UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DIANA PERCIVAL,

Plaintiff,

v. Case No: 8:23-cv-1243-KKM-JSS

DAVID LEDUC, MARCOS PERERA, JORDAN BRIZENDINE, ALARM MONITORING & SERVICE, INC. and CHAD CHRONISTER,

Defendants.
_____/

REPORT AND RECOMMENDATION

Plaintiff moves for entry of final default judgment against Defendants David Leduc and Alarm Monitoring & Service, Inc., pursuant to Federal Rule of Civil Procedure 55. (Motion, Dkt. 48.) Plaintiff seeks an award of damages and attorneys' fees and costs. (*Id.*) On December 19, 2023, the court held a hearing on Plaintiff's Motion. For the reasons that follow, the court recommends that the Motion be granted in part and denied in part.

BACKGROUND

Plaintiff brings this action for damages against Defendants David Leduc, Marcos Perera, Jordan Brizendine, Alarm Monitoring & Service, Inc., and Sherriff Chad Chronister, alleging illegal entry of Plaintiff's home, civil rights violations, and theft of personal property. (Dkt. 10.) The subjects of the instant motion, Defendants

Leduc and Alarm Monitoring & Service, Inc., have not appeared to defend against this action. On September 6, 2023, the Clerk of Court entered clerk's defaults against Leduc and Alarm Monitoring & Service, Inc. (Dkts. 44, 45.) Plaintiff now moves the court for entry of default judgment against them. (Dkt. 48.)

APPLICABLE STANDARDS

When a party fails to plead or otherwise defend a judgment for affirmative relief, the clerk of the court must enter a default against the party against whom the judgment was sought. Fed. R. Civ. P. 55(a). If the plaintiff's claim is for a sum certain or an ascertainable sum, then the clerk, upon the plaintiff's request supported by an affidavit showing the amount due, must enter a default judgment. Fed. R. Civ. P. 55(b)(1). In all other cases, the party entitled to judgment must apply to the district court for a default judgment. Fed. R. Civ. P. 55(b)(2). A court may enter a default judgment against a defendant who never appears or answers a complaint "for in such circumstances the case never has been placed at issue." *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1134 (11th Cir. 1986).

A defaulted defendant is deemed to have admitted a plaintiff's well-pled allegations of fact. *Cotton v. Mass Mut. Life Ins. Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005); *Nishimatsu Constr. Co. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).[1] However, "before entering a default for damages, the district court must ensure that

[1] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981.

the well-pled allegations in the complaint, which are taken as true due to the default, actually state a substantive cause of action and that there is a substantive sufficient basis in the pleadings for the particular relief sought." *Tyco Fire & Sec., LLC v. Alcocer*, 218 F. App'x 860, 863 (11th Cir. 2007) (emphasis omitted). Therefore, in considering whether to enter default judgment, the court must first determine whether the complaint states a claim for relief. *GMAC Com. Mortg. Corp. v. Maitland Hotel Assocs., Ltd.*, 218 F. Supp. 2d 1355, 1359 (M.D. Fla. 2002) ("A default judgment cannot stand on a complaint that fails to state a claim.") (citing *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 n.41 (11th Cir. 1997)). In addition to the pleadings, the court may consider evidence presented in support of the motion for default judgment, including affidavits. *See E.E.O.C. v. Titan Waste Servs. Inc.*, No. 3:10-cv-379-MCR-EMT, 2014 WL 931010 at *6 (N.D. Fla. Mar. 10, 2014); *Super Stop No. 701, Inc. v. BP Prod. N. Am. Inc.*, No. 08-61389-civ, 2009 WL 5068532, at *2 n.4 (S.D. Fla. Dec. 17, 2009) (noting that "unchallenged affidavits are routinely used to establish liability and damages" at default judgment); *see also Shandong Airlines Co. Ltd. v. CAPT, LLC*, 650 F. Supp. 2d 1202, 1207 (M.D. Fla. 2009) (relying on declaration and documentary evidence to support plaintiff's alleged damages on default). "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c).

ANALYSIS

A. Subject Matter Jurisdiction

To enter final default judgment, the court must have subject matter jurisdiction over the action. *See* Fed. R. Civ. P. 12(h)(3) ("if the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"); *see also Nat'l Loan Acquisitions Co. v. Pet Friendly, Inc.*, 743 F. App'x 390, 392 (11th Cir. 2018) ("If there is a deficiency in subject matter jurisdiction, district courts are constitutionally obligated to dismiss the action.") (citing *Travaglio v. Am. Exp. Co.*, 735 F.3d 1266, 1268 (11th Cir. 2013)). "[A]ny judgment rendered when the court lacked jurisdiction is void and without legal effect." *Ferrier v. Cascade Falls Condo. Ass'n, Inc.*, 820 F. App'x 911, 914 (11th Cir. 2020) (citing *Burke v. Smith*, 252 F.3d 1260, 1263 (11th Cir. 2001)).

