APP A

NOT FOR PUBLICATION

In the United States Court of Appeals For the Eleventh Circuit

No. 24-14033
Non-Argument Calendar

NIKITA LYNETTE BARNES,

Plaintiff-Appellant,

versus

GUILD MORTGAGE COMPANY LLC,
DESIREE (AMBER) KRAMER,
MCCALLA RAYMER LEIBERT PIERCE, LLC,
LINDA T. WALKER,
VICTORIA CALVERT, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-05065-SDG

Before ROSENBAUM, JILL PRYOR, and ABUDU, Circuit Judges.

PER CURIAM:

Nikita Barnes, proceeding *pro se*, filed this lawsuit against her mortgage lender, one of its executives, and the law firm that represented the lender in foreclosure proceedings. While the action was pending, she added as defendants the district court judge and magistrate judge who had been presiding over the case. After the case was reassigned to a new district court judge and magistrate judge, the district court dismissed Barnes's third amended complaint, concluding, among other things, that it was a shotgun pleading. The district court dismissed all of Barnes's claims with prejudice.

On appeal, Barnes challenges several of the district court's earlier orders in the case as well as the dismissal of the action. After careful consideration, we conclude that the district court did not abuse its discretion in any of the earlier orders or in dismissing the third amended complaint as a shotgun pleading. But we disagree with the district court's dismissal *with prejudice* of Barnes's claims against the two judges who were never served with process and never appeared in this action. We conclude that the court could not dismiss Barnes's claims against them with prejudice.

We thus affirm the district court's dismissal with prejudice of Barnes's claims against defendants Guild Mortgage Company LLC; Desiree Kramer; and McCalla Raymer Leibert Pierce, LLC. But we vacate the dismissal with prejudice as to defendants Judge Victoria Calvert and Judge Linda Walker. As to these defendants only, we remand with instructions that the district court reenter its judgment as a dismissal without prejudice.

I.

In June 2017, Barnes borrowed more than $230,000 from Guild. She signed a promissory note, which was secured by a security deed on her home in Douglasville, Georgia. Barnes fell behind on her mortgage payments, and Guild sought to foreclose on the property.

In November 2023, with foreclosure looming, Barnes filed this lawsuit in federal court in the Northern District of Georgia, bringing claims against Guild and Kramer, its chief financial officer. In her initial complaint, Barnes purported to bring federal claims for violations of the "Truth and lending act, Consumer Rights, Federal reserve act, and Negotiable Instrument." Doc. 4 at 3.[1] As damages, she sought "1% of all company assets" and "$5000 a day for every day that this matter was not handle[d] properly." *Id.* at 5. Barnes's lawsuit initially was assigned to Judge Calvert, a district court judge, and Judge Walker, a magistrate judge.

Because Barnes sought permission to proceed *in forma pauperis*, the magistrate judge reviewed the complaint to determine whether the action was frivolous or malicious, failed to state a claim for relief, or sought monetary relief against a defendant who was immune. *See* 28 U.S.C. § 1915(e)(2). The magistrate judge determined that Barnes's complaint, "as pled, [was] woefully deficient." Doc. 2 at 4. Although it appeared that Barnes intended to assert a claim under the Truth in Lending Act (TILA), the

[1] "Doc." numbers refer to the district court's docket entries.

complaint failed to identify "what provision of TILA was supposedly violated." *Id.* at 5. The magistrate judge noted that TILA "contain[ed] dozens of sections and hundreds of pages of implementing regulations" and stated that the court could not "be expected to guess what provision [d]efendants allegedly violated." *Id.* at 4. The magistrate judge determined that Barnes's other claims were "even more vague," explaining that "Consumer Rights," the "Federal reserve act," and "Negotiable Instrument" were not "plausible cause[s] of action." *Id.* at 5.

Although the complaint was deficient, the magistrate judge recommended that the district court allow Barnes to file an amended complaint and set a deadline for her to do so. The magistrate judge warned that the amended complaint would need to "clearly specify which specific statutory provisions [d]efendants allegedly violated" and include "factual allegations sufficient to support each claim." *Id.*

Barnes filed a first amended complaint, again asserting claims against Guild and Kramer.[2] She alleged that Guild and Kramer's actions "constitute[d] a breach of contract as outlined in the security deed" and "a wrongful foreclosure." Doc. 6 at 3. She also claimed that they violated TILA, the Real Estate Settlement Procedures Act (RESPA), and the Uniform Commercial Code (UCC).

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[2] Along with her first amended complaint, Barnes objected to the magistrate judge's recommendation. The district court generally adopted the magistrate judge's recommendation but determined that it need not set a deadline for Barnes to file an amended complaint because one had already been filed.

Shortly after filing the first amended complaint, Barnes moved for a temporary restraining order, seeking to stop Guild from proceeding with the foreclosure sale. The district court denied this motion, concluding that Barnes had not demonstrated that a temporary restraining order was justified.

The day after the court denied the motion for a temporary restraining order, Barnes filed a Chapter 13 bankruptcy petition, which she admits she filed for the purpose of delaying the foreclosure proceedings. Less than two months after filing the bankruptcy petition, she voluntarily dismissed the bankruptcy case.

In the district court, Guild and Kramer moved to dismiss Barnes's first amended complaint, arguing that it failed to state a claim and was a shotgun pleading. They asserted that the "few alleged facts" in the pleading did "not sufficiently provide [them] with a reasonable basis for understanding what alleged facts form the basis for the claims asserted." Doc. 17-1 at 7. Barnes opposed the motion. In her response, she purported to add claims for breach of "an implied Duty of Good Faith and Fair Dealing" and violation of the "Unfair and Deceptive Trade Practices Act." Doc. 21-1 at 4.

While the motion to dismiss was pending, Barnes filed several motions in the district court. She filed a motion to take discovery and another seeking the recusals of Judge Calvert and Judge Walker. She also purported to file, without leave of court, a second amended complaint in which she asserted claims against Guild and Kramer for breach of contract and for violations of TILA, RESPA, and the UCC.

In another attempt to stave off foreclosure, Barnes filed a new lawsuit in Georgia state court against Guild and McCalla, the law firm that represented Guild in the foreclosure proceedings. In the second lawsuit, she sought a declaration that she had "clear and unencumbered title to the property notwithstanding" the foreclosure action. Doc. 42-2 at 7. She also purported to bring claims under RESPA, the Fair Debt Collection Practices Act, and Georgia statutes. In April 2024, shortly after Barnes filed the second lawsuit, the property was sold at a foreclosure sale. Before McCalla was served or appeared in the state court action, Guild removed the action to federal court and then moved to consolidate Barnes's two lawsuits.

In August 2024, the magistrate judge issued an order and report and recommendation resolving the outstanding motions. She denied Barnes's motion seeking to take discovery, explaining that the discovery period had not yet begun. She also recommended that the district court grant Guild's motion to consolidate because Barnes's two cases involved common questions of fact and consolidation would further the "interests of judicial economy" and "eliminate unnecessary repetition and confusion." Doc. 48 at 13 (citation modified). The magistrate judge also recommended that the district court deny the motion for recusal, concluding that Barnes had not shown any valid ground for recusal.

