IT IS ORDERED as set forth below:

Date: August 28, 2015

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: RODNEY MERRIWEATHER, Debtor.	CASE NO. 13-53022-BEM CHAPTER 7
NEIL C. GORDON, CHAPTER 7 TRUSTEE, Plaintiff, v. BANK OF AMERCIA, N.A., AS SUCCESSOR BY MERCER TO BAC HOME LOANS SERVICING, LP DBA BANK OF AMERICA HOME LOANS FKA COUNTRYWIDE HOME LOANS SERVICING LP and THE BANK OF NEW YORK MELLON, Defendants.	ADVERSARY PROCEEDING NO. 15-5096-BEM

O R D E R

This matter comes before the Court on Bank of America, N.A.'s ("BOA") Motion to Dismiss [Doc. No. 4], The Bank of New York Mellon's ("BONY," and together with BOA, the "Defendants") Motion to Dismiss [Doc. No. 17], the Trustee's Consolidated Response to the Motions to Dismiss [Doc. No. 25], Defendants' Reply to the Trustee's Response [Doc. No. 30], the Trustee's Motion for Leave to File an Amended Complaint [Doc. No. 27], and Defendants' Opposition to the Trustee's Motion to Amend [Doc. No. 31]. Plaintiff's complaint (the "Complaint") asserts claims for wrongful foreclosure, violation of the Georgia Racketeer Influenced and Corrupt Organizations ("RICO") Act, violations of the Fair Debt Collection Practices Act ("FDCPA"), violation of the Georgia Fair Business Practices Act ("FBPA"), money had and received, unjust enrichment, quantum meriut, and fraudulent transfer. Plaintiff seeks to amend the Complaint to change language that describes the effect of foreclosure without confirmation in Georgia. Defendants seek dismissal of the Complaint on the basis that it fails to state a claim upon which relief may be granted. Defendants oppose amendment of the Complaint on the ground that doing so would be futile.

I. FACTUAL ALLEGATIONS IN THE PROPOSED AMENDED COMPLAINT

Plaintiff's proposed amended complaint (the "PAC") differs from the Complaint in two respects. First, it eliminates a claim of unfair practices under the FDCPA, 15 U.S.C. § 1692f. Second, where the original Complaint characterized the mortgage debt as extinguished due to failure to confirm the foreclosure sale, the PAC characterizes the debt as being unenforceable. Both statements are conclusions as to the legal effect of failing to confirm a foreclosure sale; therefore, they do not represent a substantive change to Plaintiff's factual allegations. Defendants objected to the motion to amend on the sole ground that the amendment would be futile as still failing to state a claim upon which relief can be granted. Therefore, the

Court will evaluate the motions to dismiss based on the allegations in the PAC, which will inform the Court's decision on the motion to amend.

Prior to filing for bankruptcy, Debtor owned real property at 792 Parson Street, SE, Atlanta (the "Property"). (PAC ¶ 6.) He purchased the Property with a traditional home loan and a home equity line of credit (collectively, the "Loans") from GreenPoint Mortgage Funding, Inc. ("GreenPoint"). *Id.* Mortgage Electronic Registration System, Inc. as nominee for GreenPoint held first and second security deeds on the Property securing the Loans. *Id.* ¶ 7.

In December 2008, Countrywide Home Loans Servicing LP ("Countrywide") began servicing the Loans; at that time and intermittently thereafter, the Loans were in default for nonpayment. *Id.* ¶¶ 8, 11. On April 27, 2009, Countrywide changed its name to BAC Home Loans Servicing, LP, and operated under the trade name Bank of America Home Loans ("BAC"). *Id.* ¶ 9. In 2011, BAC merged into BOA. *Id.* ¶ 10. By assignment dated March 10, 2010 and recorded on March 16, 2010, GreenPoint transferred its interest in the security deeds to BONY. *Id.* ¶ 12. At the time of the assignment, the Loans were in default. *Id.* ¶ 13.

In early 2010, BAC, through its counsel, commenced foreclosure proceedings against the Property, with the foreclosure sale scheduled for May 4, 2010. *Id.* ¶ 14. On or before April 30, 2010, Debtor and BAC reached an agreement to stop the foreclosure and cure the default (the "Workout Agreement"). *Id.* ¶ 15. Pursuant to the Workout Agreement, Defendants had a duty not to foreclose the Property. *Id.* ¶ 54. Defendants breached that duty when BAC conducted the foreclosure sale on May 4, 2010. *Id.* ¶¶ 16, 55. BONY purchased the Property with a credit bid of $34,000. *Id.* ¶ 16. The deed under power was recorded on May 26, 2010. *Id.* ¶ 18. BONY did not confirm the sale. *Id.* ¶ 17. Therefore, Defendants were prohibited from suing

Debtor for the resulting deficiency. *Id.* Debtor was unaware of the foreclosure until the meeting of creditors in his bankruptcy case held on March 18, 2013. *Id.* ¶¶ 5, 19.

In response to a request for production of documents by Plaintiff, BOA produced post-foreclosure correspondence with Debtor and a 2012 Atlanta Solid Waste bill that identified BONY as the Property owner. *Id.* ¶¶ 22, 23. In addition, Debtor produced monthly account statements he received from BOA for December 2011 to May 2012 and July 2012 to September 2012 (the "Statements"). *Id.* ¶ 30. The Statements include the purported principal balance on the Loans, the payment amount due, the due date, late charges, and a statement identifying BOA as a debt collector. *Id.* ¶ 31. The Statements either explicitly or implicitly misrepresented the nature of the account balance as pre-foreclosure and failed to reduce the balance by the amount of the foreclosure proceeds. *Id.* ¶ 39.

Between the time of the foreclosure and the petition date, BAC sent Debtor at least six notices of intent to accelerate, dated July 30, 2010, August 16, 2010, September 16, 2010, October 13, 2010, November 29, 2010, and December 17, 2010 (the "Acceleration Notices"). *Id.* ¶ 41. The Acceleration Notices stated: (1) the traditional loan was in default; (2) the amount of the arrearage; (3) the method of curing the default; (4) that if the default was not cured the loan could be accelerated and foreclosed; (5) that BAC was entitled to attorney's fees to cure the default; (6) that BAC could pursue a deficiency judgment after foreclosure; and (7) that the notices were from a debt collector. *Id.* ¶ 42.

Between the time of the foreclosure and the petition date, BAC and BOA sent Debtor at least six notices of default, including notices dated September 13, 2013 and January 16, 2013. (the "Default Notices"). *Id.* ¶ 43. The September 13, 2013 notice identifies BOA as a debt collector. *Id.* ¶ 44.

