IT IS ORDERED as set forth below:

Date: July 29, 2014

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
JOYCE WILLIAMS PARKS, Debtor.	CASE NO. 12-77687-BEM CHAPTER 13
JOYCE WILLIAMS PARKS, Plaintiff, v. BANK OF AMERICA CORPORATION, BANK OF AMERICA, LOAN SERVICING and BANK OF AMERICA, N.A., successor by merger to COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE HOME LOAN SERVICING, Defendants.	ADVERSARY PROCEEDING NO. 13-05413-BEM

ORDER GRANTING MOTION TO DISMISS

This adversary proceeding is before the Court on Defendants' Motion to Dismiss (the "Motion") [Doc. No. 13] and corresponding Memorandum of Law in Support of Motion to

Dismiss (the "Brief") [Doc. No. 14]. In the Motion, filed pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6), made applicable to adversary proceedings by Federal Rules of Bankruptcy Procedure 7008(a) and 7012(b), respectively, Defendants request that the adversary proceeding be dismissed, contending that the complaint fails to state a claim upon which relief can be granted. All claims in this proceeding are non-core matters, and Defendants have not consented to the entry of a final order by this Court. Consequently, the Court submits its proposed findings of fact and conclusions of law to the District Court for *de novo* review pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033.

I. JURISDICTION

A. Core and Non-Core Claims

Bankruptcy courts are courts of limited jurisdiction whose jurisdiction is "derivative of and dependent upon" the three categories of proceedings set forth in 28 U.S.C. § 1334(b). *See In re Toledo,* 170 F.3d 1340, 1344 (11th Cir. 1999). Thus, bankruptcy courts are permitted to hear only matters: (1) arising under title 11, (2) arising in a case under title 11, and (3) those matters related to a case under title 11. 28 U.S.C. § 157(a); *Id*. Matters arising under title 11 and arising in a case under title 11 are core matters in which a bankruptcy court has authority to enter a final judgment while matters related to a case under title 11 are non-core and the bankruptcy court may hear such matters, but does not have the authority to enter a final judgment. 28 U.S.C. § 157(b)(1) and (c)(1).

Matters arising under title 11 involve "matters invoking a substantive right created by the Bankruptcy Code while matters arising in a case under title 11 are generally administrative-type matters that could arise only in bankruptcy." *In re Toledo,* 170 F.3d at 1344. Non-core or "related to matters" are those matters that "could conceivably have an effect on the estate being administered in bankruptcy . . . . An action is related to bankruptcy if the outcome

could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *In re Lemco Gypsum, Inc.,* 910 F.2d 784, 788 (11th Cir. 1990) (adopting the *Pacor* formulation set forth in *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir. 1984)).

Here, Plaintiff has filed a complaint against the Defendant in relation to the security deed on Debtor's residence. The complaint enumerates six counts against the Defendant as follows: Count I captioned fraud in the factum, Count II captioned conversion, Count III captioned tortious interference with contract and RESPA violations, Count IV captioned attempted wrongful foreclosure, Count V captioned intentional infliction of emotional distress, and Count VI captioned wrongful foreclosure.

The Court held a hearing on the Motion on April 29, 2014 (the "Hearing"). Paul Rogers appeared on behalf of Defendants and Ernest Jones appeared on behalf of Plaintiff. At the Hearing, Mr. Jones acknowledged that there was no basis to oppose the Motion to Dismiss with respect to Counts II through VI of Plaintiff's Complaint. The Court entered an Order on May 9, 2014, dismissing those counts ("the Order"). [Doc. No. 26].

Both parties requested additional time to file documents in an attempt to clarify Count I of the Complaint, fraud in the factum. Thus, the Order directed the parties to file relevant documents within ten days of the entry of the Order. [Doc. No. 26]. The Court's consideration of the Motion included consideration of the documents, including the security deed related to Plaintiff's residence and assignments of the security deed, attached as exhibits to Defendants' Supplemental Memorandum in Support of Motion to Dismiss (the "Defendants' Supplement") [Doc. No. 24]. Because the documents are central to Plaintiff's claims and are matters of public record, such consideration does not convert the Motion to one for summary judgment. *See Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002); *Brooks v. Blue Cross and Blue Shield of*

Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) ("where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of *Rule 12(b)(6)* dismissal"); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (stating that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Rule 12(b)(6)* motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.).