The magistrate judge then addressed Guild's motion to dismiss the first amended complaint. She concluded that the first amended complaint failed to state a claim for relief. The magistrate judge also considered the additional claims that Barnes purported

to raise in her response to the motion to dismiss and the second amended complaint. After considering these filings, the magistrate judge concluded that Barnes still had failed to state a claim for relief.

Although Barnes failed to state a claim for relief, the magistrate judge recommended that the district court deny Guild and Kramer's motion to dismiss as moot. She concluded that Barnes should have an opportunity to file a third amended complaint because the court had recently consolidated her two lawsuits and because it "appear[ed] the factual circumstances of this case have changed" after the foreclosure sale. Doc. 48 at 27.

The magistrate judge warned Barnes that if she filed a third amended complaint, she would need to comply with the Federal Rules of Civil Procedure and set forth each claim in a separate count. In addition, the magistrate judge reminded Barnes that she needed to set forth "factual allegations sufficient to support each claim" and that it was insufficient to simply assert that the defendants had breached the parties' contract or violated a statute. *Id.* at 28 (citation modified).

Barnes objected. The district court adopted the magistrate judge's recommendation, granted the motion to consolidate, denied the motion for recusal, denied the motion to dismiss as moot, and ordered Barnes to file a third amended complaint.

Barnes filed a third amended complaint in which she asserted claims against Guild, Kramer, McCalla, Judge Calvert, and Judge Walker. She alleged that she had "tendered an instrument

to . . . Kramer as a tender of payment to set off the mortgage debt, which was supported by a 1099-A filing from the IRS," but Kramer "failed to apply [the instrument] to the account." Doc. 54 at 3. Barnes also alleged that she formally "revok[ed] any power of attorney previously granted" to Guild but that it continued to act "despite this revocation," which "raise[d] issues under O.C.G.A. § 10-6-52." *Id.* She also alleged that in December 2023, she had "transferred the property into a private trust" and, "[d]espite this, foreclosure proceedings persisted." *Id.* at 3–4. She further alleged that in January 2024, Guild failed to attend the creditor's meeting in her bankruptcy case.

Barnes alleged that the "[d]efendants acted in concert to unlawfully foreclose on" her property; deprived her of "constitutional rights, life, liberty, and property without due process of law"; and "violat[ed] various statutory and common law protections." Doc. 54 at 2. She asserted that Judge Calvert and Judge Walker acted with "clear bias" when they issued orders in the case. *Id.* at 5.

In the third amended complaint, Barnes purported to bring the following claims: in Count One, a wrongful foreclosure claim under Georgia law against Guild, Kramer, and McCalla; in Count Two, a TILA claim against Guild; in Count Three, a RESPA claim against Guild; and in Count Four, claims for judicial misconduct and constitutional violations against Judge Calvert and Judge Walker. She demanded compensatory damages, injunctive relief, declaratory relief, and punitive damages. Shortly after Barnes filed the third amended complaint, Judge Calvert and Judge Walker

recused themselves, and the case was assigned to a new district court judge and magistrate judge.

Guild and Kramer moved to dismiss the third amended complaint, arguing that it was a shotgun pleading and failed to state a claim for relief. McCalla also filed a motion to dismiss. In the portion of its motion setting forth the procedural history of the case, McCalla stated that it had never been served with process. But McCalla did not seek dismissal based on lack of service of process; instead, it argued only that Barnes failed to state a claim for relief and the third amended complaint should be dismissed with prejudice. On the same day that it filed a motion to dismiss, McCalla filed an answer.

Barnes filed a motion to strike McCalla's answer and a motion for default judgment.[3] She argued that McCalla's motion to dismiss and answer were untimely because it filed them more than 21 days after she had filed the third amended complaint. Given the lack of a timely response, she asserted that she was entitled to default judgment. She requested that the court enter judgment in her favor, "overturn [the] foreclosure proceedings," and award her compensatory and punitive damages. Doc. 68 at 3.

A magistrate judge issued a report and recommendation. She recommended that the district court deny Barnes's motion to

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[3] Barnes also filed several other motions in the district court, including motions seeking a temporary restraining order and to take discovery from Guild. These motions were denied.

strike McCalla's answer and her motion for default judgment. The magistrate judge explained that McCalla's response to the third amended complaint was not untimely because its obligation to respond did "not arise until [it was] properly served with that pleading" and there was no indication that McCalla had ever been properly served in the case. Doc. 74 at 9. But even if McCalla had failed to timely respond to the third amended complaint, the magistrate judge continued, Barnes was not entitled to a default judgment. The magistrate judge explained that Barnes was not entitled to a default judgment because she had not first obtained a clerk's entry of default, as required under the Federal Rules of Civil Procedure, and because the third amended complaint failed to state a claim for relief.

The magistrate judge also recommended that the district court grant the motions to dismiss the third amended complaint. The magistrate judge concluded that the third amended complaint was a "shotgun pleading" that "contain[ed] few factual allegations" and instead was "replete with conclusory allegations, legal conclusions, and legal arguments, making it difficult to determine the facts supporting Barnes's claims." *Id.* at 15. The magistrate judge determined that the third amended complaint failed to "give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* (citation modified).

The magistrate judge also ruled, in the alternative, that the third amended complaint failed to state a claim for relief. For the wrongful foreclosure claim in Count One, Barnes had alleged only

that a foreclosure sale occurred but "include[d] no facts supporting any of the other elements of a wrongful foreclosure claim." *Id.* at 17. The magistrate judge also determined that Counts Two and Three failed to state a claim under TILA and RESPA, respectively.

Even though Judge Calvert and Judge Walker had not appeared in the action and no motion to dismiss had been filed as to Count Four,[4] the magistrate judge also concluded that Barnes failed to state a claim in this count because she pleaded no facts to support it. In the alternative, the magistrate judge concluded that the claims in Count Four should be dismissed because Judge Calvert and Judge Walker enjoyed absolute judicial immunity.

The magistrate judge recommended that the court dismiss the third amended complaint with prejudice. Because Barnes already had several opportunities to amend her complaint, the magistrate judge stated that the court need not give her "leave to file a fourth amended complaint . . . before dismissing her claims with prejudice." *Id.* at 26.

Barnes objected. The district court overruled the objections, adopted the magistrate judge's recommendations, denied Barnes's motions to strike and for default judgment, granted the motions to dismiss, and dismissed the action with prejudice. This is Barnes's appeal.

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[4] There is no indication in the record that Barnes ever served Judge Calvert or Judge Walker.

II.

All issues in this appeal are governed by the abuse of discretion standard. *See Rodriguez v. Burnside*, 38 F.4th 1324, 1335 (11th Cir. 2022) (reviewing denial of request for discovery for abuse of discretion); *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1313 (11th Cir. 2017) (reviewing decision to consolidate cases for abuse of discretion); *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015) (reviewing dismissal of complaint as shotgun pleading for abuse of discretion); *Gwynn v. Walker*, 532 F.3d 1304, 1308 (11th Cir. 2008) (reviewing denial of recusal motion for abuse of discretion); *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985) (reviewing denial of motion for default judgment for abuse of discretion). "The abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Savoia-McHugh v. Glass*, 95 F.4th 1337, 1342 (11th Cir. 2024) (citation modified). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Id.* (citation modified).