BAC and, subsequently, BOA sent the Statements, Acceleration Notices, and Default Notices to Debtor through the United States mail for the purpose of obtaining money from him. *Id.* ¶¶ 61, 62. The correspondence included representations that were false, including the ability of BAC and BOA to enforce any post-foreclosure liability. *Id.* ¶ 64. The content of the representations as contained in the Statements, Acceleration Notices, and Default Notices is incorporated into the Complaint, providing with specificity the dates and exact misrepresentations used. *Id.* ¶ 67. BONY was complicit in these acts of its agents, which are imputed to BONY. *Id.* ¶ 72. BONY ratified the acts by accepting the proceeds from them. *Id.* ¶ 73.

Debtor made $62,953.55 in post-foreclosure payments between May 2010 and February 2013 in response to BAC and BOA's solicitation of payments. *Id.* ¶ 45. Of that amount, $38,169.40 was paid within two years of the petition date at a time when Debtor was insolvent as evidenced by his chronic default on the Loans and his subsequent bankruptcy. *Id.* ¶¶ 118, 121. Defendants accepted the payments. *Id.* ¶ 100. At the time Debtor made the payments, he had unsecured creditors. *Id.* ¶ 126. In addition, Debtor spent money, in an amount to be proven at trial, preserving and maintaining the Property, including payments for insurance, taxes, and general upkeep and repairs. *Id.* ¶ 46. Defendants knew or should have known Debtor would incur the preservation and maintenance costs. *Id.* ¶ 101. Defendants accepted the benefits of the preservation and maintenance costs, which provided value to them. *Id.* ¶ 102, 108. Debtor expected that by making payments and bearing the preservation and maintenance costs he would enjoy ownership of the Property. *Id.* ¶ 103. Debtor was deprived of ownership by the foreclosure. *Id.* ¶ 104.

At all relevant times, BAC and BOA had actual, inquiry, constructive, and imputed knowledge of the foreclosure. *Id.* ¶ 47. At the time it sent the Statements, Acceleration Notices, and Default Notices and collected payments, BAC had actual knowledge of the foreclosure as evidenced by its execution of the deed under power, and it was imputed with its attorney's knowledge of the foreclosure. *Id.* ¶¶ 48, 50. At the time BOA sent Statements and Default Notices and collected payments, BOA had actual knowledge of the foreclosure as evidenced by the Solid Waste bill, and it was imputed with its attorney's knowledge of the foreclosure. *Id.* ¶¶ 49, 51.

Debtor filed a Chapter 7 petition on February 13, 2013. *Id.* ¶ 5. Plaintiff was appointed trustee and conducted the § 341(a) meeting of creditors on March 18, 2013. *Id.* On January 9, 2015, Plaintiff sent Defendants an *ante litem* notice pursuant to O.C.G.A. § 10-1-399(b) that identified Plaintiff, identified unfair and deceptive acts, and made a demand for relief. *Id.* ¶ 88. Plaintiff made a demand on Defendants for a return of the post-foreclosure payments made by Debtor; Defendants refused the demand. *Id.* ¶¶ 94, 95.

Plaintiff filed the original Complaint in this adversary proceeding on February 12, 2015. Plaintiff attached seven exhibits to the Complaint as follows: (1) Exhibit A, the deed under power executed by officers of BONY on May 4, 2010; (2) Exhibit B, the 2012 Atlanta Solid Waste bill for the Property listing BONY as the property owner; (3) Exhibit C, Statements for the home loan for the periods December 2011 to May 2012 and July 2012 to September 2012; (4) Exhibit D, six Acceleration Notices sent by BAC each month from July 2010 to December 2010; (5) Exhibit E, notices dated February 24, 2011 and February 28, 2011 indicating recent payments were not sufficient to bring the account current and that failure to bring the account current may result in foreclosure, a notice dated May 28, 2011 stating a recent payment was

being returned because it was not a full payment, a notice dated September 13, 2012 stating that the current payment due had not been received and payment was necessary to avoid "default-related actions," and a notice dated January 16, 2013 stating that a check or draft had been dishonored; (6) Exhibit F, a post-foreclosure payment history for Debtor from May 2010 to February 2013; (7) Exhibit G, Plaintiff's notice of claim and demand for payment pursuant to O.C.G.A. § 10-1-399(b).

II. JURISDICTION

Pursuant to 28 U.S.C. § 1334(b), the Court's jurisdiction extends to "all civil proceedings arising under title 11, or arising in or related to cases under title 11." A proceeding "arises under" title 11 when it "invok[es] a substantive right created by the Bankruptcy Code." *Continental Nat'l Bank of Miami v. Sanchez* (*In re Toledo*), 170 F.3d 1340, 1345 (11th Cir. 1999) (citations omitted). A proceeding "arises in" a case under title 11 when it "involve[s] administrative-type matters" or "matters that could arise only in bankruptcy." *Id.* (citations and internal quotation marks omitted). Proceedings that fall into one of these two categories are "core" proceedings pursuant to 28 U.S.C. § 157(b)(2). *Id.* at 1345 n.6. By contrast, "related to" jurisdiction applies when the proceeding is not dependent on the existence of a bankruptcy case, but it does require "some nexus between the related civil proceeding and the Title 11 case." *Miller v. Kemira, Inc.* (*In re Lemco Gypsum, Inc.*), 910 F.2d 784, 787 (11th Cir. 1990). The required nexus exists when "the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Id.* at 788 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

Plaintiff alleges the Court has core jurisdiction over the claims pursuant to 28 U.S.C. § 157(b)(2)(A), (H), and (O) and 11 U.S.C. §§ 542, 544, 548, and 550. (Complaint ¶¶ 2,

3; PAC ¶¶ 2, 3). Except for the fraudulent conveyance claims, all the claims at issue arise under nonbankruptcy law; thus, they are not core claims. However, they are subject to the Court's jurisdiction as claims related to the bankruptcy case, because they will provide funds for distribution to unsecured creditors if Plaintiff prevails.[1] The Court cannot enter final orders on non-core claims or *Stern* claims without the parties' consent. 28 U.S.C. § 157(c)(2); *Wellness Intern. Network, Ltd. v. Sharif*, __ U.S. ___, ___, 135 S. Ct. 1932, 1948 (2015). Here, the parties have been silent as to consent. However, because this Order does not dismiss the entire action, it is not a final order. *See Bell v. Florida Highway Patrol*, 589 Fed. Appx. 473, 474 (11th Cir. 2014) (citing *Briehler v. City of Miami*, 926 F.2d 1001, 1002 (11th Cir. 1991)). Thus, any questions regarding consent need not be answered today.

