despite her status as a multiple repeat filer[1].

We review de novo the district court's dismissal of a complaint for failure to state a claim, viewing the allegations in the complaint as true. *Dimanche v. Brown*, 783 F.3d 1204, 1214 (11th Cir. 2015). When a litigant seeks to file a case *in forma pauperis*, the district court must dismiss the case if at any time it determines that

BEFORE: MARCUS, WILSON, and WILLIAM PRYOR, Circuit Judges.

PERCURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

/s/ *AMY C. NERENBERG* Acting Clerk of Court

ORD-42 October 21, 2015

APPENDIX 4

USCA11 Opinion, Appeal Case 22-11512- 07/11/23 – App. 4

USCA11 Case: 22-11512 Document: 21-1 Date Filed: 07/11/2023 Page: 1 of 6

[DO NOT PUBLISH]
In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11512
Non-Argument Calendar

ALTHEA MILEY,
Plaintiff-Appellant,
versus
DEBORAH J. BURNS, Individually as Corporate Executive and Employee of TMST Home Mortgage Loans, Inc., f.k.a. Thornburg Mortgage Home Loans,

nucleus of operative fact" or are "based upon the same factual predicate." *Id.* (quoting *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999)). *Res judicata* bars all legal theories and claims arising out of the same operative nucleus of fact unless a substantial change in the underlying facts or law has transpired. *Id.* at 1376. (quotation marks omitted). "Dismissal of a complaint with prejudice satisfies the requirement that there be a final judgment on the merits." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

A court may consider the defense of *res judicata* in a motion to dismiss filed pursuant to Rule 12(b)(6) when the existence of the defense can be judged from the face of the com-plaint. *Starship Enter. of Atlanta, Inc. v. Coweta Cty., Ga.*, 708 F.3d 1243, 1252-53 n.13 (11th Cir. 2013). A court also may take judicial notice of matters of public record when considering a Rule 12(b)(6) motion, at least where the truth of the statements in such records is not at issue for purposes of the motion to dismiss. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278, 1280 & n. 15 (11th Cir. 1999).

A district court has supplemental jurisdiction over claims that "form part of the same case or controversy" as the underlying claims to which the court has original jurisdiction. 28 U.S.C. § 1367(a). However, the court may decline to exercise supplemental jurisdiction over a claim when it has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3).

AFFIRMED.[1]

[1] We DENY the motion for sanctions filed by Burns and TMST Home Mort-gage Loans.

APPENDIX 5

USDC - Order - Case 21-cv-00616 - 03/30/22 - App. 5

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

ALTHEA MILEY,
Plaintiff,
*
** V.
* 1:21-CV-00616-ELR
DEBORAH J. BURNS, *Individually* *
as Corporate Executive and Employee *
of TMST Home Mortgage Loans, Inc., *
f/k/a Thornburg Mortgage Home *
Loans, Inc. as Mortgage Service *
Provider (MSP), et al., *
Defendants.
*

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ORDER

Presently before the Court is Plaintiff Althea Miley's "Motion to Notify Clerk of Court of Defendants[']Failure of Duty to Avoid Unnecessary Expenses of Serving a

action." (listing cases)), *adopted by* 2009 U.S. Dist. LEXIS 133009 (N.D. Ga. Sept. 3, 2009).

In the unlikely event that the identification of the statute is not in error, Plaintiff also may not successfully advance a claim under the statute actually cited -- 15 U.S.C. § 5(a). That code section relates to the court having the ability to bring in other parties to an equitable proceeding brought by the Attorney General

to prevent and restrain anti-competitive behavior under the Sherman Act. *See* 15 U.S.C. § 4. This code section is wholly inapplicable to Plaintiff's allegations, so no claim based on that statute could survive a motion to dismiss.

3. Violations Of The National Housing Act (Count VIII)

Plaintiff contends that Defendants violated the National Housing Act, 12 U.S.C. § 1701x(c)(5) "which requires all private lenders servicing non-federally insured home loans to advise borrowers of any home ownership counseling offered by the U.S. Department of Housing and Urban Development." (Doc. 1-1 at ¶ 175).

Like the FTCA, however, no private right of action exists for violations of the National Housing Act. *See, e.g.*, *Hall v. BAC Home Loans*, No. 2:12-cv-3720-LSC, 2013 U.S. Dist. LEXIS 71645, at *10-11 (N.D. Ala. May 21, 2013) ("[T]he National Housing Act, 12 U.S.C. § 1701, *et seq.*, and the regulations promulgated thereunder . . . , pertain to relations between the mortgagee and the government and do not give the mortgagors (i.e., Plaintiffs) a remedy for the mortgagee's failure to follow

those regulations. Federal courts throughout the country have repeatedly rejected similar attempts by borrowers to bring claims under the
National Housing Act and its implementing regulations." (listing cases)). Therefore this claim fails as well.

Because Plaintiff's Complaint does not state a federal law claim on which relief can be granted, the undersigned **RECOMMENDS** that Plaintiff's federal

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claims—violation of the automatic stay provisions of 11 U.S.C. § 362 (Count IV), unfair and deceptive practices (Count VII), and violation of the National Housing Act (Count VIII)—be **DISMISSED**. The undersigned acknowledges that where a "more carefully drafted complaint might state a claim," the court must allow a *pro se* plaintiff "at least one chance to amend the complaint before the district court dismisses the action with prejudice," unless amendment would be futile. *Lee v. Alachua Cnty.*, 461 Fed. Appx. 859, 860 (11th Cir. 2012) (unpublished decision).

The undersigned finds that amendment would be futile in this case because all of Plaintiff's federal claims fail as a matter of law and no factual enhancements could cure the deficiencies which impair these claims.

Therefore, the undersigned further **RECOMMENDS** that dismissal of Plaintiff's federal claims be **with prejudice**.