We liberally construe a *pro se* litigant's pleadings, holding them "to less stringent standards than formal pleadings drafted by lawyers." *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168 (11th Cir. 2014). We construe briefs filed by *pro se* litigants liberally. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Despite this liberal construction, "issues not briefed on appeal by a *pro se* litigant are deemed abandoned." *Id.*

III.

On appeal, Barnes raises a number of issues. She challenges several non-final orders as well as the order dismissing her third amended complaint with prejudice. We address Barnes's challenges to the non-final orders and then turn to her challenge to the district court's dismissal.

A.

On appeal, Barnes challenges the non-final orders consolidating her two lawsuits, denying a default judgment, refusing to order discovery, and denying her request for recusal. We conclude that the district court did not abuse its discretion in entering these orders.

We begin with Barnes's challenge to the order consolidating her two lawsuits. The Federal Rules of Civil Procedure permit a district court to consolidate two pending actions when they "involve a common question of law or fact." Fed. R. Civ. P. 42(a). Rule 42(a) "is permissive and vests a purely discretionary power in the district court." *Young v. City of Augusta*, 59 F.3d 1160, 1168 (11th Cir. 1995) (citation modified). We have urged district courts to "make good use of Rule 42(a) in order to expedite the trial and eliminate unnecessary repetition and confusion." *Id.* at 1169 (citation modified). Given the overlapping issues in Barnes's two lawsuits, we cannot say that the district court abused its discretion when it consolidated them.

Barnes next challenges the district court's decision to deny her motion for a default judgment. The district court gave three

alternative reasons for denying this motion: (1) McCalla's response to the third amended complaint was not untimely because it had never been served with process in the case, (2) Barnes had not obtained a clerk's entry of default, and (3) the third amended complaint failed to state a claim for relief. On appeal, Barnes raises no challenge to the district court's second ground for denying the motion for default judgment: that she had not obtained a clerk's entry of default. Because the district court denied the motion for a default judgment on multiple grounds and Barnes failed to challenge one of those grounds, she "is deemed to have abandoned any challenge of that ground, and it follows that the [denial of the motion] is due to be affirmed." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014).

Barnes also argues that the district court erred in denying her motions seeking discovery. A district court has authority to "manag[e] the discovery process." *Rodriguez*, 38 F.4th at 1335. And we have explained that in general, a court should resolve any motion to dismiss for failure to state a claim before discovery begins. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). We thus cannot say that the district court abused its discretion when it refused to allow Barnes to take discovery while the case remained at the pleadings stage.

Although Judge Calvert and Judge Walker recused themselves from this case after Barnes added them as defendants, she argues on appeal that they erred in denying her earlier requests for their recusal. Generally, a judge must recuse if she has "personal

bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1). But merely ruling against a litigant in a case is not sufficient to warrant dismissal. *See Ginsberg v. Evergreen Sec., Ltd.*, 570 F.3d 1257, 1274 (11th Cir. 2009) ("Challenges to adverse rulings are generally grounds for appeal, not recusal."). We conclude that Judge Calvert and Judge Walker did not abuse their discretion when they denied Barnes's initial requests for their recusal, which were based on their adverse rulings.

B.

We now turn to Barnes's challenge to the district court's order dismissing her third amended complaint. We conclude that the district court did not abuse its discretion in dismissing on shotgun pleading grounds.

To state a claim for relief, 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). This short and plain statement 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) (citation modified). An adequate complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* In addition, the complaint must "state its claims . . . in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Fed. R. Civ. P. 10(b). The purpose of these rules is "to require the pleader to present his claims discretely and succinctly, so that, his adversary can discern what he is claiming and frame a responsive

pleading" and so that "the court can determine which facts support which claims and whether the plaintiff has stated any claims upon which relief can be granted." *Weiland*, 792 F.3d at 1320 (citation modified).

Complaints that violate these rules are often referred to as "shotgun pleadings." *Id.* A shotgun pleading fails "to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323. Shotgun pleadings "waste scarce judicial resources, inexorably broaden the scope of discovery, wreak havoc on appellate court dockets, and undermine the public's respect for the courts." *Vibe Micro Inc. v. Shabanets*, 878 F.3d 1291, 1295 (11th Cir. 2018) (citation modified). Shotgun pleadings include complaints that: (1) contain "multiple counts where each count adopts the allegations of all preceding counts"; (2) are "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action"; (3) fail to separate into a separate count each cause of action or claim for relief; or (4) assert "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Weiland*, 792 F.3d at 1321–23.

A district court has inherent authority to dismiss a complaint on shotgun pleading grounds. *Vibe Micro*, 878 F.3d at 1295. When a plaintiff files a shotgun pleading, a district court must "give him one chance to replead." *Id.* at 1296. So that the plaintiff can correct the deficiencies, the court "should explain how the offending

pleading violates the shotgun pleading rule." *Id.* If the new complaint is also a shotgun pleading, the district court may then dismiss the action with prejudice. *Id.*; *see Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989) (explaining that although dismissal with prejudice is a drastic remedy, "dismissal upon disregard of an order, especially where the litigant has been forewarned, generally is not an abuse of discretion").

Here, the district court did not abuse its discretion in dismissing the third amended complaint as a shotgun pleading. The third amended complaint was a shotgun pleading because it was replete with conclusory allegations not obviously connected to any particular cause of action, making it difficult to determine the facts supporting Barnes's claims. *See Weiland*, 792 F.3d at 1322. In addition, the third amended complaint failed to separate into a separate count each cause of action or claim for relief. For example, Count Four against Judge Walker and Judge Calvert purported to raise in a single count multiple claims against them for judicial misconduct and for violations of Barnes's constitutional rights. On top of that, the district court had already given Barnes multiple opportunities to fix the deficiencies and replead before dismissing the action. *See Vibe Micro*, 878 F.3d at 1296.

Before closing, we pause to address whether it was appropriate for the district court to dismiss *with prejudice* Barnes's claims against Judge Calvert and Judge Walker. We note that Barnes never served the two judicial defendants, and they never appeared in the action. We conclude that the district court erred in

dismissing the claims against them with prejudice. As we have previously explained, "[s]ervice of process is a jurisdictional requirement." *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990). Thus, "a court lacks jurisdiction over the person of a defendant when that defendant has not been served." *Id.* When a court lacks jurisdiction, it cannot pass judgment on the merits. And a "dismissal of a complaint with prejudice" counts as "final judgment on the merits." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

A defendant may waive an objection to the exercise of jurisdiction based on lack of service of process. Federal Rule of Civil Procedure 12 directs that this defense is waived when a party fails to raise it in a motion to dismiss filed under Rule 12 or include it in a responsive pleading. *See* Fed. R. Civ. P. 12(g)(2), (h). Consistent with Rule 12, we have recognized that "[o]bjections to service of process . . . like any other objection to jurisdiction over the person, can be waived by the party over whom jurisdiction is sought." *Pardazi*, 896 F.2d at 1317. Here, Judge Calvert and Judge Walker never waived the issue of lack of service of process. Indeed, they never appeared in the case, much less filed a responsive pleading or a Rule 12 motion.[5] We thus conclude that the district court erred

[5] It also appears that Barnes did not serve McCalla. Even assuming she failed to serve McCalla, it waived any defense based on lack service. McCalla appeared in the action and filed a motion to dismiss and an answer. In the motion to dismiss, it mentioned in one sentence that it had not properly been served. But it sought dismissal on one ground only: that the third amended complaint failed to state a claim against it. Because McCalla failed to adequately raise the

in dismissing the claims against Judge Calvert and Judge Walker with prejudice. As to these two defendants, we vacate and remand with instructions for the district court to dismiss the claims against them without prejudice.