III. LEGAL STANDARD

Defendants have each filed a motion to dismiss for failure to state a claim upon which relief may be granted, which is governed by Federal Rule of Civil Procedure 12(b)(6), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b). To survive a motion to dismiss for failure to state a claim, the 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." *Ashcroft v. Iqbal*, 566 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citations omitted). Although the complaint "does not need detailed factual allegations" to survive a motion to dismiss, it "requires more than

[1] Although the fraudulent transfer claims are designated as "core" by 28 U.S.C. § 157(b)(2)(H), they may be *Stern* claims. *See Wellness Intern. Network, Ltd. v. Sharif*, __ U.S. ___, ___, 135 S. Ct. 1932, 1953 (2015) (Roberts, C.J., dissenting) (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56, 109 S. Ct. 2782 (1989); *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. ___, ___, 134 S. Ct. 2165, 2172-73 (2014)). *Stern* claims are claims designated as core proceedings by 28 U.S.C. § 158(b)(2) over which bankruptcy courts lack constitutional authority to enter final judgments. *Stern v. Marshall*, 564 U.S. __, __, 131 S. Ct. 2594, 2610-11 (2011). For purposes of this non-final order, the Court need not resolve that issue to resolve the pending motions.

labels and conclusions[;] a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Id.*, 127 S. Ct. at 1965.

When, as in this case, the complaint includes claims for fraud, Federal Rule of Civil Procedure 9(b) and Federal Rule of Bankruptcy Procedure 7009 require the complaint to "state with particularity the circumstances constituting fraud …. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." To satisfy Rule 9(b), Plaintiff must allege: "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *American Dental Assoc. v. Cigna Corp*., 605 F.3d 1283, 1291 (11th Cir. 2010). Plaintiff may plead circumstantial evidence from which the Court may infer intent. *Old Republic Nat'l Title Ins. Co. v. Presley* (*In re Presley*), 490 B.R. 633, 638 (Bankr. N.D. Ga. 2013) (Diehl, J.) (citing *Dionne v. Keating* (*In re OYZ Options, Inc*.), 154 F.3d 1262, 1271 (11th Cir. 1998)). The Court will now address each claim asserted by Plaintiff.

IV. LEGAL ANALYSIS

A. Wrongful Foreclosure and Punitive Damages

To state a claim for wrongful foreclosure, Plaintiff must allege: (1) a legal duty owed by the foreclosing party; (2) breach of the duty; (3) a causal connection between the breach and the injury sustained; and (4) damages. *Racette v. Bank of Am. N.A.*, 318 Ga. App. 171, 174, 733 S.E.2d 457, 462 (2012). The Court may award punitive damages "only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful

misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b).

Plaintiff contends Defendants had a legal duty not to foreclose based on the Workout Agreement, that they breached that duty by foreclosing, and that Debtor was harmed by making post-foreclosure monthly payments totaling $62,953 plus costs to maintain the Property. Defendants contend Plaintiff failed to allege a duty not to foreclose because he did not allege the Workout Agreement was reduced to writing. Defendants contend Plaintiff failed to allege damages because Debtor maintained possession of the Property and collected rents on it after the foreclosure. Defendants further contend there is no causal connection between the breach of duty and damages, because any damages resulted from Debtor's default in payments. Finally, Defendants contend the claim is barred by the statute of limitations.

As to Defendants' contention that Debtor received rental income from the Property after it was foreclosed, Plaintiff argues the Court may not consider such facts because they were not alleged in the Complaint. Debtor made statements relating to the rental income during the 341 meeting of creditors, a transcript of which is attached to both Defendants' motions to dismiss. Generally, on a motion to dismiss, the Court may not consider documents outside the complaint without converting the motion to a motion for summary judgment. Fed. R. Civ. P. 12(d). However, "the court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed" in the sense that its authenticity is unchallenged. *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002)). As the Third Circuit explained, failing to consider such documents would enable a plaintiff "with a legally deficient claim [to] survive a motion to

dismiss simply by failing to attach a dispositive document on which it relied." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). When the complaint relies on the document in question, "the plaintiff obviously is on notice of the contents of the document, and the need for a chance to refute evidence is greatly diminished." *Id.* at 1196-97. Plaintiff's Complaint and PAC reference the 341 meeting as being the first time Debtor learned the Property had been foreclosed. (Complaint ¶ 20, PAC ¶ 19). Debtor's lack of knowledge is central to Plaintiff's claims, and there is no dispute as to the authenticity of the content of the transcript. Therefore, the Court will consider Debtor's statements in the transcript relating to his rental income from the Property, which are as follows:

> MR. GORDON [Plaintiff]: Yeah. They said – well, what are you using the property for?
>
> MR. MERRIWEATHER [Debtor]: It's a rental property. It's in the AU area. It's used to house students.
>
> MR. GORDON: So is it covering – I mean, is the rent covering the —
>
> MR. MERRIWEATHER: No. That's part of the problem.
>
> . . .
>
> MR. SPAIN [Debtor's counsel]: Mr. Merriweather, you're collecting rent on it and paying the mortgage, right? I mean, there are tenants there, right?
>
> MR. MERRIWEATHER: There's a few. Not enough to cover, but a few.
>
> . . .
>
> MR. SPAIN: You have tenants in the property, correct?
>
> MR. MERRIWEATHER: Yeah, two. Two and a half, actually.
>
> . . .

> MR. GORDON: All right. Now, have you operated any business of your own in the last two years?
>
> MR. MERRIWEATHER: Yeah, the real estate business.
>
> MR. GORDON: Doing what?
>
> MR. MERRIWEATHER: Renting out, in this case, 792 Parsons Street, to college students.
>
> . . .
>
> MR. GORDON: … All right. Now, the rent that you're collecting at Parsons is how much a month?
>
> MR. MERRIWEATHER: About $1,000.00.
>
> MR. GORDON: So, right now you're just keeping that because you're not making the mortgage payments anymore, right?
>
> MR. MERRIWEATHER: I've got to pay the utilities.

(Doc. No. 4, Ex. A, Transcript, p.5, lines 12-19; p.8, lines 7-11; p.16, lines 12-15; p.25, lines 1-6; p. 27, lines 3-9).

Considering the allegations in the PAC and the statements at the 341 meeting, the Court finds Plaintiff has alleged sufficient facts to state a claim for wrongful foreclosure. Plaintiff has alleged that Debtor and BAC entered into an agreement that would stop the pending foreclosure and allow Debtor to cure the default. This is sufficient to allege Defendants owed Debtor a duty not to foreclose. Defendants' contention that the PAC is insufficient because it does not allege the Workout Agreement is in writing is unavailing. The Court can reasonably infer that the Workout Agreement was legally enforceable. This does not prevent Defendants from later raising the statute of frauds[2] or contract formation issues as a defense. *See Turpin v.*

[2] Under Georgia's statute of frauds, "Any contract for sale of lands, or any interest in, or concerning lands" must be in writing. O.C.G.A. § 13-5-30(4). However, the statute of frauds does not apply when "there has been such part

North Am. Acceptance Corp., 119 Ga. App. 212, 215-16, 166 S.E.2d 588, 590-91 (1969) (promise to delay foreclosure was not an enforceable contract due to lack of certainty, mutuality and consideration; to the extent it was a false promise, it was also not actionable as fraud); *Mills v. JP Morgan Chase Bank, N.A.*, No. 1:11-cv-3709, 2012 WL 4086508, at *6-8 (N.D. Ga. July 23, 2012) (claim for wrongful foreclosure did not survive motion to dismiss because lender's oral promise not to proceed with foreclosure sale was not an enforceable contract and did not constitute wrongful foreclosure when the sale was noticed and conducted in compliance with the law).