B. State Law Claims

Having found that Plaintiff has failed to state a federal law claim on which relief can be granted, the undersigned further **RECOMMENDS** that the Court decline to exercise its supplemental jurisdiction over Plaintiff's state law claims (Counts I, II, III, V, VI, IX) pursuant to 28 U.S.C. § 1367(c). *See Arnold v. Tuskegee* Case 1:14-cv-02819-CC Document 3 Filed 09/09/14 Page 11 of 11

Univ., 212 Fed. Appx. 803, 811 (11th Cir. 2006) (unpublished decision) ("When the district court has dismissed all federal claims from a case, there is a strong argument for declining to exercise supplemental jurisdiction over the remaining state law claims.").2

Summary
It is **ORDERED** that Plaintiff's application to proceed *in forma pauperis* (Doc. 1) is **GRANTED**. It is **RECOMMENDED** that Plaintiff's federal claims be **DISMISSED with prejudice** for failure to state a claim on which relief can be granted. It is further **RECOMMENDED** that the Court **DECLINE** to exercise its supplemental jurisdiction over Plaintiff's state law claims and close the case.

The Clerk is **DIRECTED** to terminate the reference of this case to the
undersigned.

IT IS SO ORDERED, REPORTED AND RECOMMENDED this 9th day of September, 2014.
/s/ *J. CLAY FULLER*
J. CLAY FULLER
United States Magistrate Judge
2 Plaintiff asserts in her Complaint that diversity jurisdiction exists pursuant to 28

U.S.C. § 1332(a). (*See* Doc. 1-1 at ¶ 2). " 'Diversity jurisdiction requires complete diversity; every plaintiff must be diverse from every defendant.' " *Leyva v.* Daniels, 530 Fed. Appx. 933, 934 (11th Cir. 2013) (unpublished decision).
(quoting *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir.1998)). Plaintiff, a Georgia citizen, has not shown that complete diversity exists between her and all Defendants, in particular McCalla Raymer, a Georgia law firm, and its attorneys. (*See* Doc. 1-1 at ¶¶ 8, 17-21). Therefore, diversity jurisdiction is not present.

APPENDIX – 2

USCA11- Order - Appeal Case 14-15630 – 8/12/15 - App. 2

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15630
Non-Argument Calendar

D.C. Docket No. 1:14-cv-02819-CC

ALTHEA MILEY,
Plaintiff-Appellant,
versus
THORNBURG MORTGAGE HOME LOANS INC.,
"TMHL",

DEBORAH J. BURNS,
SCOTT TURLINGTON,
CENLAR FSB,
(Cenlar),
JOSEPH LOOTS, et al.,
Defendants-Appellees.

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

(August 21, 2015)

Before MARCUS, WILSON, and WILLIAM PRYOR,
Circuit Judges.
PER CURIAM:

Althea Miley, proceeding pro se, appeals the district court's sua sponte dismissal of her complaint for failure to state a claim. In the court below, Miley alleged that Thornburg Mortgage Home Loans and other parties (collectively, creditors) violated a bankruptcy court stay when they foreclosed on her house. On appeal, she argues that, because she could request a stay within 30 days of filing, there was a temporary 30-day stay in effect after she filed her third bankruptcy petition despite her status as a multiple repeat filer[1].

We review de novo the district court's dismissal of a complaint for failure to state a claim, viewing the allegations in the complaint as true. *Dimanche v. Brown*, 783 F.3d 1204, 1214 (11th Cir. 2015). When a litigant seeks to file a case *in forma pauperis*, the district court must dismiss the case if at any time it determines that

the action fails to state a claim on which relief may be granted. 28 U.S.C. § 15(e)(2)(B)(ii).

The filing of a bankruptcy petition operates as an automatic stay applicable to creditors seeking to foreclose on a debtor's property. 11 U.S.C. § 362(a). No 2008) (per curiam). Also, we will not consider her arguments that the property was part of the bankruptcy estate or that her creditors were required to seek a court order confirming no stay was in effect, because she raises them for the first time on appeal. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004).

[1] Miley does not challenge on appeal the district court's dismissal of her other federal claims, or its refusal to exercise supplemental jurisdiction over her state law claims, and so has abandoned any argument in this respect. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam). Also, we will not consider her arguments that the property was part of the bankruptcy estate or that her creditors were required to seek a court order confirming no stay was in effect, because she raises them for the first time on appeal. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004).

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automatic stay goes into effect, however, if, when the debtor files a petition, she has had two or more bankruptcy cases that were pending in the previous year but were dismissed. *Id.* § 362(c)(4)(A)(i). Within 30 days of filing the latest case, upon request of a party, the court may order a stay if the party demonstrates that the case was filed in good faith. *Id.* § 362(c)(4)(B). The statute upon which Miley relies expressly states that an automatic stay does not issue upon filing of a successive bankruptcy petition under the circumstances

of this case. *See id.* § 362(c)(4)(A)(i). As she now acknowledges, no automatic stay was in effect under § 362(a) because she had two bankruptcy cases pending in the previous year that were ultimately dismissed, *see id.* § 362(c)(4)(A)(i), and neither the record nor her brief support her current legal contention that a temporary stay was in effect. Specifically, § 362(c)(4)(B) gives a party 30 days to request a stay and allows the court to grant that request, but it does not prohibit her creditors from taking action during that time period. Miley did not allege that she requested a stay from the court or that the court exercised its discretion to grant a stay. Accordingly, the district court did not err in determining that Miley had failed to state a claim upon which relief could be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

Upon review of the record and consideration of Miley's arguments, we affirm the district court's dismissal of Miley's complaint.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
Douglas J. Mincher
Clerk of Court

August 21, 2015
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APPENDIX 3

USCA11 - Order – Petition for Rehearing Enbanc Case No. 14- 15630 - 10/21/15 – App. 3
USCA11 Case: 14-15630 Document: 11-2 Date Filed: 10/21/2015 Page: 1 of 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-15630-AA

ALTHEA MILEY,
Plaintiff - Appellant,
versus
THORNBURG MORTGAGE HOME LOANS INC.,
"TMHL",
DEBORAH J. BURNS,
SCOTT TURLINGTON,
CENLARFSB,
(Cenlar),
JOSEPH LOOTS, et al.,
Defendants - Appellees.

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

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, WILSON, and WILLIAM PRYOR, Circuit Judges.

PERCURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

/s/ *AMY C. NERENBERG* Acting Clerk of Court

ORD-42 October 21, 2015

APPENDIX 4

USCA11 Opinion, Appeal Case 22-11512- 07/11/23 – App. 4

USCA11 Case: 22-11512 Document: 21-1 Date Filed: 07/11/2023 Page: 1 of 6

[DO NOT PUBLISH]
In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11512
Non-Argument Calendar

ALTHEA MILEY,
Plaintiff-Appellant,
versus
DEBORAH J. BURNS, Individually as Corporate Executive and Employee of TMST Home Mortgage Loans, Inc., f.k.a. Thornburg Mortgage Home Loans,

Inc., as Mortgage Service Provider (MSP),TMST HOME LOANS, INC., as Mortgage Service Provider (MSP)f.k.a. Thornburg Mortgage Home Loans, Inc.,

USCA11 Case: 22-11512 Document: 21-1 Date Filed: 07/11/2023 Page: 1 of 6

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia
D.C. Docket No. 1:21-cv-00616-ELR

Before JILL PRYOR, ANDERSON and DUBINA, Circuit Judges.

PER CURIAM:
Althea Miley, proceeding *pro se*, appeals the district court's dismissal of her complaint that raised federal and state claims related to the foreclosure of her home. On appeal, Miley argues that the district court improperly determined that she was not opposed to Deborah Burns and TMST Home Mortgage Loans, Inc. motion to dismiss and dismissed her complaint as a sanction for her failure to respond timely to the motion to dismiss.

Miley also argues that the district court improperly determined that her complaint was barred by *res judicata*. Finally, she argues that the district court had jurisdiction over all her claims because she raised some federal claims in her complaint; thus, it erroneously declined to exercise supplemental jurisdiction over her state law claims. Having read the parties' briefs and reviewed the record, we affirm the district court's order dismissing Miley's complaint.

I.

We review *res judicata* determinations *de novo* because they are pure questions of law. *Maldonado v. U.S. Att'y Gen.*, 664 F.3d 1369, 1375 (11th Cir. 2011). We review *de novo* a district court's ruling on a Rule 12(b)(6) motion. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). The court views the complaint in the light most favorable to the plaintiff and accepts all the plaintiff's well-pleaded facts as true. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). Further, "[i]n the case of a *pro se* action . . . the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers." *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990).

II.

Res judicata is a judicially made doctrine created to provide finality to parties who already litigated a claim and to promote judicial economy. *Maldonado*, 664 F.3d at 1375. However, a court is permitted to stray from the rule when a mechanical application would result in manifest injustice and undermine the rule's general effectiveness. *Id.* (quotation marks omitted). The doctrine of *res judicata* bars filing claims that were raised or could have been raised in a prior proceeding. *Id.* (quotation marks omitted). The application of *res judicata* has four requirements: (1) a final judgment on the merits (2) that was rendered by a court of competent jurisdiction with (3) the same parties and (4) the same cause of action. *Id.* (quotation marks omitted). Two cases are generally considered to involve the same cause of action if they arise out of "the same

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nucleus of operative fact" or are "based upon the same factual predicate." *Id.* (quoting *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999)). *Res judicata* bars all legal theories and claims arising out of the same operative nucleus of fact unless a substantial change in the underlying facts or law has transpired. *Id.* at 1376. (quotation marks omitted). "Dismissal of a complaint with prejudice satisfies the requirement that there be a final judgment on the merits." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

A court may consider the defense of *res judicata* in a motion to dismiss filed pursuant to Rule 12(b)(6) when the existence of the defense can be judged from the face of the com-plaint. *Starship Enter. of Atlanta, Inc. v. Coweta Cty., Ga.*, 708 F.3d 1243, 1252-53 n.13 (11th Cir. 2013). A court also may take judicial notice of matters of public record when considering a Rule 12(b)(6) motion, at least where the truth of the statements in such records is not at issue for purposes of the motion to dismiss. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278, 1280 & n. 15 (11th Cir. 1999).

A district court has supplemental jurisdiction over claims that "form part of the same case or controversy" as the underlying claims to which the court has original jurisdiction. 28 U.S.C. § 1367(a). However, the court may decline to exercise supplemental jurisdiction over a claim when it has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3).

III.

The record demonstrates that Miley failed to respond timely to the motion to dismiss and the district court properly determined that the motion to dismiss was unopposed. *See* N.D. Ga. Local Rule 7.1(B) (providing that any party opposing a motion must file a response within 14 days and failure to file a timely response will indicate that there is no opposition to the motion). Further, the record indicates that the district court did not dismiss Miley's com-plaint as a sanction for her failure to respond timely to the motion to dismiss because the district court dismissed her complaint on the merits.

We conclude, based on the record, that the district court properly determined that Miley's complaint was barred by *res judicata*. Miley had previously filed a federal complaint against Burns and TMST; the district court for that case adjudicated the case on the merits; the district court for the prior federal case is a court of competent jurisdiction; and the two federal actions arose out of the same disputed foreclosure and sale of the property for which Miley obtained a mortgage. *Maldonado*, 664 F.3d at 1375. We further conclude that the district court properly declined to exercise supplemental jurisdiction over Miley's state law claims because it had dismissed the claims over which it had original jurisdiction. Accordingly, based on the aforementioned reasons, we affirm the district court's order dismissing Miley's complaint.

AFFIRMED.[1]

[1] We DENY the motion for sanctions filed by Burns and TMST Home Mort-gage Loans.

APPENDIX 5

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

ALTHEA MILEY,
Plaintiff,
*
** V.
* 1:21-CV-00616-ELR
DEBORAH J. BURNS, *Individually* *
as Corporate Executive and Employee *
of TMST Home Mortgage Loans, Inc., *
f/k/a Thornburg Mortgage Home *
Loans, Inc. as Mortgage Service *
Provider (MSP), et al., *
Defendants.
*

*

ORDER

Presently before the Court is Plaintiff Althea Miley's "Motion to Notify Clerk of Court of Defendants['] Failure of Duty to Avoid Unnecessary Expenses of Serving a

Summons" [Doc. 7] and Defendant Deborah J. Bums' "Motion to Dismiss." [Doc. 11]. The Court sets forth its reasoning and conclusions below.

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I. Background[1]

This case arises from the foreclosure of Plaintiffs primary residence, located in DeKalb County, Georgia (hereinafter, the "Property"). See generally Compl. [Doc. 1]. Plaintiff is the former owner of the Property. See id. , 1. Defendant Burns was the Senior Vice President and Secretary of Defendant TMST Home Loans, Inc. ("TMHL"), the mortgage service provider for the Property. 2 See id. ,, 2-3.