IV.

For the above reasons, we AFFIRM the district court's dismissal with prejudice as to Guild, Kramer, and McCalla. We VACATE the dismissal with prejudice as to Judge Calvert and Judge Walker. As to these two defendants only, we REMAND to the district court with instructions to reenter judgment dismissing without prejudice.[6]

AFFIRMED in part, VACATED and REMANDED in part WITH INSTRUCTIONS.

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issue of lack of service of process in its motion to dismiss, it waived this defense. *See* Fed. R. Civ. P. 12(g)(2), (h); *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs.*, 553 F.3d 1351, 1360 (11th Cir. 2008). Given McCalla's waiver of any objection based on lack of service, the district court did not err in dismissing the claims against McCalla with prejudice.

[6] We DENY Barnes's motion to dismiss the appeal and declare the district court's judgment void.

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

NIKITA LYNETTE BARNES,
Plaintiff,

v.

GUILD MORTGAGE COMPANY LLC,
DESIREE (AMBER) KRAMER,
MCCALLA RAYMER LEIBERT PIERCE LLC,
LINDA T. WALKER, and
VICTORIA CALVERT,
Defendants.

CIVIL ACTION NO.
1:23-cv-5065-SDG-CMS

FINAL REPORT AND RECOMMENDATION AND ORDER

Plaintiff Nikita Lynette Barnes, who is proceeding without an attorney, asserts several claims in her Third Amended Complaint. [Doc. 54, Third Am. Compl.]. This matter is before the Court on several motions, including (1) Barnes's Petition for Injunctive Relief [Doc. 47], (2) a Motion to Dismiss for Failure to State a Claim filed by Defendants Guild Mortgage Company LLC ("Guild") and Desiree (Amber) Kramer [Doc. 55], (3) a Motion to Dismiss for Failure to State a Claim filed by Defendant McCalla Raymer Leibert Pierce, LLC ("McCalla") [Doc. 58], (4) Barnes's Motion to Strike Answer [Doc. 67], (5) Barnes's Motion for Default Judgment [Doc. 68], and (6) Barnes's Motion for Issuance of Subpoena [Doc. 71].

For the reasons below, I **RECOMMEND** that the motions to dismiss [Docs. 55, 58] be **GRANTED,** that Barnes's petition for injunctive relief [Doc. 47] be **DENIED,** that Barnes's motion to strike [Doc. 67] be **DENIED**, and that Barnes's motion for default judgment [Doc. 68] be **DENIED**.

I. BACKGROUND

In June 2017, Barnes signed a promissory note (the "Note") promising to pay Guild more than $230,000 plus interest. [Doc. 6-1 at 13–15].[1] The Note was secured by a security deed (the "Security Deed") attaching real property located at 2710 Gentry Drive, Douglasville, Georgia, 30135 (the "Property"). [*Id.* at 16–30]. This action arises from the foreclosure proceedings relating to the Property.

[1] Although Barnes did not attach the Note or Security Deed to her Third Amended Complaint, she attached those documents to her Amended Complaint. [Doc. 6-1 at 13–30]. The Court may consider those documents when ruling on the motions to dismiss because the documents are central to Barnes's Third Amended Complaint, and they are undisputed. *See Sheppard v. Bank of Am., N.A.*, 542 F. App'x 789, 791 (11th Cir. 2013) (per curiam) (noting that the district court did not convert a motion to dismiss into a motion for summary judgment by considering a promissory note and a notice from the lender because both of those documents were central to the plaintiff's claims and their authenticity was not disputed). The Security Deed is also a public record. *See Reid v. HSBC Bank, USA, N.A.*, No. 1:19-cv-2888-CAP-CCB, 2020 WL 10460736, at *3 (N.D. Ga. Dec. 14, 2020) (taking judicial notice of a security deed and assignment "because they are public records not subject to reasonable dispute"), *adopted by* 2021 WL 3073270 (N.D. Ga. Jan. 6, 2021).

On November 2, 2023, Barnes initiated this lawsuit by filing an application to proceed *in forma pauperis* ("IFP"). [Doc. 1]. On November 9, 2023, U.S. Magistrate Judge Linda T. Walker granted Barnes leave to proceed IFP [Doc. 2], and the Clerk filed Barnes's Complaint [Doc. 4, Compl.]. Judge Walker, however, found that Barnes's Complaint was deficient, and she recommended that Barnes be given fourteen days after the district judge's ruling on the Report and Recommendation to file an amended complaint. [Doc. 2].

On November 22, 2023, Barnes filed an Amended Complaint. [Doc. 6, Am. Compl.]. On February 21, 2024, Barnes filed a Second Amended Complaint. [Doc. 28, Second Am. Compl.]. On April 11, 2024, U.S. District Judge Victoria M. Calvert adopted Judge Walker's Report and Recommendation with modification, finding that Barnes's Complaint did not state a plausible claim for relief but concluding that it was not necessary to give Barnes another opportunity to file an amended pleading. [Doc. 40].

Barnes also filed motions, including (1) a motion for TRO [Doc. 7], (2) a motion for discovery [Doc. 22], (3) a motion for reconsideration of Judge Calvert's Order denying her motion for TRO [Doc. 30], (4) a motion for fairness and judicial review [Doc. 37], (5) a motion for stay of execution [Doc. 38], (6) a motion for issuance of subpoena [Doc. 45], (7) a motion for recusal (styled as a petition for a

writ of mandamus) [Doc. 46], and (8) a petition for injunctive relief [Doc. 47]. Guild and Kramer, for their part, moved to (1) refer this case to the Bankruptcy Court [Doc. 17], (2) consolidate this case with *Barnes v. Guild Mortgage Co., LLC.*, No. 1:24-cv-1792-VMC-LTW (the "Related Action")[2] [Doc. 18], and (3) dismiss the Amended Complaint [Doc. 42].

On July 17, 2024, Judge Walker denied four of Barnes's motions, including the motion for discovery, the motion for issuance of subpoena, the motion for fairness and judicial review, and the motion for stay of execution. [Doc. 48]. Judge Walker recommended: (1) that the motion to consolidate the Related Action into this case be granted; (2) that the motion to refer the case to the Bankruptcy Court be denied as moot; (3) that the motion to dismiss be denied as moot; and (4) that Barnes's motion for recusal and petition for a writ of mandamus be denied. [*Id.*].