Plaintiff alleged BAC's counsel went forward with the foreclosure and recorded the deed under power, which is sufficient to show a breach of the duty. Plaintiff alleged Debtor continued making monthly mortgage payments and maintaining the Property, despite having lost his ownership interest in the Property. These facts are sufficient to show damages. The fact that Debtor received some rental income from the Property, although not enough to cover the mortgage payment, may reduce damages but does not necessarily result in the absence of damages. Finally, Plaintiff alleged Debtor made the ongoing payments in the belief that he continued to own the Property. This is sufficient to allege proximate cause between the foreclosure and Debtor's injury. Defendants cite *Warque v. Taylor, Bean & Whitaker Mortg. Corp.*, No. 1:09-cv-1906, 2010 WL 9474634, at *5 (N.D. Ga. July 30, 2010), for the proposition that the foreclosure was caused by Debtor's default. *See also Heritage Creek Dev. Corp. v. Colonial Bank*, 268 Ga. App. 369, 372, 601 S.E.2d 842, 845 (2004) (no proximate cause for wrongful foreclosure where debtor defaulted on payments, failed to cure the default, received notice of the foreclosure sale, failed to bid at the foreclosure sale, and received an opportunity to

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performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance." *Id.* § 13-5-31(3).

repurchase the property post foreclosure but failed to tender payment). However, the facts in *Warque* and *Heritage Creek* did not include any type of post-default Workout Agreement that created a duty not to foreclose notwithstanding Debtor's default, as alleged by Plaintiff in this case. In *Heritage Creek*, the debtor's efforts to reach a cure agreement were rejected by the creditor. 268 Ga. App. at 370, 601 S.E.2d at 843.

Defendants also contend that a wrongful foreclosure claim is barred by the statute of limitations. Although the statute of limitations is an affirmative defense, it may be a basis for dismissal under Rule 12(b)(6) if it can be established based on the allegations in the PAC. *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 921 (2007); *accord Marsh v. Butler County*, 268 F.3d 1014, 1022 (11th Cir. 2001) (abrogated on other grounds by *Twombly*, 550 U.S. at 555). Plaintiff alleges the foreclosure sale took place on May 4, 2010 and that Debtor's petition was filed on February 13, 2013. The Complaint was filed on February 12, 2015. If applicable nonbankruptcy law provides a deadline for initiating a cause of action and the deadline has not expired before the petition date, the trustee may pursue that cause of action before the later of the end of the deadline or two years after the order for relief. 11 U.S.C. § 108(a). Because the Complaint was filed within two years of the petition date, the claim for wrongful foreclosure is only barred if the statute of limitations expired prior to the petition date.

Defendants contend a two-year statute of limitations applies to the wrongful foreclosure claim pursuant to O.C.G.A. § 9-3-33[3] because Plaintiff is not asserting claims related to the value of the Property but is asserting claims akin to injuries to the person. Plaintiff requests general damages for wrongful foreclosure (PAC ¶ 57), special damages for the post-foreclosure mortgage payments and preservation costs, (*id.* ¶ 58), and punitive damages (*id.* ¶ 59). Plaintiff

[3] "Except as otherwise provided in this article, actions for injuries to the person shall be brought within two years after the right of action accrues …." O.C.G.A. § 9-3-33.

contends that to the extent the wrongful foreclosure claim arises under contract, the statute of limitations is six years and to the extent it arises from damage to personal property (money paid by Debtor to Defendants), the statute of limitations is four years. *See* O.C.G.A. §§ 9-3-24, -31, -32.

"In a claim for wrongful foreclosure the applicable statute of limitations is dependent upon the nature of the damages sought by the plaintiff." *In re McDaniel*, 523 B.R. 895, 907 (Bankr. M.D. Ga. 2014). While a wrongful foreclosure claim may sound in contract, it may also sound in tort, arising from breach of the statutory duty to exercise a power of sale fairly and in good faith. *Clark v. West*, 196 Ga. App. 456, 457, 395 S.E.2d 884, 886 (1990) (citing O.C.G.A. § 23-2-114). Regardless of whether Plaintiff can or will prevail on a contract theory or a tort theory,[4] the appropriate statute of limitations under either theory is not less than four years. Therefore, the claim for wrongful foreclosure is not time-barred.

To the extent Plaintiff seeks punitive damages based on the tort of wrongful foreclosure, Plaintiff has alleged the Defendants foreclosed on the Property despite agreeing not to do so and then continued to solicit payments from Debtor as though no foreclosure occurred such that Debtor remained under the impression that he still owned the Property. These facts are sufficient to state a claim for the type of wrongful conduct punitive damages are intended to address.

Because the PAC alleges sufficient facts to show Defendants owed Debtor a duty, they breached the duty, and the breach proximately caused injury to Debtor, Defendants' motions to dismiss as to wrongful foreclosure and as to punitive damages will be denied.

[4] The PAC does not allege the foreclosure sale failed to comply with statutory procedural requirements but rather that it should not have occurred.

B. Georgia RICO Violations

Under O.C.G.A. § 16-14-6(c),[5] "Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action …." Under O.C.G.A. § 16-14-4(a), it is "unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money." A pattern is at least two interrelated acts of racketeering activity in furtherance of a scheme. *Id*. § 16-14-3(8)(A), re-designated as § 16-14-3(4)(A). Racketeering activity includes conduct defined as racketeering activity under 18 U.S.C. § 1961(1), which includes mail fraud under 18 U.S.C. § 1341. *Id.* § 16-14-3(9)(A)(xxix), re-designated as § 16-14-3(5)(C). Mail fraud under 18 U.S.C. § 1341 requires (1) intentional participation in a scheme to defraud; and (2) use of mails in the furtherance of that scheme. *Ayres v. General Motors Corp*., 234 F.3d 514, 520 (11th Cir. 2000). Thus, to state a claim under the Georgia RICO statute, Plaintiff must show: (1) Defendants violated or conspired to violate the RICO statute; (2) Debtor was injured as a result of Defendants' conduct; and (3) the violation of or conspiracy to violate the RICO statute was the proximate cause of Debtor's injury. *Wylie v. Denton*, 323 Ga. App. 161, 165, 746 S.E.2d 689, 693 (2013).