On September 30, 2002, Plaintiff purchased the Property and financed the purchase through a mortgage loan provided by BancMortgage Financial Corporation and a deed to secure debt by Mortgage Electronic Registration Systems, Inc. ("MERS"). See id.,, 10, 23. After experiencing a financial setback in June 2006, Plaintiff began to miss payments on her mortgage loan for the Property. See id., 11. To prevent foreclosure of the Property, Plaintiff sought to initiate a forbearance agreement by contacting Cenlar, Inc. (or "Cenlar"), a wholesale bank commissioned by Defendant TMHL that specializes in mortgage subservicing and provides third party mortgage services. See id. ,, 3, 11, 14. Although Cenlar initially made positive assurances to Plaintiff regarding the feasibility of a forbearance agreement, such an agreement never came to fruition. See id. ,, 13, 16---17. On October 5,

[1] As required when analyzing a Rule 12(b)(6) motion to dismiss, the Court accepts all allegations within the Complaint as true and draws all reasonable inferences

in favor of the non-moving party. See Bell Atl. Corp. v. Twombly. 550 U.S. 544, 555-56 (2007).

[2] Defendant TMHL was formally known as "TMST Mortgage Home Loans, Inc.," which in turn was formerly known as "Thornburg Mortgage Home Loans, Inc." See Compl.,r 2.

2006, Defendant TMHL and Cenlar sent Plaintiff a written Notice of Default indicating that non-judicial foreclosure of the Property had commenced. See id. 19. To avoid foreclosure, Plaintiff filed a petition for chapter 13 bankruptcy on November 4, 2006. See id. 26.

Thereafter, on February 2, 2007, MERS filed a Motion for Relief from Stay in Plaintiffs Chapter 13 proceeding-seeking to allow the foreclosure sale of the Property to proceed. See id.30.

In its Motion for Relief from Stay, MERS stated that it was the holder of record for the security deed, however, Plaintiff disputes this fact. See id. □ 31. Before a ruling on MERS' Motion for Relief from Stay was issued, the Plaintiffs bankruptcy action was dismissed because she failed to show proof of mortgage payments. See id.

On January 23, 2007, MERS assigned its interest in the security deed of Plaintiffs Property to Defendant TMHL. See id. 25, 39. Subsequently, Plaintiff filed successive Chapter 13 bankruptcy petitions on April 2, 2007, and September 3, 2007, which were both dismissed prior to confirmation (for failure to show a record of mortgage payments and abandonment, respectively). See id. 35-36.

During the pendency of Plaintiffs third bankruptcy case, on September 4, 2007, Defendant TMHL foreclosed on the Property. See id.□□ 37, 44. Thereafter, on October 4, 2007, the security deed was recorded in the Office of the Clerk of Superior Court of DeKalb County, Georgia. See id. □ 44. From October 2007 to

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March 2009, Plaintiff initiated several legal actions to avoid being evicted from the Property. See id.□ 60. As a result, on October 2, 2007, Defendant TMHL brought a dispossessory action in the State Court of DeKalb County, Georgia. See id. 48.In the state court dispossessory action, Plaintiff asserted counterclaims against Defendant TMHL for wrongful foreclosure and a violation of the supposed automatic stay from Plaintiffs third bankruptcy filing. See id. 50. thereafter, the state court awarded Defendant TMHL a writ of possession and dismissed Plaintiffs wrongful foreclosure counterclaim without prejudice.3 See id. 53 . Eventually, on March 20, 2009, Plaintiff was evicted from the Property. See id. 62.

II. Procedural History

After filing several other suits in federal and state court, Plaintiff initiated this action on February 10, 2021.4 See generally Compl. By her Complaint, Plaintiff brings five (5) Counts against Defendants: Count I-Bankruptcy Fraud, in violation of 18 U.S.C. § 157(3); Count II-Foreclosure Fraud and Deceit; Count III-

3 Later, on October 2, 2008, the Georgia Court of Appeals affirmed the state court's judgment. See Miley v. Thornburg Mortg. Home Loans. Inc., 668 S.E.2d 560, 561 (Ga. Ct. App. 2008). Additionally, Plaintiffs request for reconsideration was denied on October 21, 2008, and the Georgia Supreme Court denied a petition for certiorari. See id.

4 Plaintiff has filed several other cases in state and federal court asserting claims for wrongful foreclosure, fraud, and violation of the automatic stay for bankruptcy proceedings. See. e.g., Miley v. Thornburg Mortg. Home Loans. Inc .• et al.. No. 08-CV-13141 (DeKalb Super. Ct. Dec. 5, 2008); Miley v. Thornburg Mortg. Home Loans, No. 1:14-CV-02819-CC-JCF, 2014 WL 11485571, at *5 (N.D. Ga. Sept. 9, 2014), report and recommendation adopted, No. 1:14-CV-2819-CC, 2014 WL 11485572 (N.D. Ga. Nov. 24, 2014), affd sub nom. Miley v. Thornburg Mortg. Home Loans Inc., 613 F. App'x 915 (11th Cir. 2015); Miley v. Thornburg Mortg. Home Loans. Inc .• et al., No. 15CV12019-8 (DeKalb Super. Ct. Nov. 30, 2015).

Fraudulent Misrepresentations; Count IV-Mail Fraud, in violation of 18 U.S.C. §1341; Count V-Wire Fraud, in violation of 18 U.S.C. § 1343. See generally id. In sum, Plaintiff alleges that Defendants made fraudulent is representations regarding the true owner of the property throughout the bankruptcy, foreclosure, and eviction proceedings and purportedly offered into evidence falsified documents regarding the ownership of the Property. See id. 11 155-56.

On March 24, 2021, Plaintiff filed her purported "Amended Complaint" (without the leave of Court). [Doc. 5]. On that same day, Plaintiff filed her "Motion to Notify Clerk of Court of Defendants[’] Failure of Duty to Avoid Unnecessary Expenses of Serving a Summons." [Doc. 7]. Subsequently, on May 6, 2021, Defendant Burns filed

her instant "Motion to Dismiss." [Doc. 11]. On May 28, 2021, Plaintiff untimely filed her response in opposition. [Doc. 17].