Barnes filed objections to that Report and Recommendation. [Doc. 51]. On August 16, 2024, Judge Calvert adopted the Report and Recommendation and

[2] On March 21, 2024, Barnes filed a Complaint for Quiet Title in the Superior Court of Douglas County, Georgia. *Barnes v. Guild Mortg. Corp.*, No. 1:24-cv-1792-VMC-LTW, Doc. 1 at 10. Barnes named Guild and McCalla as defendants in that action. *Id.* On April 25, 2024, with McCalla's consent, Guild removed that case to this Court. *Id.* at 1.

permitted Barnes to file a Third Amended Complaint within fourteen days. [Doc. 52].

On August 29, 2024, Barnes filed a Third Amended Complaint against Guild, Kramer, McCalla, and two new defendants—Judge Calvert and Judge Walker. [Doc. 54, Third Am. Compl.].[3] Barnes alleges that "Defendants acted in concert to unlawfully foreclose on" the Property, "depriving [Barnes] of her constitutional rights, life, liberty, and property without due process of law, and violating various statutory and common law protections." [*Id.* at 2].[4] Barnes claims that the defendants violated the Truth in Lending Act ("TILA"), the Real Estate Settlement Procedures Act ("RESPA"), "and other related provisions." [*Id.*].

Barnes resides in Douglas County, Georgia. [Third Am. Compl. at 2]. Barnes alleges that Guild is a California-based corporation that is "engaged in mortgage lending and servicing," and Kramer is "an individual employed by [Guild] in a fiduciary role." [*Id.*]. Barnes states that McCalla is "a Georgia-based law firm acting as foreclosure counsel for Guild." [*Id.*]. She also alleges that Judge Walker is a U.S.

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[3] The following facts are taken from the Third Amended Complaint and are accepted as true for purposes of resolving the motion to dismiss. *Rivell v. Priv. Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (per curiam).

[4] Citations are to CM/ECF numbering.

Magistrate Judge in the Northern District of Georgia, and Judge Calvert is a U.S. District Judge in the same Court. [*Id.*].

According to the Third Amended Complaint, on July 28, 2023, Barnes "tendered an instrument to [Kramer] as a tender of payment to set off the mortgage debt, which was supported by a 1099-A filing from the IRS," and "Kramer retained the instrument but failed to apply it to the account or provide any accounting." [Third Am. Compl. at 3]. Barnes alleges that on October 18, 2023, she served Guild "with a formal notice revoking any power of attorney previously granted." [*Id.* at 3]. According to the Third Amended Complaint, "This revocation was recorded in Douglas County and remains uncontested," and "Guild's continued actions despite this revocation raise issues under O.C.G.A. § 10-6-52." [*Id.*].

The Third Amended Complaint also alleges that on December 4, 2023, Barnes "transferred the property into a private trust in compliance with contractual provisions." [Third Am. Compl. at 3]. Foreclosure proceedings against the Property continued, however. [*Id.* at 3–4].

According to the Third Amended Complaint, Guild did not attend a January 2024 "355 Bankruptcy Creditor's Meeting" that would have given Guild "an opportunity to assert any claims regarding the property." [Third Am. Compl. at 4].

Barnes alleges that Guild still "continued to advance foreclosure efforts, without notice of amount owed." [*Id.*].

The Third Amended Complaint further alleges that Guild conducted a foreclosure sale of the Property on April 2, 2024. [Third Am. Compl. at 4]. Barnes alleges that the foreclosure sale violated her due process rights. [*Id.*]. Barnes states that she "filed for bankruptcy to delay the foreclosure but encountered significant judicial problems," and the bankruptcy proceeding was dismissed. [*Id.*].

Barnes alleges that Judge Calvert and Judge Walker "issued orders obstructing discovery, improperly consolidating state and federal claims, and denying motions for temporary restraining orders, all to the detriment of [Barnes's] due process rights." [Third Am. Compl. at 4–5]. According to the Third Amended Complaint, Judge Calvert and Judge Walker "demonstrated clear bias" by their rulings and then "refused to recuse themselves," allegedly "compromising the integrity of the proceedings." [*Id.* at 5].

The Third Amended Complaint includes the following claims:

- wrongful foreclosure against Guild, Kramer, and McCalla ("Count One") [Third Am. Compl. at 5–6];
- TILA claims against Guild based on alleged failures to (1) provide required disclosures, (2) properly credit Barnes's "payment instrument," and (3) "honor [Barnes's] right to rescind the loan" ("Count Two") [*Id.* at 6–7];

- RESPA claims against Guild based on (1) allegedly "concealing information about the true owner of [Barnes's] mortgage note and failing to provide accurate accounting disclosures," as required by 12 U.S.C. § 2605(e), and (2) continuing "foreclosure proceedings while [Barnes] was actively seeking loss mitigation and/or loan modification in violation of Regulation X, 12 C.F.R. § 1024.41(g), which prohibits dual tracking" ("Count Three") [*Id.* at 7]; and
- claims for judicial misconduct and constitutional violations against Judge Calvert and Judge Walker ("Count Four") [*Id.* at 7–8].

Barnes seeks compensatory damages, injunctive and declaratory relief, and punitive damages. [*Id.* at 8–9].

On September 17, 2024, Guild and Kramer filed their motion to dismiss. [Doc. 55]. On September 30, 2024, McCalla filed its motion to dismiss [Doc. 58], along with an Answer [Doc. 60]. On October 3, 2024, Judge Calvert recused herself from this action, and the case was reassigned to U.S. District Judge Steven D. Grimberg. [Doc. 64]. Judge Walker recused herself on October 7, 2024, and the case was reassigned to me for pretrial proceedings. [Doc. 65].

On October 9, 2024, Barnes filed a Motion to Strike McCalla's Answer [Doc. 67], and a Motion for Default Judgment against McCalla [Doc. 68]. On October 15, 2024, Barnes filed a Motion for Issuance of Subpoena. [Doc. 71].

II. BARNES'S MOTIONS

Barnes moved to strike McCalla's Answer, arguing that McCalla filed that document ten days late. [Doc. 67]. Barnes also moved for a default judgment against McCalla based on McCalla's alleged failure to respond to the Amended Complaint on time. [Doc. 68]. For the reasons discussed below, both motions should be denied.

A. Motion to Strike

The motion to strike should be denied because McCalla's Answer was not untimely filed. Federal Rule of Civil Procedure 15(a)(3) states: "Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the original pleading, whichever is later." FED. R. CIV. P. 15(a)(3). The obligation to respond to an amended complaint does not arise until a defendant is properly served with that pleading. *See Solus v. Regions Bank*, Civil Action File No. 1:19-cv-2650-CC-JKL, 2020 WL 7396004, at *2 (N.D. Ga. July 1, 2020) (noting that the time for a defendant to respond to an amended complaint had not begun to run where nothing suggested that the plaintiff had properly served the defendant with the amended complaint).

Although McCalla was named as a defendant in the Related Action, which was later consolidated into this case, nothing suggests that McCalla was ever served with process in the Related Action or in this case. *See* [Doc. 58-1 at 3 ("McCalla has never been served in this Case or the Consolidated Action.")].[5] Because McCalla has not been properly served in either case, its deadline to respond to the Third Amended Complaint has not yet begun to run. *Solus*, 2020 WL 7396004, at *2. McCalla's Answer consequently is not untimely, and the motion to strike should be denied.

B. Motion for Default Judgment

Barnes's motion for default judgment should also be denied. As discussed above, McCalla's Answer was not untimely. Barnes, therefore, is not entitled to a default judgment.