Plaintiff alleged Debtor was induced to make post-foreclosure mortgage payments based on Statements, Acceleration Notices, and Default Notices sent by BAC through the U.S. mail. Plaintiff further alleged that the Statements and Notices contained false representations, including representations that BAC could enforce Debtor's liability. Plaintiff alleged BAC had actual, constructive, or imputed knowledge that the documents included false statements and that

[5] Portions of the Georgia RICO statutes were amended effective July 1, 2015. 2015 Ga. Laws Act 98. Some of the relevant provisions were renumbered, but the substance remains substantially the same.

the documents were essential devices to facilitate a scheme by BAC to obtain money from Debtor by false pretense. Finally, Plaintiff alleged multiple documents with the false representations were mailed over a 21-month period. The PAC incorporates the documents, which contain the specific misrepresentations and the dates they were made. Plaintiff further alleges that BONY ratified BAC's conduct by accepting the fruits of the mail fraud and that the actions of BONY's agents are imputed to BONY. Defendants contend Plaintiff failed to allege mail fraud with the requisite particularity required by Rule 9(b), failed to allege facts showing a pattern of racketeering activity, failed to show the existence of an enterprise, failed to allege a scheme to defraud, and failed to allege a proximately caused injury.

With regard to mail fraud, Plaintiff has alleged that BAC sent statements and notices through the mails and that it was acting as BONY's agent in doing so. Plaintiff has provided copies of the relevant correspondence showing the actual statements in question and the dates they were issued. The Acceleration Notices state that the loan is in default and, "If the default is not cured on or before [a certain date], the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property." (Complaint, Exhibit D, at 1). These allegations are sufficient to meet the standard of Rule 9(b). *See supra* Part III.

Because Defendants had already foreclosed on the Property when these notices were sent, the allegations in the PAC are sufficient to plausibly show that Defendants misrepresented their ability to foreclose and that they did so knowingly and intentionally. In addition, the balance due on the Statements sent after the foreclosure was not reduced to account for the foreclosure proceeds received by Defendants, which is further evidence of intent to

misrepresent the amount and nature of any remaining debt in an effort to collect same. Accordingly, Plaintiff has sufficiently alleged the predicate defense of mail fraud and, therefore, racketeering activity. In addition, Plaintiff has shown that the documents were sent on more than two occasions and that they involve the same Debtor. Therefore, Plaintiff has alleged a pattern in furtherance of a scheme to collect the deficiency and, thus, a scheme to defraud.

With regard to an enterprise, "[u]nlike federal civil RICO, the Georgia RICO statute does not require proof of an 'enterprise.'" *Williams v. Mohawk Indus*., 465 F.3d 1277, 1293 (11th Cir. 2006) (citing *Cobb County v. Jones Group, P.L.C*., 218 Ga. App. 149, 152, 460 S.E. 2d 516, 520-21 (Ga. Ct. App. 1995)). It requires that the defendant acquire or maintain property, including money. *Interagency, Inc. v. Danco Fin. Corp*., 203 Ga. App. 418, 419, 417 S.E.2d 46, 49 (1992). Here, Plaintiff has alleged Defendants acquired money from Debtor in the form of post-foreclosure mortgage payments, which is all that is required to state a claim under the statute.

With respect to proximate cause, Plaintiff must show Debtor's "injury flowed directly from at least one of the predicate acts." *Wylie*, 323 Ga. App. at 166, 746 S.E.2d at 694. This requires Plaintiff to allege "more than that an act of racketeering occurred and that [Debtor] was injured. … Rather, she must show that her injury was the direct result of a predicate act targeted toward her, such that she was the intended victim." *Id.* (internal citations omitted). The Court is satisfied that Plaintiff's allegations are sufficient to show a direct nexus between the Notices and Statements sent to Debtor by Defendants and Debtor's damages—in the form of making post-foreclosure payments on an unenforceable debt. Plaintiff has sufficiently alleged Debtor was the target of the mailings and that he acted in response to them to his detriment.

Plaintiff has alleged facts to show a pattern of mail fraud from which Defendants acquired property of Debtor. Therefore, Defendants' motion to dismiss as to Georgia RICO violations is denied.

C. False and Misleading Representations Under the FDCPA, 15 U.S.C. § 1692e

Section 1692e of the FDCPA imposes strict liability on a debt collector who uses a false, deceptive, or misleading representation in connection with collection of a debt. *Clark v. Capital Credit & Collection Servs. Inc.*, 460 F.3d 1162, 1175-76 (9th Cir. 2006); *see also LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010). Defendants contend the claim is barred by the statute of limitations, that Defendants are not debt collectors, and that a foreclosure proceeding does not constitute debt collection.

The definition of a "debt collector" includes a person "who regularly collects or attempts to collect, directly or indirectly, debts owed or due … to another." 15 U.S.C. § 1692a(6). Generally, a mortgage servicer—in this case, BOA—is not a debt collector. *Fenello v. Bank of Am.*, 577 Fed. Appx. 899, 902 (11th Cir. 2014). However, a servicer may be a debt collector if the loan is in default at the time it begins servicing the loan. *Id.*; *Oppong v. First Union Mortg. Corp.*, 215 Fed. Appx. 114, 118 (3d Cir. 2007). The note holder—in this case, BONY—can also be a debt collector if it acquires the loan when it is in default. *LaCosta v. McCalla Raymer, LLC*, No. 1:10-cv-1171, 2011 WL 166902, at *6 (N.D. Ga. 2011); *McKinney v. Cadleway Props. Inc.*, 548 F.3d 596, 501 (7th Cir. 2008). Plaintiff alleged that the Loans were in default at the time BOA begin servicing them and at the time BONY acquired them. Therefore, Plaintiff has sufficiently alleged that Defendants are debt collectors.

A false, deceptive, or misleading representation may include the false representation of the character, amount, or legal status of a debt; a representation that

nonpayment will result in the sale of property unless such action is lawful and the debt collector intends to take such action; and a threat to take action that legally cannot be taken. 15 U.S.C. § 1692e(2)(A), (4), and (5). Here, Plaintiff has provided the correspondence in which BAC states the Loans will be accelerated and the Property foreclosed if not paid. In addition, Plaintiff alleges the post-foreclosure Statements showed a balance due that was not reduced by the proceeds of the foreclosure. Thus, Plaintiff has sufficiently alleged a false, deceptive, or misleading representation.

With respect to the statute of limitations, FDCPA claims must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). The statute of limitations begins to run on the day after the debt collector mails the correspondence at issue. *Maloy v. Phillips*, 64 F.3d 607, 608 (11th Cir. 1995). Conduct occurring prior to the one-year period may constitute a continuing violation, "which generally allows later claims to bring earlier actions within the statute of limitations." *Solomon v. HSBC Mortg. Corp. (USA)*, 395 Fed. Appx. 494, 497 n.3 (10th Cir. 2010); *see also Hansen v. Resurgent Capital Servs., L.P.*, No. 8:15-cv-426, 2015 WL 3652838, at *2 (M.D. Fla. June 11, 2015). Under Bankruptcy Code § 108(a), if the statute of limitations has not expired as of the petition date, the trustee has the later of two years or the expiration of the statute of limitations to file a complaint.