Having been fully briefed, these matters are ripe for the Court's review. The Court begins with Plaintiffs "Motion to Notify Clerk of Court of Defendants['] Failure of Duty to A void Unnecessary Expenses of Serving a Summons." [Doc. 7].

III. Plaintiff's "Motion to Notify Clerk of Court of Defendants['] Failure of Duty to Avoid Unnecessary Expenses of Serving a Summons" [Doc. 7]

By her instant motion, Plaintiff seeks an order from the Court imposing on Defendants the expenses she incurred for service of the summons and Complaint due to their failure to return the waiver of service form. [See id. at 2]. Plaintiff represents that waiver of service forms were sent to Defendants on February 20,

2021, but Defendants did not waive service of process. [See id. at 1]. Additionally, Plaintiff maintains that Defendants have not shown good cause for failure to waive service. [See id.] Thus, Plaintiff seeks an order from the Court requiring Defendants to pay the costs for service of process upon them.

Pursuant to Federal Rule of Civil Procedure 4(d)(l), "[a]n individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons."

See FED. R. Crv. P. 4(d)(l). Additionally, Federal Rule of Civil Procedure 4(d)(2) provides:

[i]f a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant: (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

See FED. R. Crv. P. 4(d)(2). However, "[c]ompliance with the provisions of Federal Rule of Civil Procedure 4(d)(l) setting forth the requirements for a proper notice and request for waiver is a condition precedent to a demand for costs for refusal to waive service." See Morsette v. Brewster, No. 1:13-CV-00011-AT, 2013 WL 12111600, at *1 (N.D. Ga. Apr. 17, 2013).

Here, although notice and waiver of service forms are attached to them Complaint, nothing on the docket indicates that Plaintiff sent those notice and waiver of service forms to Defendants at all, much less in accordance with Rule 4 's requirements. [See Docs. 1-2, 1-3]; see also FED. R. Crv. P. 4(d)(l)(A}-(G). While

Plaintiff represents that the notice and waiver of service forms were sent to the Defendants on February 20, 2021, she fails to attach any documentary support for this allegation. See LR 7.l(A)(l), NDGa. ("If allegations of fact are relied upon, supporting affidavits must be attached to the memorandum of law."). Additionally, Plaintiff fails to provide support regarding whether the notice and waiver forms were sent in the manner

required pursuant to Rule 4(d)(l). See FED. R. CIV. P. 4(d)(l)(A)-
(G).

Thus, the Court finds that Plaintiff has failed to demonstrate compliance with Rule 4(d)(l), as is required prior to making any "demand for costs for refusal to waive service."5 See FED. R. CIV. P. 4(d)(l); see also Morsette, 2013 WL 12111600, at *1. Accordingly, the Court denies Plaintiffs motion. [Doc. 7].

[Doc. 17]

Before turning to the merits of Defendant Bums' motion to dismiss, the Court considers whether the pending motion to dismiss should be treated as unopposed due to the untimely nature of Plaintiffs response brief. As set forth above, Defendant Burns filed her motion to dismiss on May 6, 2021. [Doc. 11]. Thereafter, Plaintiff had through May 20, 2021, to submit a response brief in opposition. See LR 7.l(B),

[5] Additionally, even if Plaintiff satisfied her burden pursuant to Rule 4(d)(l), which she does not, Plaintiff fails to provide the amount she incurred in expenses associated with serving Defendants. [See generally Doc. 7]; see also FED. R. CIV. P. 4(d)(2)(A).

NDGa ("[a]ny party opposing a motion shall serve [her] response, responsive memorandum, affidavits, and any other responsive material not later than fourteen (14) days after service of the motion"). However, Plaintiff did not file her response brief until May 28, 2021. [Doc. 17]. Local Rule 7.l(B) provides that "[f]ailure to file a

response shall indicate that there is no opposition to the motion." See LR 7.l(B), NDGa. Moreover, pursuant to Local Rule 7. l(F), "[t]he Court, in its discretion, may decline to consider any motion or brief that fails to conform to the requirements of the Local Rules." See LR 7 .1 (F), NDGa.

Here, Plaintiff did not file her response to Defendant Burns' motion to dismiss until after the deadline to do so expired. [See generally Doc. 17]. Plaintiff made no request for an extension of her deadline to respond and provides no explanation for her untimeliness. Upon consideration, the Court exercises its discretion and declines to consider Plaintiffs untimely response brief. [See id.]; see also LR 7.l(F), NDGa. Accordingly, the Court construes Defendant Bum's pending motion to dismiss as unopposed. [Doc. 11].

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IV. Defendant Burns' Unopposed Motion to Dismiss [Doc. 11]

Next, the Court considers Defendant Bums' unopposed motion to dismiss Plaintiff's Complaint. 6 [Doc. 11]. By her instant motion, Defendant Bums contends that this action should be dismissed for three (3) reasons. [See Doc. 11-1 at 14-22].

First, Defendant Bums argues that the doctrine of res judicata bars Plaintiff's claims. [See id. at 14-19]. Second, Defendant Bums contends that each of Plaintiff's claims are barred by their applicable statute of limitations. [See id. at 19-20]. Third, Defendant Bums moves to dismiss the Complaint for failure to state a

claim upon which relief could be granted. [See id. at 20-22]. The Court begins by assessing Defendant Burns' first argument.

A. Res Judicata and Plaintiff's Federal Claims

The doctrine of res judicata "bars the filing of claims which were raised or could have been raised in an earlier proceeding." See Schatler v. Indian Spring Maint. Ass'n., 139 F. App'x 147, 150 (11th Cir. 2005) (quoting Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999)) (internal quotation marks [6] As a preliminary matter, the Court finds that Plaintiffs "Amended Complaint" to be improper and declines to consider it. [See Doc. 5]; see also FED. R. Crv. P. 15. Because Plaintiff filed her operative Complaint on February 10, 2021, she had until March 3, 2021, to amend her Complaint as a matter of course. See Compl.; see also FED. R. Crv. P. 15(a)(l)(A) (providing that a litigant may amend a pleading as a matter of course within 21 days after serving it).