Even if McCalla had not filed a timely answer or motion to dismiss, Barnes would not be entitled to a default judgment. Federal Rule of Civil Procedure 55 sets

[5] As noted above, the Related Action contained a claim for quiet title against McCalla, while the Third Amended Complaint asserts a wrongful foreclosure claim against McCalla. The Third Amended Complaint thus asserts a new claim against McCalla. The Third Amended Complaint, therefore, was required to be served on McCalla under Rule 4. *See* FED. R. CIV. P. 5(a)(2) (providing that "a pleading that asserts a new claim for relief against [a party] must be served on that party under Rule 4.").

forth a two-step process for securing a default judgment. FED. R. CIV. P. 55. First, a party must obtain a clerk's entry of default under Rule 55(a) by providing evidence "by affidavit or otherwise" that the opposing party "has failed to plead or otherwise defend." *Id.* Second, after the clerk has made an entry of default, the party seeking a default judgment must move for default judgment under Rule 55(b). FED. R. CIV. P. 55(b). A clerk's entry of a default is a prerequisite to obtaining a default judgment. *G&G Closed Circuit Events, LLC v. Chilango Taco Bar, LLC*, No. 1:21-cv-2565-LMM, 2021 WL 10269433, at *1 (N.D. Ga. Dec. 13, 2021) (citing *Sun v. United States*, 342 F. Supp. 2d 1120, 1124 n.2 (N.D. Ga. 2004)); *Frazier v. Absolute Collection Serv., Inc.*, 767 F. Supp. 2d 1354, 1360 n.1 (N.D. Ga. 2011). Barnes has not obtained a clerk's entry of default against McCalla. *See generally* [Docket]. Barnes, therefore, cannot obtain a default judgment against McCalla, and her motion for default judgment should be denied.[6]

C. Motion for Issuance of Subpoena

Barnes also has requested that the Clerk issue a subpoena duces tecum under Federal Rule of Civil Procedure 45 to Guild Mortgage Company LLC. [Doc. 71].

[6] Barnes also cannot obtain a default judgment because the Third Amended Complaint fails to state a claim for relief. *See United States v. Kahn*, 164 F. App'x 855, 858 (11th Cir. 2006) (per curiam) ("[A] default judgment may not stand on a complaint that fails to state a claim.").

That motion is premature because discovery has not yet begun. The motion, therefore, will be denied.

III. MOTIONS TO DISMISS

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss a complaint, or portions thereof, for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). When reviewing a motion to dismiss under Rule 12(b)(6), the Court must take the allegations of the complaint as true and must construe those allegations in the light most favorable to the plaintiff. *Rivell v. Priv. Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (per curiam). Although a court must accept well-pleaded facts as true and make reasonable inferences in favor of the plaintiff, it is not required to accept the plaintiff's legal conclusions or unwarranted deductions of fact. *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (per curiam) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("*Iqbal*")); *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246, 1248 (11th Cir. 2005) (per curiam).

A court may dismiss a complaint if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Chandler*, 695 F.3d at 1199 (internal

quotation marks and citation omitted). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("*Twombly*"), the Supreme Court stated that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Although factual allegations in a complaint need not be detailed, those allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations and footnote omitted).

Moreover, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The mere possibility that the defendant might have acted unlawfully is insufficient to allow a claim to survive a motion to dismiss. *Id.* Instead, the well-pleaded allegations of the complaint must move the claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. But the factual allegations in a complaint can survive a motion to dismiss even though recovery may be remote or unlikely. *Id.* at 555–56. As long as the facts alleged create a reasonable expectation that discovery will reveal evidence of the necessary elements, the plaintiff's suit should continue. *Id.* at 556.

Where, as here, a plaintiff files a complaint pro se, the Court must liberally construe the complaint and hold it to less stringent standards than formal pleadings

drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). A pro se plaintiff, however, still must comply with the threshold requirements of the Federal Rules of Civil Procedure and allege facts sufficient "to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555.

B. Guild and Kramer

Guild and Kramer argue that the Court should dismiss Barnes's Third Amended Complaint for several reasons, including: (1) the Third Amended Complaint is a shotgun pleading [Doc. 55-1 at 6–7]; (2) the Third Amended Complaint does not allege facts supporting a claim against Kramer individually [*id.* at 4–6]; (3) the Third Amended Complaint fails to plead a plausible wrongful foreclosure claim [*id.* at 8–9]; (4) the Third Amended Complaint does not state plausible TILA claims [*id.* at 9–10]; and (5) the Third Amended Complaint does not contain facts supporting plausible RESPA claims [*id.* at 12–13]. I will address those arguments in turn.

1. Shotgun Pleading

Guild and Kramer argue that the Third Amended Complaint is a shotgun pleading and that it does not provide them with a reasonable basis to understand the facts underlying Barnes's claims. [Doc. 55-1 at 6–7]. The Eleventh Circuit has identified four categories of shotgun pleadings: (1) "a complaint containing multiple

counts where each count adopts the allegations of all preceding counts"; (2) a complaint that is "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action"; (3) a complaint that does not separate each cause of action or claim for relief into a different count; and (4) a complaint that asserts "multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against." *Weiland v. Palm Beach Cnty. Sheriff's Office*, 792 F.3d 1313, 1321–23 (11th Cir. 2015). "The unifying characteristic of all types of shotgun pleadings is that they fail . . . to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323.

The Third Amended Complaint contains few factual allegations. Instead, it is replete with conclusory allegations, legal conclusions, and legal arguments, making it difficult to determine the facts supporting Barnes's claims. The Third Amended Complaint, therefore, does not give the defendants "adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland*, 792 F.3d at 1323. The Third Amended Complaint consequently is a shotgun pleading. The Third Amended Complaint also violates Federal Rule of Civil Procedure 8(a)(2)'s

requirement that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

2. Claims Against Kramer

Guild and Kramer also argue that the Third Amended Complaint fails to state a claim for relief against Kramer individually. [Doc. 55-1 at 4–6]. According to Guild and Kramer, the Third Amended Complaint contains no allegations relating to Kramer as an individual. [*Id.* at 4–5].

The Third Amended Complaint alleges only that (1) Kramer is "an individual employed by [Guild] in a fiduciary role" [Third Am. Compl. at 2], (2) on July 28, 2023, Barnes "tendered an instrument to [Kramer] as a tender of payment to set off the mortgage debt," and "Kramer retained the instrument but failed to apply it to the account or provide any accounting" [*id.* at 3], and (3) Guild and its agents, including Kramer, "wrongfully foreclosed on" the Property "without legal standing" [*id.* at 6]. Even viewed in the light most favorable to Barnes, the Third Amended Complaint alleges facts showing that Kramer acted only in her capacity as an employee of Guild; it does not include facts suggesting that Kramer acted tortiously in her individual capacity or that she exceeded the scope of her authority. The Amended Complaint, therefore, does not state a viable claim against Kramer, and the claims against Kramer should be dismissed. *See Earnest v. Merck*, 358 S.E.2d 661, 663

(Ga. Ct. App. 1987) ("The mere operation of corporate business does not render one personally liable for corporate acts."); *Oglethorpe Realty Co. v. Hazzard*, 321 S.E.2d 820, 822 (Ga. Ct. App. 1984) ("Under Georgia law, an agent can be held individually liable apart from his principal for his own tortious acts and for undertakings exceeding the scope of his authority.").