None of the claims alleged in the Complaint are within this Court's core jurisdiction, thus the Court cannot enter a final judgment in this proceeding[1]. *See* 28 U.S.C. § 157(b).

II. STANDARD

Under Fed. R. Civ. P. 8(a)(2), Plaintiff need only provide, "a short and plain statement of the claim showing that the pleader is entitled to relief," enough to give the Defendant adequate notice of the claim, "and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). Detailed facts are not necessary, but Plaintiff must provide enough information "to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Id.* "A complaint that provides 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' is not adequate to survive a Rule 12(b)(6) motion to dismiss." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (internal citations omitted). *Twombly* does not require that a pleading show the likelihood of success on the merits, "but instead 'simply calls for enough fact to raise a reasonable expectation that

[1] The Court is also referring the Order to the District Court for consideration of the Court's proposed dismissal of Counts II-VI of the Complaint.

discovery will reveal evidence of' the necessary element." *In re Haven Trust Bancorp., Inc.*, 461 B.R. 910, 912 (Bankr.N.D.Ga. 2011) (citing *Twombly*). *See also Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010).

"The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*).

> To 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." 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678. (internal citations omitted) (citing *Twombly*).

III. PROPOSED FINDINGS OF FACT

Plaintiff's Complaint alleges very few facts relevant to Count I, those that are alleged are as follows: Plaintiff, Joyce Williams Parks ("Plaintiff" or "Parks") has been the owner of certain real property located at 4640 Heatherwood Drive, Atlanta, Georgia 30331, (the "Property") for forty-one (41) years. [Complaint ¶ 6]. On September 23, 1993, Plaintiff secured a thirty (30) year five percent (5%) adjustable rate note (the "Note") with a company called Paragon Mortgage Corporation ("Paragon"), located in Smyrna, Georgia. [Complaint ¶ 10]. Paragon assigned servicing of the Note to Troy and Nichols, Inc. ("Troy & Nichols"), a company located in Monroe, Louisiana. [Complaint ¶ 11]. On October 1, 1994, Paragon was dissolved by the Securities and Exchange Commission (the "SEC"). [Complaint ¶ 12]. From 1993 to 1995, Plaintiff addressed her monthly mortgage payments to Troy and Nichols. [Complaint ¶ 13]. In

1995, she was directed by Countrywide Home Loans, Inc. ("Countrywide") to direct all Note payments to Countrywide. [Complaint ¶ 14].

Plaintiff alleges the following additional facts: Plaintiff was unaware that the SEC had dissolved Paragon and Troy & Nichols. Plaintiff alleges that Countrywide has misrepresented facts to extract payments from her, causing her to respond to demands "based upon information intentionally concealed, actions intentionally deceptive, and misrepresentations intentionally contrived to engender reliance on actions and declarations made out of whole cloth." [Complaint Count I]. Plaintiff alleges that Defendants "purposely concealed relevant facts" regarding ownership of the Note. *Id.* Plaintiff further alleges that Defendants concealed facts relating to the SEC's removal of Paragon from the stock exchange as a way to "further their plan to deprive Plaintiff of her property." *Id.* In 2008, Bank of America, as servicer, began sending monthly statements to Plaintiff. *Id.*

Finally, Plaintiff alleges that neither Bank of America, nor Countrywide held a promissory note to the Property and that there may have been an attempt to securitize the Note. Plaintiff asserts that the mortgage is not owned by Defendants because there was no chain of ownership established between the original mortgage lender, Paragon, and the Defendants

In the Motion, Defendants assert that the Complaint should be dismissed for failure to state a claim and that Plaintiff's claims fail as a matter of law. [Doc. Nos. 13, 14]. Defendants allege that Plaintiff's Complaint does not plead sufficient facts "to support a reasonable inference that there has been some wrongdoing," but rather that the "Complaint consists only of a handful of factual allegations which do not support any claim." [Doc. No. 14, pp. 6-7]. Defendants further allege that the Complaint does not meet the heightened pleadings requirements for fraud and that there are no specific allegations of fact that would support a claim for fraud. *Id.*