However, Plaintiff did not submit her proposed amended pleading until 21) March 24, 2021, twenty-one (days past the deadline to amend as a matter of course. [See Doc. 5]; see also FED. R. Crv. P. 15(a)(l)(A).
Further, the Court notes that Plaintiff filed her "Amended Complaint" without seeking leave of the Court or consent of Defendants, and thus, there was no basis for Plaintiff to amend her pleading outside the time provided to do so as a matter of course. See FED. R. Crv. P. 15(a)(2)

and citations omitted). Four (4) elements must be satisfied for a claim to be barred by prior litigation pursuant to res judicata: (1) there was a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases. See id.

"Generally[,] both the party invoking res judicata and the party against whom it is invoked must have been represented in the prior action for res judicata to apply." See Brown v. JP Morgan Chase Bank, N.A., 314CV00044TCBRGV, 2014 WL 12478008, at *5 (N.D. Ga. Aug. 11, 2014), report and recommendation adopted, 314CV00044TCBRGV, 2014 WL 12480500 (N.D. Ga. Sept. 25, 2014) (internal quotation omitted).

As noted above, Plaintiff has filed multiple previous actions in both federal and state court regarding the foreclosure of the Property in dispute. Most importantly, Plaintiff previously filed a case in this district concerning the same "mortgage loan transaction and subsequent bankruptcy, foreclosure, and eviction proceedings" at issue in the present action. See Miley v. Thornburg Mortg. Home Loans, No. 1:14-CV-02819-CC-JCF, 2014 WL 11485571, at *5 (N.D. Ga. Sept. 9, 2014), report and recommendation adopted, No. 1:14-CV-2819-CC, 2014 WL 11485572 (N.D. Ga. Nov. 24, 2014), aff d sub nom. Miley v. Thornburg Mortg. Home Loans Inc., 613 F. App'x 915 (11th Cir. 2015) (hereinafter, "Miley I"). Upon

consideration, the Court finds that all four (4) elements of the res judicata test are satisfied with regard to Plaintiffs federal claims.

The first two (2) elements of the res judicata test are satisfied here, as Judge Cooper adopted the Magistrate Judge's Report and Recommendation ("R&R") from Miley I and dismissed Plaintiffs federal claims with prejudice for failure to state a claim.[7] See Miley I, 2014 WL 11485572, at *2 (adopting Miley I R&R); see also Bonomi, 2013 WL 12109449, at *5 (collecting cases).

Thus, Judge Cooper's order was a final judgment on the merits rendered by a court of competent jurisdiction. See Schafler, 139 F. App'x at 150.

The third element of the res judicata test is also satisfied here. See id. (requiring the parties, or those in privity with them, to be identical in both suits). Specifically, both Miley I and the instant matter involved the same relevant Parties: Plaintiff, Defendant Bums, and Defendant TMHL. See Compl.; see also Miley I, 2014 WL 11485571 at *1.

Finally, the fourth prong of the res judicata test is satisfied, because although Plaintiff asserts different claims in the present action than her claims from Miley I,

[7] Having dismissed the federal claims with prejudice, Judge Cooper declined to exercise supplemental jurisdiction over Plaintiffs state law claims and dismissed them without prejudice. See Miley I, 2014 WL 11485572, at *2.

they arise from the same cause of action.[8] Compare Compl., with Miley I, 2014 WL 11485571 at * 1. This is because "identical claims and legal theories are not required for res judicata to apply." See Bonomi, 2013 WL 12109449, at *6 (finding that in a case where the plaintiff "challenged the propriety of the actions taken by defendants while foreclosing on the property and with respect to plaintiff's application for a loan modification" in a previous action, res judicata barred different claims the plaintiff asserted in a subsequent action that were based on the same facts).

"Res judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact." Draper v. Atlanta Indep. Sch. Sys., 377 F. App'x 937, 939-40 (11th Cir. 2010) (internal citations and punctuation marks omitted); see also Home Depot U.S.A., Inc. v. U.S. Fire Ins. Co., 299 F. App'x 892, 896 (11th Cir. 2008) (per curiam) (stating that res judicata applies if a case arises out of the same nucleus of operative facts, or is based on the same factual predicate as a former action); Manning v. City of Auburn, 953 F.2d 1355, 1358 (11th Cir. 1992) (explaining that

8 Specifically, in Miley I, Plaintiff brought various state law fraud claims, state law claims for breach of contract and breach of fiduciary duty, a claim for violation of an automatic bankruptcy stay pursuant to 11 U.S.C. § 362, "a claim for 'unfair deceptive acts or practices' in which she references the Federal Trade Commission[,]" and a "claim for violations of the National Housing Act, 12 U.S.C. § 1701." See 2014 WL 11485571 at *l. In the instant matter, Plaintiff asserts claims pursuant to 18 U.S.C. § 157(3) (prohibiting bankruptcy fraud); 18 U.S.C. § 1341 (prohibiting mail fraud); O.C.G.A. § 16-14-4(b) (the Georgia Civil RICO statute); O.C.G.A. § 16-8-102(5) (prohibiting residential mortgage fraud); and O.C.G.A. § 7-1-1013(6) (prohibiting fraudulent statements in connection with mortgage loans). See generally Compl. However, as explained

above, the claims in a current action need not be precisely the same as the claims in a previous action for res judicata to apply.

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res judicata "bars relitigation of matters that were or could have been litigated in [the] earlier suit") internal citation omitted). Plaintiffs instant federal claims arise from the same alleged wrongful foreclosure and eviction at issue in Miley I. Thus because her federal claims arise out of the same operative nucleus fact as her previous lawsuit in this district, they are barred by res judicata. Therefore, the Court finds that each of the four (4) prongs of the res judicata test of are met with regards to Plaintiffs federal claims. See Schafler, 139 F. App'x at 150. As such, these claims are due to be dismissed as barred.

B. Plaintiff's State Law Claims

Having determined that res judicata bars Plaintiffs federal claims, the Court turns to Plaintiffs state law claims. Here, Plaintiff alleges her state law claims are supported by supplemental jurisdiction and diversity jurisdiction. See Compl. 1 4 (citing 28 U.S.C. § 1367(a) and 28 U.S.C. § 1332).