Here the petition was filed on February 13, 2013. BAC sent Acceleration Notices every month from July 2010 to December 2010 stating that failure to cure the default would result in acceleration of the debt and foreclosure. BAC sent Default Notices in February 2011 stating that the Loans were in default and that foreclosure proceedings may begin or continue if the default is not cured. It sent a Default Notice in May 2011 stating Debtor failed to make the full monthly payment for May. It sent a Default Notice in September 2012 indicating the Loans

were in default and that full payment was necessary to prevent default-related actions. It sent a notice in January 2013 stating that a check had been dishonored, and if not paid in full within 10 days, it could sue on the check. Thus, all the notices that specifically referenced acceleration or foreclosure were sent more than one year prior to the petition date. The September 2012 notice made a non-specific reference to default-related actions and the January 2013 notice only evidenced an intent seek remedies for a dishonored check, rather than for default on the Loans. The two notices that were mailed within the statute of limitations lack the specific statements regarding remedies that are allegedly unavailable to Defendants. They are tied to the prior notices only because they are related to the same Loans and to payments or lack of payments made on the Loans. However, BAC sent monthly Statements to Debtor at least as recently as September 21, 2012. Plaintiff alleged the Statements show a principal balance that was not reduced by the foreclosure proceeds. The Statements are sufficient to show an ongoing pattern of misrepresentations regarding the nature and amount of debt owed to Defendants but not necessarily about Defendants' intent or ability to foreclose.

More problematic for Plaintiff is an issue not raised by Defendants. Section 1692e of the FDCPA applies to collection of "any debt." Under § 1692a(5) of the FDCPA, a debt is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for *personal, family, or household purposes* …." *Id.* (emphasis added). Plaintiff does not allege anything about the nature of the debt at the time it was incurred, other than describing the Loans as a "home" loan and a "home" equity line of credit, which implies a residential use. (PAC ¶ 6). However, because Debtor's testimony at the 341 meeting indicates the Property was being used for investment purposes and not as Debtor's personal residence, the

Court cannot reasonably infer that the subject of the transaction was primarily for personal, family, or household purposes at the time the debt was incurred. *See Edwards v. Ocwen Loan Servicing, LLC*, 24 F. Supp. 3d 21, 26-27 (D.D.C. 2014). Because Plaintiff has failed to allege that Defendants were attempting to collect the type of debt governed by the FDCPA, Plaintiff failed to state a claim under the FDCPA.[6] Defendants' motions to dismiss the FDCPA claim will be granted.

D. Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq.

To state a claim under the Georgia FBPA, Plaintiff must show "[u]nfair or deceptive acts or practices in the conduct of consumer transactions." O.C.G.A. § 10-1-393. A consumer transaction is defined as "the sale, purchase, lease, or rental of goods, services, or property, real or personal, primarily for personal, family, or household purposes." *Id.* § 10-1-392(a)(10). Defendants contend that FBPA only applies if their actions harm or potentially harm the public. Because the transaction at issue was a private transaction, FBPA does not apply. Defendants also contend that FBPA does not apply to mortgage transactions because they are already heavily regulated.

In *Jenkins v. BAC Home Loan Servicing, LP*, 822 F. Supp. 2d 1369 (M.D. Ga. 2011), the court said, "only the unregulated consumer marketplace falls within the scope of the FBPA, not regulated areas of activity. … Since the area of mortgage transactions is heavily regulated by the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the Georgia Residential Mortgage Act, courts have found it appropriate to dismiss FBPA claims that allege injury based on mortgage transactions." *Id.* at 1375-76 (citations omitted). Plaintiff argues that the conduct at issue here is not covered by any of those regulations and that a violation of

[6] Plaintiff's original Complaint also included a claim under 15 U.S.C. § 1692f, which was dropped from the PAC. Because § 1692f similarly applies to collection of a debt as defined in § 1692a(5), the cause of action would also be dismissed for failure to state a claim on the same basis.

the FDCPA may be the basis of a violation of the FBPA. The Georgia Court of Appeals has held that a violation of the FDCPA may also be a violation of the FBPA, at least to the extent it involves "[m]isrepresenting consumers' financial indebtedness to others or falsely reporting consumers' credit histories …." *1st Nationwide Collection Agency, Inc. v. Werner*, 288 Ga. App. 457, 459, 654 S.E.2d 428, 431 (2007). Those are not the type of misrepresentations alleged by Plaintiff. Further, the Court has already found that Plaintiff failed to state a claim under the FDCPA because he failed to allege the transaction was for personal, family, or household purposes. The same omission is fatal to his FBPA claim.

Plaintiff failed to allege a consumer transaction and failed to allege sufficient facts for the Court to reasonably infer the debt arose from a consumer transaction. Therefore, Defendants' motions to dismiss will be granted as to Plaintiff's claim under FBPA.

E. Money Had and Received

To state a claim for money had and received, Plaintiff must show (1) Defendants received money that Plaintiff is in equity and good conscience entitled to, (2) Plaintiff has made a demand for payment, and (3) the demand was refused. *City of Atlanta v. Hotels.com*, 289 Ga. 323, 328, 710 S.E.2d 766, 770 (2011). Defendants contend they are not liable for money had and received because Debtor maintained possession of the Property and received rental income from it. They further contend money had and received is an equitable doctrine that only applies in the absence of a contract, and that they were not unjustly enriched by receiving payments admittedly due under the note. Plaintiff contends that his claim is based on fraud, not contract; but even if it were based on contract, it would not rule out a claim for money had and received.

The existence of a contract between the parties does not necessarily preclude an action for money had and received. *McGonigal v. McGonigal*, 294 Ga. App. 427, 428, 609

S.E.2d 446, 447-48 (2008). So long as the plaintiff is not seeking to use a claim of money had and received to alter the terms of the contract, to recover for conduct that is expressly governed by the contract, or to otherwise "avoid the terms of a contract," the claim may proceed. *Id.* at 428-30 (citing *Baghdady v. Central Life Ins. Co*., 224 Ga. App. at 170, 171, 480 S.E.2d 221, 224 (1996); *Wynn v. Arias*, 242 Ga. App 712, 715, 531 S.E.2d 126, 130-31 (2000)). This does not prevent Defendants from later demonstrating that a contract between the parties includes terms that govern the post-foreclosure mortgage payments.