3. Wrongful Foreclosure ("Count One")

Guild and Kramer also argue that Count One does not state a plausible wrongful foreclosure claim against Guild. [Doc. 55-1 at 8–9]. "In Georgia, a plaintiff asserting a claim for wrongful foreclosure must establish a legal duty owed to him by the foreclosing party, a breach of that duty, a causal connection between the foreclosing party's breach and the plaintiff's injury, and damages." *Walker v. JPMorgan Chase Bank, N.A.*, 987 F. Supp. 2d 1348, 1353 (N.D. Ga. 2013). The plaintiff must also establish that a foreclosure sale occurred. *Jenkins v. McCalla Raymer, LLC*, 492 F. App'x 968, 972 (11th Cir. 2012) (per curiam). Although the Third Amended Complaint alleges that a foreclosure sale occurred [Third Am. Compl. at 4], it includes no facts supporting any of the other elements of a wrongful foreclosure claim. The Third Amended Complaint, therefore, does not state a plausible wrongful foreclosure claim against Guild, and Count One should be dismissed on this basis as well.

4. TILA Claims (Count Two)

Guild and Kramer also argue that Count Two fails to state plausible TILA claims. [Doc. 55-1 at 9–10]. I agree.

In Count Two, Barnes claims that Guild violated 15 U.S.C. § 1601 by failing to provide her with required disclosures. [Third Am. Compl. at 6]. Section 1601, however, is titled "Congressional findings and declaration of purpose," and it does not appear to create an actionable claim. *See generally* 15 U.S.C. § 1601. Even if Barnes could assert a claim under Section 1601, the claim would fail because the Third Amended Complaint contains no factual allegations concerning Guild's alleged failure to provide Barnes with required disclosures.

Barnes also claims in Count Two that Guild violated 15 U.S.C. § 1639(f) by failing "to properly credit [Barnes's] payment instrument." [Third Am. Compl. at 6]. Section 1639(f) relates to negative amortization, and it states, "A mortgage referred to in section 1602(aa) of this title may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due." 15 U.S.C. § 1639(f) (footnote omitted). The Third Amended Complaint contains no factual allegations indicating that any agreement between Barnes and Guild contained terms that allowed for negative amortization. *See generally* [Third Am.

Compl.]. Barnes, therefore, has not pled a plausible claim for a violation of Section 1639(f).

Finally, Barnes claims in Count Two that Guild "engaged in deceptive practices by failing to honor [Barnes's] right to rescind the loan." [Third Am. Compl. at 6]. It appears that Barnes is asserting this claim based on 15 U.S.C. § 1635. Any claim under Section 1635, however, must be brought within "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part" were not provided. 15 U.S.C. § 1635(f). The mortgage transaction at issue here occurred in June 2017, and this action was filed more than six years later, in November 2023. Any claim under Section 1635 consequently would be time-barred, and the Third Amended Complaint thus fails to state a plausible claim for relief under that statute.

For the above reasons, Count Two of the Third Amended Complaint does not state plausible TILA claims. Count Two, therefore, should be dismissed.

5. RESPA Claims (Count Three)

Guild and Kramer also argue that Barnes does not state plausible RESPA claims in Count Three of the Third Amended Complaint. In Count Three, Barnes

contends that Guild "violated 12 U.S.C. § 2605(e) by concealing information about the true owner of [the Note] and failing to provide accurate accounting disclosures" and that Guild violated Regulation X, 12 C.F.R. § 1024.41(g), by continuing foreclosure proceedings while Barnes "was actively seeking loss mitigation and/or loan modification." [Third Am. Compl. at 7].

Section 2605(e) requires a servicer of a mortgage loan to provide written responses to qualified written requests from a borrower (or borrower's agent) for information relating to the servicing of the loan. 12 U.S.C. § 2605(e). "[T]o state a RESPA claim for failure to respond to a qualified written request, a plaintiff must allege: (1) the defendant is a loan servicer under the statute; (2) the plaintiff sent a qualified written request consistent with the requirements of the statute; (3) the defendant failed to respond adequately within the statutorily required days; and (4) the plaintiff has suffered actual or statutory damages." *Correa v. BAC Home Loans Servicing, LP*, No. 6:11-cv-1197-Orl-22DAB, 2012 WL 1176701, at *6 (M.D. Fla. Apr. 9, 2012). The Third Amended Complaint, however, contains no factual allegations supporting any of those elements. Count Three thus fails to state a plausible RESPA claim for a violation of Section 2605(e).

In Count Three, Barnes also claims that Guild violated Regulation X, 12 C.F.R. § 1024.41(g). That provision restricts a mortgage servicer's right to proceed

with a foreclosure sale if a borrower "completes a complete loss mitigation application" and submits it at least thirty-seven days before a foreclosure sale. 12 C.F.R. § 1024.41(g). The Third Amended Complaint, however, contains no facts relating to (1) Barnes's delinquency on the Note, (2) whether she submitted a loss mitigation application, (3) if she did submit such an application, when she did so, and (3) whether she received a response to any loss mitigation application. Count Three, therefore, does not state a plausible RESPA claim based on an alleged violation of Regulation X. *See Licona v. Wash. Savs. Fund Soc., FSB*, No. 1:16-cv-2756-AT-CMS, 2016 WL 9275412, at *3 (N.D. Ga. Sept. 26, 2016) ("The bare allegations that Defendants violated [the plaintiff's] rights under Regulation X, without factual support is not sufficient to state a plausible claim for relief."), *adopted by* 2016 WL 9308546 (N.D. Ga. Oct. 19, 2016).

For the above reasons, Count Three does not state a plausible RESPA claim, and it should be dismissed.

C. McCalla (Count One)

McCalla also moved to dismiss the Third Amended Complaint. [Doc. 58]. The Third Amended Complaint contains only one claim against McCalla—the wrongful foreclosure claim asserted in Count One. [Third Am. Compl. at 5–6]. McCalla argues that the Third Amended Complaint does not state a plausible

wrongful foreclosure claim because it contains no facts supporting the elements of a wrongful foreclosure claim. [Doc. 58-1 at 5–6]. As discussed above, Count One should be dismissed because the Third Amended Complaint does not plead facts supporting the elements of a wrongful foreclosure claim. McCalla's motion to dismiss, therefore, should be granted.

D. Claims against Judges Calvert and Walker (Count Four)

In Count Four of the Third Amended Complaint, Barnes asserts claims against Judges Calvert and Walker for alleged "judicial misconduct" and "constitutional violations." [Third Am. Compl. at 7–8]. Although there is no pending motion to dismiss relating to Count Four, the count should be dismissed because Barnes has not pled facts to support it. Instead, Barnes sets forth only legal conclusions, which must be disregarded.