As noted above, when Judge Cooper dismissed with prejudice Plaintiffs federal claims in Miley I, he declined to exercise supplemental jurisdiction over Plaintiffs state law claims and dismissed them without prejudice. See 2014 WL 11485572, at *2. The Court now confronts the same issue in the present case:

Plaintiffs federal claims are barred, and thus, only her state law claims remain. As relevant here, a district court "may decline to exercise supplemental jurisdiction over a claim . . . if ... the district court has dismissed all claims over which

it has original jurisdiction." 28 U.S.C. § 1367(c)(3). " A district court's decision whether to exercise [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." Carlsbad Tech., Inc.v .H IF Bio, Inc.,5 56 U.S.6 35,639 (2009) .... [T]he Eleventh Circuit has stressed that when all federal claims are dismissed before trial, a district court should typically dismiss the pendant state claims as well. See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 [] (1966). See Smith v. Stimpson, CV 1:18-00037-CG-N, 2018 WL 3581678, at *7 (S.D. Ala. Apr. 20, 2018), report and recommendation adopted, CV 18-0037-CG-N, 2018 WL 3581094 (S.D. Ala. July 25, 2018); see also Lietzke v. County of Montgomery, Ala, CIV.A. 2:07CV814-MHT, 2007 WL 3342559, at *5 (M.D. Ala. Nov. 9, 2007) ("If the federal claims over which the court has original jurisdiction are dismissed, the court may decline to exercise jurisdiction over state law claims.").

In determining whether to exercise supplemental jurisdiction, the Court should "weigh [a] host of factors ... [including] judicial economy, convenience, fairness, and comity." See Ameritox, Ltd. v. Millennium Labs., Inc., 803 F.3d 518, 532 (11th Cir.2 015) (internal quotation marks omitted).

However, the United State Supreme Court has explained that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims."

See Carnegie-Mellon U. v. Cohill, 484 U.S. 343, 350 n.7 (1988) (internal citation omitted). Thus, "[w]hen all federal claims are dismissed before trial, a district court

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should typically dismiss the pendant state claims as well." See Vibe Micro, Inc. v. Shabanets, 878 F.3d 1291, 1296 (11th Cir. 2018) (citing Gibbs, 383 U.S. at 726).Thus, in its discretion and in the interest of judicial economy, convenience, fairness, and comity, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.[9] See 28 U.S.C. § 1367(c)(3); see also Carlsbad Tech., 556 U.S. at 639 (2009). And "[a]s is appropriate when a district court declines to continue exercising supplemental jurisdiction," the Court dismisses Plaintiff's state law claims "without prejudice so that the claims [may] be refiled in the appropriate state court." See Stimpson, 2018 WL 3581678, at *8; see also Crosby v. Paulk, 187 F.3d 1339, 1352 (11th Cir. 1999) (where a district court "decides to dismiss [] state[] law claims" because all federal claims have also been dismissed, the district court should dismiss the state law claims "without prejudice so that the claims may be

refiled in the appropriate state court"). Accordingly, the Court dismisses without prejudice Plaintiff's state law claims.[10]

[9] In the absence of supplemental jurisdiction, the Court notes that diversity jurisdiction also does not support Plaintiffs state law claims. While Plaintiff claims that diversity jurisdiction exists, she fails to properly allege the citizenship for the Parties (including herself). See Compl. ,r,r 1-4. And"[w]here, as here, the plaintiff asserts diversity jurisdiction, [she] has the burden to prove that there is diversity." See King v. Cessna Aircraft Co., 505 F.3d 1160, 1171 (11th Cir. 2007).

[10] Having found that Plaintiffs instant federal claims are barred by res judicata and having declined to exercise supplemental jurisdiction over Plaintiffs state law claims, the Court does not discuss Defendant Burns' other arguments in favor of dismissal. [See Doc. 11].

V. Conclusion

For reasons set forth above, the Court **DENIES** Plaintiffs "Motion to Notify Clerk of Court of Defendants Failure of Duty to Avoid Unnecessary Expenses of Serving a Summons" [Doc. 7] and **GRANTS** Defendant Burns' "Motion to Dismiss." [Doc. 11]. The Court **DISMISSES WITH PREJUDICE** Plaintiffs federal claims and **DISMISSES WITHOUT PREJUDICE** her state law claims.

Lastly, the Court **DIRECTS** the Clerk to close the case. **SO ORDERED,** this 30th day of March, 2022.

Eleanor L. Ross

United States District Judge
Northern District of Georgia

APPENDIX 7

USCA11 - Order- Petition for Rehearing En Banc – ,
Case 22-11512 -09/06/23 - App. 7
USCA11 Case: 22-11512 Document: 24-2

Date Filed: USCA11 Case: 22-11512 Document: 24-2

Date Filed: 09/06/2023

09/06/2023 Page: 1 of 2 (1 of 2)

In the United States Court of Appeals

For the Eleventh Circuit _

No. 22-11512

ALTHEA MILEY, , Plaintiff-Appellant,

versus

DEBORAH J. BURNS Individually as Corporate Executive and Employee of TMST Home Mortgage Loans, Inc., f.k.a. Thornburg Mortgage Home Loans, Inc., as Mortgage Service Provider (MSP),

TMST HOME LOANS, INC., as Mortgage Service Provider (MSP) f.k.a. Thornburg Mortgage Home Loans, Inc.,

Defendants-Appellees.

Order of the Court Appeal from the United States District Court for the Northern District of Georgia D.C. Docket No. 1:21-cv-00616-ELR

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

22-11512

Before JILL PRYOR, ANDERSON and DUBINA, Circuit Judges. PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35.

The Petition for Panel Rehearing also is DENIED. FRAP 40.

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

CIVIL ACTION NO. 1:14-CV-2819-CC

USDC - Opinion and Order - Case No.14- CV-2819- Filed 11/24/14 – Appx -6

ALTHEA MILEY,

Plaintiff,

vs.

THORNBURG MORTGAGE HOME : LOANS, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on the Report and Recommendation [Doc. No. 3] (the "R&R") issued by Magistrate Judge J. Clay Fuller on September 9, 2014.

In the R&R, Magistrate Judge Fuller recommends that Plaintiff Althea Miley's federal claims in the case be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and that the Court decline to exercise its supplemental jurisdiction over Plaintiff's state law claims.

The record reflects that Plaintiff timely filed Plaintiff's Response and Objection to Magistrate Judge's Final Report and Recommendation [Doc. No. 5] on September 22, 2014.