As to the first element of money had and received, Plaintiff alleges Defendants foreclosed on Debtor's Property after agreeing to stop the foreclosure and to allow Debtor to cure the default. Plaintiff further alleges that after the foreclosure, Defendants through their agents continued to send Debtor monthly Statements that gave no indication the Property had been foreclosed and that Debtor continued to make payments in the belief that he maintained an ownership interest in the Property. These facts sufficiently allege Defendants received money to which Plaintiff has a claim of entitlement. Plaintiff also alleges he sent a written demand to Defendants for return of the payments, which was refused. As noted previously, Debtor's continued use of the Property after it was sold does not foreclose the claim, although it may reduce the damages available to Plaintiff. Accordingly, the Court finds Plaintiff has alleged sufficient facts to state a claim for money had and received, and Defendants' motion to dismiss this claim will be denied.

F. Unjust Enrichment

To state a claim for unjust enrichment, Plaintiff must show an absence of a legal contract and a benefit conferred that would result in unjust enrichment unless compensated. *Tidikis v. Network for Med. Communs. & Research*, 274 Ga. App. 807, 811, 619 S.E.2d 481, 485

(2005). Defendants contend this claim cannot be maintained because there was a contract between the parties in the form of a note and security deed. Further, because Debtor maintained constructive ownership of the Property after foreclosure, Defendants were not unjustly enriched by post-foreclosure payments. Plaintiff contends the benefits that flowed to Defendants did not arise from their contract, but instead as a result of their fraudulent misrepresentations.

When the existence of a valid contract is undisputed, there can be no claim for unjust enrichment. *Clark v. Aaron's, Inc*., 914 F. Supp.2d 1301, 1310 (N.D. Ga. 2012) (citing *Tidikis*, 274 Ga. App. at 811, 619 S.E.2d at 485); *see also Stroman v. Bank of Am. Corp*., 852 F. Supp.2d 1366, 1378 (N.D. Ga. 2012). Here, two contracts are in play: (1) the note and deed to secure debt, which Plaintiff contends is not enforceable as to any deficiency that arose after the foreclosure; and (2) the Workout Agreement, which Defendants contend either does not exist or is not enforceable due to lack of writing. Assuming without deciding the post-foreclosure payments are governed by either of those contracts, because the contracts are disputed, the unjust enrichment claim is a viable alternative theory of relief. *Stroman*, 852 F. Supp.2d at 1378. If the payments are not governed by either contract, then the allegations regarding the existence of a contract do not preclude relief.

Plaintiff has alleged a benefit conferred on Defendants in the form of post-foreclosure mortgage payments. Plaintiff has alleged the payments would result in unjust enrichment to Defendants if not compensated because Defendants could not legally enforce the deficiency at the time the payments were made. Although Debtor may have received some value in return by retaining use of the Property and collecting rent, Plaintiff may still state a claim for unjust enrichment albeit with reduced damages. *See Holliefied v. Monte Vista Biblical Gardens, Inc.*, 251 Ga. App. 124, 131, 553 S.E.2d 662, 670 (2001) ("Since unjust enrichment is primarily

an equitable doctrine, then where it would be unjust to require full restitution, there is no duty to make full restitution.") Because Plaintiff has alleged sufficient facts to state a claim for unjust enrichment, Defendants' motions to dismiss will be denied as to that claim.

G. Quantum Meruit

To state a claim for quantum meruit, Plaintiff must allege facts showing (1) services of value to Defendants were performed; (2) Defendants requested or knowingly accepted the services; (3) failure to compensate the provider would be unjust; (4) and the provider expected compensation at the time the services were performed. *One Bluff Drive, LLC v. K.A.P. Inc.*, 330 Ga. App. 45, 47, 766 S.E.2d 508, 512 (2014); *see also* O.C.G.A. § 9-2-7 ("Ordinarily, when one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof."). The presumption that the recipient of the services should pay for the services can be rebutted by showing "(a) that the services were rendered with gratuitous intent by the provider, or (b) that, by the particular circumstances, which in law would raise the counter-presumption that the services were not intended to be a charge against the party benefitted." *Hollifield*, 251 Ga. App. at 129, 553 S.E.2d at 668.

Defendants contend Plaintiff cannot state a claim for quantum meriut because an express contract exists between the parties. In *Harden v. TRW, Inc.*, 959 F.2d 201 (11th Cir. 1992), the court said that quantum meriut is precluded if the court finds "the existence of an express contract, as a matter of law …." *Id.* at 204. However, it further explained that a contract theory and a quantum meriut theory may both be presented to the jury "if there is sufficient evidence to support them both." *Id.* Plaintiff's quantum meriut claims are based on the costs Debtor incurred to repair and maintain the Property. The only contract identified by Defendants

as relevant is the deed to secure debt and note. The Court has no allegations before it that the contract governs these expenses. Thus, the existence of a contract related to the Property does not necessarily preclude relief. Plaintiff alleged Debtor incurred costs to maintain and repair the Property, including taxes and insurance, in the belief that he owned the Property. Plaintiff did not allege that Debtor expected compensation at the time he performed the services, but this is so because he believed he was performing the services for his own benefit. In addition, Plaintiff alleged Defendants knew or should have known Debtor was performing the services. Alleged facts supporting such an assertion are that Defendants did not take possession of the Property after foreclosure and continued send monthly Statements to Debtor. The Statements show the payments included escrow amounts to be used to pay insurance and taxes on the Property. If Defendants were collecting money from Debtor to pay taxes and insurance on the Property, it is plausible and reasonable to conclude that they knew they were receiving a beneficial service from Debtor. Because Plaintiff has alleged sufficient facts to state a claim for quantum meriut, Defendants' motion to dismiss as to that claim will be denied.

H. Avoidance and Recovery of Constructive Fraudulent Transfer, 11 U.S.C. §§ 548(a)(1)(B) and 550(a)

Plaintiff seeks to recover as fraudulent transfers payments made by Debtor two years prior to the petition date in the amount of $38,169.40. To state a claim for fraudulent transfer under 11 U.S.C. § 548(a)(1)(B), Plaintiff must allege facts showing: (1) a transfer; (2) of an interest of debtor in property; (3) made within two years of the petition date; (4) for which debtor received less than reasonably equivalent value; and (5) that debtor was insolvent on the date of the transfer or became insolvent as a result of the transfer. *Id.*

Here Plaintiff has alleged transfers of Debtor's money to Defendants in the form of post-foreclosure debt payments. He has alleged the dates of the transfers via Exhibit F, which is a payment history prepared by Plaintiff showing the dates and amounts of payments from May 7, 2010 to February 8, 2013, such that some of the payments were made within two years of the February 13, 2013 petition date. Plaintiff has alleged Debtor received less than reasonably equivalent value because he no longer owned the Property and the debt was not legally enforceable. Plaintiff has alleged Debtor was insolvent at the time of the transfers as evidenced by his chronic default on the Loans and subsequent bankruptcy.