Defendants further allege that Plaintiff executed a security deed on September 23, 1993, which was recorded on October 4, 1993 with the Clerk of Superior Court of Fulton County in Book 17194 at Page 308 (the "Security Deed"). The Security Deed identifies Plaintiff, Joyce Williams Parks, as the borrower and Paragon as the lender. [Doc. No. 14, p. 3]. The Security Deed states that Plaintiff granted the Property as collateral for the mortgage loan to Paragon and all "successors and assigns." *Id.* Defendants acknowledge Paragon's dissolution and that Plaintiff was directed to make payments to Countrywide in 1995. *Id.* Defendants further state that on July 30, 2012, Countrywide Home Loans, Inc. assigned the Security Deed to Bank of America, N.A., recording the assignment on August 10, 2012 with the Clerk of Superior Court of Fulton County in Book 51525 at Page 494. [Doc. No. 14, p. 4]. According to Defendants, Plaintiff was in default of her mortgage loan in November 2012 and a foreclosure was initiated on the Property. *Id.* However, due to the filing of Plaintiff's bankruptcy case on November 5, 2012, the foreclosure sale did not occur. *Id.* Defendants move to dismiss the Complaint. *Id.*

Defendants filed their Defendants' Supplement on April 30, 2014. [Doc. No. 24]. Defendants also filed several exhibits supporting the argument that the Security Deed and Note were properly assigned from the original mortgagee, Paragon, to Defendant Bank of America. [Doc. No. 25]. Exhibit A is a copy of the original Security Deed between Paragon and Plaintiff showing an amount owing of $92,900 secured by the Property. The Security Deed states that "Borrower does hereby grant and convey to Lender and Lender's successors and assigns, with power of sale" over the Property. [Doc. No. 25, Ex. A]. On September 23, 2014, Paragon assigned "all its right, title and interest" in the Security Deed to Troy & Nichols, Inc. (the "Paragon Assignment"). [Doc. No. 25, Ex. B]. The Paragon Assignment was recorded on October 4, 1991 with the Clerk of Superior Court of Fulton County in Book 17194 Page 317 and re-recorded on April 26, 1994 at Book 18184 at Page 248. *Id.*

Defendants further provided a copy of an assignment of the Security Deed from Chase Manhattan Mortgage Corporation fka Chase Home Mortgage Corporation to Countrywide Funding Corporation. [Doc. No. 25, Ex. C]. Exhibit C states that Chase Manhattan Mortgage Corporation was the successor by merger to Troy & Nichols, Inc., and as such, assigned the Security Deed to Countrywide Funding Corporation on July 3, 1995. *Id.* This assignment was recorded on August 18, 1995 with the Clerk of Superior Court of Fulton County in Book 19934 at Page 328. Defendants' final exhibit is an assignment of the Security Deed from Countrywide Home Loans, Inc., fka Countrywide Funding Corporation for value to Bank of America, N.A. [Doc. No. 25, Ex. D]. The assignment was executed on July 30, 2012 and recorded on August 10, 2012 with the Clerk of Superior Court of Fulton County in Book 51525 at Page 494. *Id.*

Plaintiff filed two pleadings following the Hearing in which she challenges the validity of the chain of title of the Security Deed between the parties. [Doc. Nos. 27, 29]. Plaintiff argues that there is the possibility that any assignments from Paragon or Troy & Nichols to other entities are fraudulent. Although the Plaintiff does not cite to any evidence or allege specific facts that the documents are fraudulent, Plaintiff submitted the following Exhibits: (i) an Assignment of Deed of Trust between Fleet Mortgage Corp. and Source One Mortgage Services Corporation for real property located in Mississippi; (ii) a letter from Bank of America, N.A. to Plaintiff stating that the loan may have been bundled into a trust, and; (iii) various Assignments of Mortgages between Fleet Real Estate Funding Corp. and Chase Home Mortgage Corporation for real properties located in California. [Doc. No. 27]. The Plaintiff's response alleges that the exhibits demonstrate assignments of other property by other parties that Plaintiff believes to be fraudulent as well. At the Hearing, Plaintiff expressed concern that any assignments of the Security Deed may have been "robo-signed."