Moreover, judicial immunity bars the claims asserted in Count Four. Barnes sues Judges Calvert and Walker for actions that they took while acting in their judicial capacity, and Judges Calvert and Walker consequently are entitled to absolute judicial immunity. "Judges are entitled to absolute judicial immunity from damages for those acts taken while they are acting in their judicial capacity unless they acted in the 'clear absence of all jurisdiction.'" *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978))

(internal quotation marks omitted). "This immunity applies even where the judge's acts are in error, malicious, or were in excess of her jurisdiction, because it is not for the protection or the benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequence." *Higdon v. Tusan*, 746 F. App'x 805, 810 (11th Cir. 2018) (per curiam) (internal quotation marks and citation omitted). The Supreme Court has recognized only two exceptions to this broad grant of immunity: (1) for actions taken in a nonjudicial capacity and (2) for actions taken in the complete absence of all jurisdiction. *William v. Cashion Nev. Spendthrift Trust v. Vance*, 552 F. App'x 884, 885–86 (11th Cir. 2014) (per curiam).

"Whether a judge's actions were made while acting in [her] judicial capacity depends on whether: (1) the act complained of constituted a normal judicial function; (2) the events occurred in the judge's chambers or in open court; (3) the controversy involved a case pending before the judge; and (4) the confrontation arose immediately out of a visit to the judge in [her] judicial capacity." *Sibley v. Lando*, 437 F.3d 1067, 1070 (11th Cir. 2005). Determining whether a judge acted in "complete absence of all jurisdiction" requires an inquiry into whether the court had subject matter jurisdiction over the claim. *Wash. Mut. Bank v. Bush*, 220 F. App'x 974, 975–76 (11th Cir. 2007) (per curiam).

Barnes's allegations establish that Judges Calvert and Walker were acting in their judicial capacities. Barnes's complaints all relate to various actions taken by Judges Calvert and Walker during this case. Barnes's allegations against Judges Calvert and Walker thus "all clearly implicate acts taken in their judicial capacity." *Coggins v. U.S. Dist. Court Eastern Div.*, No. 3:09-cv-40-TMH, 2009 WL 1181953, at *2 (M.D. Ala. Apr. 30, 2009).

Barnes's allegations also do not establish that Judges Calvert and Walker acted in the clear absence of all jurisdiction. Barnes "alleges no facts to show [Judges Calvert and Walker] performed any action without having subject matter jurisdiction." *Thomas v. Sweatt*, No. CV 2:22-139, 2023 WL 1997119, at *2 (S.D. Ga. Feb. 14, 2023), *aff'd*, No. 23-10605, 2023 WL 7105581 (11th Cir. Oct. 27, 2023). Indeed, Barnes herself invoked the Court's jurisdiction by filing this lawsuit and asserting claims arising under federal law. *See Moreland v. Wood*, No. CV 214-143, 2015 WL 1799898, at *7 (S.D. Ga. Apr. 16, 2015) (finding that a federal magistrate judge and a federal district judge "did not act in clear absence of all jurisdiction" where the plaintiff "himself invoked the jurisdiction" of the district court by filing an employment discrimination lawsuit).

Barnes cannot evade judicial immunity based on her contention that her due process rights were violated when Judges Calvert and Walker refused to refuse themselves from this case or when they made allegedly erroneous rulings. *See Littlejohn v. Moore*, No. 1:20-cv-2754-MLB-JKL, 2020 WL 12048972, at *2 (N.D. Ga. July 7, 2020) (noting that allegations of due process violations did not defeat judicial immunity), *adopted by* 2020 WL 12048971 (N.D. Ga. July 28, 2020). "Moreover, judicial immunity covers recusal decisions." *Id.* (collecting cases).

As one court observed, "[I]f a district judge or a clerk or a magistrate judge has been in error in rulings or official court actions initiated by them, the path for challenging such rulings is an appeal to an appellate court. The law does not subject a court, a judge, a clerk or a magistrate judge to suit by unsuccessful litigants." *Id.* Thus, Barnes's allegations, which all relate to her disputes with the previous rulings by Judges Calvert and Walker in her case, do not state plausible claims for relief. *Id.*; *see also Kight v. U.S. Dist. Court, N. Dist. of Ga.*, 681 F. App'x 882, 884 (11th Cir. 2017) (per curiam) (finding that the challenged actions of federal judges in the plaintiff's prior case "are protected by absolute judicial immunity"). Count Four, therefore, does not state plausible claims for relief, and it should be dismissed.

E. Leave to Amend

Barnes has received four opportunities to amend her pleadings and attempt to state plausible claims for relief. [Docs. 4, 6, 28, 54]. The Court, therefore, need not grant Barnes leave to file a fourth amended complaint here before dismissing her claims with prejudice.

IV. PETITION FOR INJUNCTIVE RELIEF

Barnes also filed a petition for injunctive relief. [Doc. 47]. A plaintiff seeking injunctive relief must establish: (1) that she has a substantial likelihood of success on the merits; (2) that she will suffer irreparable injury absent injunctive relief; (3) that the threatened injury to her absent an injunction outweighs the damage to the defendants if an injunction is granted; and (4) that granting the injunction would not be contrary to the public interest. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005). "[A] preliminary injunction is an extraordinary and drastic remedy" and should be granted only when the party seeking injunctive relief clearly carries the burden of persuasion on each of the four elements. *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003) (alteration in original) (internal quotation marks and citation omitted).

As discussed above, Barnes's Third Amended Complaint does not state plausible claims for relief. Barnes thus cannot show that she has a substantial

likelihood of succeeding on the merits of her claims. Barnes also fails to demonstrate that any threatened injury to her outweighs the possible damage to Defendants form an injunction or that granting an injunction would not be contrary to the public interest. Barnes, therefore, has not shown that she is entitled to injunctive relief, and her requests for injunctive relief should be denied.

V. CONCLUSION

For the reasons discussed above, I **RECOMMEND** that Barnes's Petition for Injunctive Relief [Doc. 47] be denied. I further **RECOMMEND** that Barnes's Motion to Strike Answer [Doc. 67] and her Motion for Default Judgment [Doc. 68] be **DENIED**. I also **RECOMMEND** that the Motions to Dismiss [Docs. 55, 58] be **GRANTED**, that Counts One, Two, and Three of the Third Amended Complaint be **DISMISSED with prejudice**, and that Guild, Kramer, and McCalla be **DISMISSED** from this action. I further recommend that Count Four of the Third Amended Complaint be **DISMISSED with prejudice** and that Judges Walker and Calvert be **DISMISSED** from this action. It is further **ORDERED** that Barnes's Motion for Issuance of Subpoena [Doc. 71] is **DENIED**.

Because this is a Final Report and Recommendation, and there is nothing further pending before the undersigned, I **DIRECT** the Clerk to terminate the reference of this civil action to me.

SO ORDERED AND REPORTED AND RECOMMENDED, this 24th day of October, 2024.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-14033

NIKITA LYNETTE BARNES,

Plaintiff-Appellant,

versus

GUILD MORTGAGE COMPANY LLC,
DESIREE (AMBER) KRAMER,
MCCALLA RAYMER LEIBERT PIERCE, LLC,
LINDA T. WALKER,
VICTORIA CALVERT, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-05065-SDG

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before ROSENBAUM, JILL PRYOR, and ABUDU, 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 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

Additional material from this filing is available in the Clerk's Office.