Defendants contend that Plaintiff has failed to allege Debtor received less than reasonably equivalent value because Debtor maintained possession of the Property and received a stream of income and because the payments were applied to reduce the balance of the debt. Whether Debtor received reasonably equivalent value is a question of fact as to whether Debtor received a fair exchange. *Howell v. Fulford* (*In re Southern Home and Ranch Supp., Inc*.), 515 B.R. 699, 707 (Bankr. N.D. Ga. 2014) (Drake, J.). The fact that Defendants contend Debtor received some economic benefit in exchange for the payments does not mean he received reasonably equivalent value. Plaintiff has alleged facts as to each element of a fraudulent transfer. Therefore, Defendants' motion to dismiss as to fraudulent transfers under § 548 is denied.

I. Avoidance and Recovery of Constructive Fraudulent Transfer, 11 U.S.C. § 544 and O.C.G.A. § 18-2-75(a); 11 U.S.C. § 550(a)

Plaintiff seeks to recover as fraudulent transfers under Georgia law post-foreclosure payments made by Debtor in the four years prior to the petition date. The

requirements to state a claim for fraudulent transfer under O.C.G.A. § 18-2-75(a)[7] are similar to those under Bankruptcy Code § 548(a). The applicable version of the statute provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." O.C.G.A. § 18-2-75(a). The only significant difference from § 548(a) is that Georgia law provides for a four-year reach back period rather than a two-year period. O.C.G.A. § 18-2-79(a). As already explained in the discussion of fraudulent transfers under 11 U.S.C. § 548(a), Plaintiff has alleged sufficient facts to survive a motion to dismiss.

However, Defendants contend that a state law fraudulent transfer action is barred by the four-year statute of limitations in O.C.G.A. § 9-3-32[8] because it applies to the date Debtor incurred the obligation to make payments, not the date the payments were made. Debtor incurred the obligation to Defendants when he executed the note and security deed on July 6, 2004. Plaintiff has alleged that the post-foreclosure payments are rooted in Defendants' fraudulent conduct, not in a contractual obligation. Further, Plaintiff argues that O.C.G.A. § 18-2-75(a) applies to two types of transactions: (1) transfers made by the debtor; and (2) obligations incurred by the debtor. *Id.* ("A transfer made *or* obligation incurred by a debtor is fraudulent ….") (emphasis added). The statute of limitations provides that a cause of action must be brought "within four years after the transfer was made *or* the obligation was incurred[.]" *Id.* § 18-2-79(a)

[7] Effective July 1, 2015, the Georgia Uniform Fraudulent Transfers Act was amended and renamed the Uniform Voidable Transactions Act. 2015 Ga. L. 167 (S.B. 65) (2015). The amendments do not apply to transfers made or obligations incurred before July 1, 2015, such as those at issue in this case. *Id.* § 7-1(d)(2).

[8] "Actions for the recovery of personal property, or for damages for the conversion or destruction of the same, shall be brought within four years after the right of action accrues …." O.C.G.A. § 9-3-32.

(emphasis added). In this case, Plaintiff is seeking to avoid the post-foreclosure transfers of cash made by Debtor; he is not seeking to avoid the underlying obligation.

The applicable version of O.C.G.A. § 18-2-76 explains when a transfer is made or an obligation is incurred for purposes of fraudulent transfer law:

> (1) A transfer is made:
> …
> (B) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this article that is superior to the interest of the transferee;
> …
> (3) If applicable law does not permit the transfer to be perfected as provided in paragraph (1) of this Code section, the transfer is made when it becomes effective between the debtor and the transferee;
> …
> (5) An obligation is incurred:
> (A) If oral, when it becomes effective between the parties; or
> (B) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

O.C.G.A. § 18-2-76 (2002). If Defendants are correct that the payments are rooted in Debtor's obligation under the note notwithstanding any satisfaction by the foreclosure, then subsection (5)(B), indicates the allegedly fraudulent conveyance occurred when the note was signed in 2004—well before the reach back period. If Plaintiff is correct that the payments were procured by fraud, they are arguably transfers under subsections (1)(B) and (3), and the allegedly fraudulent conveyance occurred when the payments were made in 2010 to 2013, which is within the reach back period. It is not clear from the face of the PAC which view is correct; therefore, the Court cannot conclude that the statute of limitations has expired. Because Plaintiff has alleged sufficient facts to state a claim under state fraudulent conveyance law, Defendants' motion to dismiss that claim will be denied.

J. Plaintiff's Motion to Amend the Complaint

A motion to amend the complaint is governed by Federal Rule of Civil Procedure 15, made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7015. Because a responsive pleading was filed prior to the PAC, Plaintiff requires either written consent of Defendants or leave of Court to amend. Fed. R. Bankr. P. 15(a)(1), (2). "The court should freely give leave [to amend] when justice so requires." *Id.* 15(a)(2). Defendants' only opposition to the amendment is that it would be futile because the claims would remain subject to dismissal under Rule 12(b)(6). *See Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010). However, as the Court's analysis of Defendants' motions to dismiss demonstrates, the PAC sufficiently states a claim as to at least some of Plaintiff's claims. Therefore the motion to amend will be granted to allow Plaintiff to amend its claims for wrongful foreclosure, Georgia RICO violations, money had and received, unjust enrichment, quantum meriut, fraudulent transfer under 11 U.S.C. § 548, fraudulent transfer under O.C.G.A. § 18-2-75(a) and to withdraw its claim under FDCPA § 1692f. With respect to Plaintiff's claims for violation of FDCPA § 1692e and violation of FBPA, the proposed amendment would be futile, and the motion to amend is denied.

V. CONCLUSION

Plaintiff's Complaint and PAC fail to state a claim upon which relief may be granted with respect to violation of FDCPA § 1692e and violation of FBPA and sufficiently state a claim for relief as to all other causes of action. Accordingly, it is

ORDERED that Defendants' motions to dismiss are GRANTED as Plaintiff's claims for violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e and violation

of the Georgia Fair Business Practices Act. Defendants' motion to dismiss is DENIED as to all other claims in Plaintiff's proposed amended complaint. It is further

ORDERED that Plaintiff's motion to amend complaint is granted as to the claims for wrongful foreclosure, violation of the Georgia Racketeer Influenced and Corrupt Organizations Act, money had and received, unjust enrichment, quantum meriut, fraudulent transfer under 11 U.S.C. § 548, fraudulent transfer under O.C.G.A. § 18-2-75(a), and to allow for the withdrawal of Plaintiff's claim under FDCPA § 1692f. The motion to amend is DENIED as to any other claims. It is further

ORDERED that Plaintiff is directed to file an amended complaint consistent with this Order as a separate pleading within 14 days of entry of this Order, to serve the amended complaint on Defendants, and to file proof of service. In accordance with Rule 15(a)(3), Defendants shall have 14 days from service of the amended complaint to respond to it.

END OF ORDER

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