IV. PROPOSED CONCLUSIONS OF LAW

A. ANALYSIS

The Court previously dismissed all counts of the Complaint except for Count I. The Court will now address the fraud claim in Count I.

I. Count I – Fraud in the Factum

Pursuant to Fed. R. Civ. P. 9(b), a party must state with particularity "the circumstances consisting fraud." *Currie v. Cayman Res. Corp.*, 595 F. Supp. 1364, 1372 (N.D. Ga. 1984) (holding that, under Rule 9(b), a pleader must "include all the elements of fraud" and must "specifically aver the circumstances constituting fraud"). A plaintiff alleging fraud in a complaint must set forth the following facts in her complaint:

> (1) Precisely what statements were made in what documents or oral representations or what omissions were made; and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same; and (3) the content of such statements and the manner in which they misled the plaintiff; and (4) what the defendants obtained as a consequence of the fraud.

Brooks v. Blue Cross and Blue Shield of Fla., 116 F.3d 1364, 1371 (11th Cir. 1997); *Georgia ex rel. Saunders v. Mortg. Elec. Registration Sys.*, 1:10-CV-3419-TWT-RGV, 2011 U.S. Dist. LEXIS 37982, at *25-26 (N.D. Ga. Mar. 11, 2011). This standard reflects the five essential elements required under Georgia law for a claim of fraud: (1) a false representation or omission of a material fact; (2) scienter; (3) intention to induce the party claiming fraud to act or refrain from acting; (4) justifiable reliance; and (5) damages. *Lehman v. Keller*, 677 S.E.2d 415, 417 (2009).

The only facts Plaintiff alleges in support of her claim that the Defendants have defrauded her is that: (1) she was unaware that Paragon and Troy & Nichols had become defunct; (2) that, beginning in 1995, she began making payments to Countrywide; and (3) a

general assumption that the documents were the subject of robo-signing and are thus, fraudulent. Taking Plaintiff's allegations as true, as the Court must, Plaintiff has failed to allege any facts that would support a finding of fraud. This is true because a party that was not an original party to an assignment may not challenge the validity of such assignment. *See Montgomery v. Bank of Am.*, 740 S.E.2d 434, 436 (Ga. Ct. App. 2013) (holding that because assignment of security deed was contractual, the plaintiff lacked standing to contest its validity because he was not a party to the assignment) (citing O.C.G.A. § 9-2-20(a), which provides that an action based on a contract can be brought only by a party to the contract); *see also Edward v. BAC Home Loans Serv., L.P.*, 534 Fed.Appx. 888 (11th Cir. 2013). Plaintiff was not a party to any of the assignments she challenges or that have been submitted by Defendant.

Further, Plaintiff's argument that the assignments are fraudulent because of "robo-signing", fails because "there is no cause of action in Georgia" to contest a claim of "robo-signing." *Reynolds v. JPMorgan Chase Bank N.A.*, No. 5:11-cv-311-MTT, 2011 WL 5835925, at *3 (M.D.Ga. Nov. 21, 2011). Consequently, because Plaintiff was not a party to the assignments between Paragon, Troy & Nichols, Countrywide, and Bank of America, she does not have standing under Georgia law to challenge the validity of the assignments. Further, there is no cause of action for a claim of "robo-signing" in Georgia. Finally, the facts alleged in the Complaint do not allege the elements of fraud. Accordingly, the claim asserted at the Hearing that the mortgage documents may be fraudulent does not state a claim, nor does the Complaint, and it should be dismissed.

B. CONCLUSION

Based upon the proposed findings of fact and conclusions of law contained herein, the undersigned respectfully recommends that the District Court grant Defendants' Motion to Dismiss.

The Clerk is directed to transmit these proposed findings of fact and conclusions of law along with the record in this adversary proceeding to the Clerk for the United States District Court for the Northern District of Georgia, to serve a copy of the same on the parties and to note the date of service on the parties on the docket in this proceeding.

END OF ORDER

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