After reviewing a magistrate judge's findings and recommendations, a district judge may accept, reject, or modify the findings or recommendations. 28 U.S.C. § 636(b)(1).

A party challenging a report and recommendation must "file . . . written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection." Macort v. Prem, Inc. , 208 F. App'x 781, 783 (11th Cir. 2006) (citation and internal quotation marks omitted); see also Fed. R. Civ. P. 72(b)(2). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Jeffrey S. v. State Bd. of Educ. of Ga. , 896 F.2d 507, 512 (11th Cir. 1990) (citation omitted).

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The district judge must "give fresh consideration to those issues to which specific objection has been made by a party." Id. "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).

Those portions of a report and recommendation to which an objection has not been made are reviewed for plain error. United States v. Slay , 714 F.2d 1093, 1095 (11th Cir. 1983). In the instant case, Plaintiff articulates three main objections.

First, Plaintiff objects to the Magistrate Judge's finding that no automatic stay went into effect when Plaintiff filed a bankruptcy action on September 3, 2007, due to Plaintiff's prior filing of two bankruptcy cases that were dismissed less than a year before her September 2007 filing. Second, Plaintiff objects to the Magistrate Judge's finding that Plaintiff failed to allege facts showing that an automatic stay was in effect when Defendants pursued foreclosure and/or eviction proceedings after she filed her third bankruptcy action on September 3, 2007. Third, Plaintiff objects to the Magistrate Judge's recommendation that the Court dismiss Plaintiff's federal claims and decline to exercise supplemental jurisdiction over Plaintiff's state law claims. The merit of Plaintiff's latter two objections depend on the merit of Plaintiff's first objection. Plaintiff's first objection rests on Plaintiff's mistaken belief that 11 U.S.C. § 362(c)(4)(B) imposes an automatic 30-day stay, irrespective of the number of petitions previously filed by the debtor. "In general terms, once a debtor files a petition in bankruptcy, a stay of virtually all proceedings, or attempts to collect debts of a debtor, are stayed by operation of law." In re Berry , 340 B.R. 636, 636 (Bankr. M.D. Ala. 2006) (citing 11 U.S.C. § 362(a) and In re Briskey , 258 B.R. 473 (Bankr. M.D. Ala. 2001)). Following the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub.L. 109-8, § 1501) (the "BAPCPA"), the automatic stay does not uniformly apply to all debtors. In the case of a multiple repeat bankruptcy filer, who has filed 2 or more single or joint cases-

Case 1:14-cv-02819-CC Document 6 Filed 11/24/14 Page 3 of 4 within the previous year that were dismissed, 11 U.S.C. § 362(c)(4)(A) provides that the stay under 11 U.S.C. § 362(a) shall not go into effect upon the filing of the later case. See In reBates , 446 B. R. 301, 304 (B.A.P. 8th Cir. 2011) ("Many courts have concluded that § 362(c)(4)(A)(i) is unambiguous, and as far as we can tell, courts have universally held that under § 362(c)(4)(A)(i), where a debtor has filed a third bankruptcy case in a one-year period, the automatic stay never goes into effect.") (listing cases); Instead, 11 U.S.C. § 362(c)(4)(B) provides the following: [I]f, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all other creditors ... after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B). A reading of the plain language of the statute informs that § 362(c)(4)(B) does not impose an automatic stay. Rather, at the request of a party in interest, a bankruptcy court, after notice and a hearing, may impose a stay, provided that the bankruptcy court finds that the petition was filed in good faith as to the creditors to be stayed. See also In re Norman , 346 B.R. 181, 183 (Bankr. N.D. W. Va. 2006) ("When § 362(c)(4) applies to a case, no automatic stay is in effect until one is imposed by the court – the hearing on which is not constricted to a rigid time period so long as the debtor files the motion before the expiration of the 30-day period."); In re Toro-Arcila , 334 B.R. 224, 226 (Bankr. S.D. Tex. 2005) ("Although under § 362(c)(3)(A) there is a 30-day automatic stay for first-time repeat filers, § 362(c)(4)(A) imposes no automatic stay at all for multiple repeat filers. Instead, § 362(c)(4)(B) provides that the

court may order the stay take effect after notice and a hearing if a party in interest requests such relief . . . ."); In re Easthope , No. 06–20366, 2006 WL 851829, at *2 (Bankr. D. Utah Mar. 28, 2006) ("For those debtors with two or more cases pending in the previous year, § 362(c)(4) applies and there is no automatic stay in effect upon the filing of their petition."). In the instant case, because Plaintiff was a multiple repeat filer when she filed her bankruptcy petition on September 3, 2007, the Magistrate Judge correctly-

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concluded that no automatic stay when into effect upon the filing of that later petition. Any foreclosure activities conducted by Defendants McCalla Raymer and its attorneys between September 3, 2007, and the date that Plaintiff obtained a stay of the execution of a Warrant to Evict – October 29, 2007 – did not occur in violation of an automatic stay.

Accordingly, Plaintiff's first and second objections to the R&R are without merit, as the Court agrees with the Magistrate Judge that Plaintiff has failed to state a claim under 11 U.S.C. § 362 for violation of an automatic stay.

Having found that Plaintiff has failed to state a claim under 11 U.S.C. § 362 and finding no plain error with the Magistrate Judge's conclusions that Plaintiff has not stated any other federal claim, the Court will dismiss Plaintiff's federal claims and decline to exercise

supplemental jurisdiction over Plaintiff's state law claims. Other than reiterating the rejected argument that she has stated a claim under 11 U.S.C. § 362, Plaintiff offers no reason as to why this Court should retain jurisdiction over the state law claims.

Accordingly, the court will dismiss the state law claims without prejudice. Based on the foregoing, the Court hereby ADOPTS the R&R as the decision of this Court.

Plaintiff's federal claims are DISMISSED with prejudice for failure to state a claim on which relief can be granted. Further, the Court DECLINES to exercise supplemental jurisdiction over Plaintiff's state law claims, and those state law claims are DISMISSED without prejudice.

SO ORDERED this 24th day of November , 2014.

s/ CLARENCE COOPER CLARENCE COOPER SENIOR UNITED STATES DISTRICT JUDGE- 4

Respectfully submitted,

Althea Miley

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