"In a given case, a federal district court must have at least one of three types of subject matter jurisdiction: (1) jurisdiction under a specific statutory grant; (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331; or (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)." *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1469 (11th Cir. 1997) (holding "[f]ederal question jurisdiction exists only when the 'well-pleaded complaint standing alone establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'"). Under 28 U.S.C. § 1367(a), district courts have jurisdiction over supplemental state law claims when they are "so related to claims in the action within such original jurisdiction that they form part of the same case or

controversy under Article III of the United States Constitution." The term "case or controversy" refers to "state claims which arise out of a common nucleus of operative fact with a substantial federal claim." *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006) (holding federal and supplemental claims arose out of a common nucleus of operative fact when the defendant's operation of a junkyard adjacent to the plaintiff's property resulted in claims for damages cognizable under both federal and state law because of its physical proximity).

Plaintiff brings state law claims against Leduc and Alarm Monitoring & Service, Inc. and alleges Leduc, as an agent of Alarm Monitoring & Service, Inc., unlawfully entered her residence, removed items from her residence, and directed Defendants Marcos Perera and Jordan Brizendine of the Hillsborough County Sheriff's Office to unlawfully arrest her. *See* (Dkt. 10 ¶ 111.) Additionally, Plaintiff alleges Leduc returned to her residence hours after she was arrested, removed additional items, and damaged her property. (Dkt. 10 ¶ 111–15.) According to the Amended Complaint, the claims against Defendants Perera, Brizendine, and Chronister arise under 42 U.S.C. § 1983 and provide the court with original jurisdiction pursuant to its federal question jurisdiction under 28 U.S.C. § 1331. (Dkt. 10 ¶ 126–161.) Plaintiff brings supplemental state law claims against Leduc and Alarm Monitoring & Service, Inc. for trespass, civil theft, and conversion. (Dkt. 10 ¶ 181–195, 220–238.) As pled, these events all form the same case or controversy and arise out of a common nucleus of operative fact with the facts which form the basis of the substantive federal claims

brought against Perera, Brizendine, and Sherriff Chad Chronister. Accordingly, the court recommends there exists supplemental jurisdiction over Plaintiff's state law claims against Leduc and Alarm Monitoring & Service, Inc. *See* 28 U.S.C. § 1367(a). ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

B. Service of Process

A district court may not enter default judgment against a defendant who was not properly served. *Colclough v. Gwinnett Pub. Schs.*, 734 F. App'x 660, 662 (11th Cir. 2018) ("Given the improper service, the Court lacked jurisdiction over the matter and could not render a default judgment or enter default."); *Varnes v. Local 91, Glass Bottle Blowers Ass'n*, 674 F.2d 1365, 1368 (11th Cir. 1982) (holding that default judgment entered against defendant who was not properly served is void); *see also Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("In the absence of such service (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant."). Federal Rule of Civil Procedure 4(h) provides that a domestic corporation, such as Alarm Monitoring & Service, Inc., may be served by "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process[.]" Fed. R. Civ. P. 4(h)(1)(B). Federal Rule of Civil

Procedure 4(e) provides that an individual, such as Leduc, may be served by "delivering a copy of the summons and of the complaint to the individual personally." Fed. R. Civ. P. 4(e)(2)(A).

Plaintiff bears the burden to establish sufficient service of process on Leduc, an individual, and Alarm Monitoring & Service, Inc., a corporation. On July 12, 2023, Plaintiff filed Affidavits of Process Server indicating Plaintiff effected personal service of its Amended Complaint on Defendants Leduc and Alarm Monitoring & Service, Inc. (Dkts. 16, 18.) The court ordered Plaintiff to provide proof the Amended Complaint was served on Defendants consistent with Federal Rule of Civil Procedure 5. (Dkt. 24.) Plaintiff filed a Certificate of Service on August 3, 2023, in compliance with the court's order. (Dkt. 31.) Additionally, at the court's direction, Plaintiff filed a Brief in Support of Proper Service to Defendants, concerning the method of service effectuated on Defendants. (Dkt. 62.) Upon review, the court recommends finding Plaintiff properly effectuated service on Defendants Leduc and Alarm Monitoring & Service, Inc. and that the Defendants failed to appear or respond.

C. Liability

1. Trespass to Land against Leduc (Count X)

Plaintiff seeks default judgment against Leduc on Count X and alleges that Leduc is liable for trespass to land under Florida law. (Dkt. 10 ¶¶ 181–87.) "Trespass to real property is an injury to or use of the land of another by one having no right or authority." *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1254 n.1 (11th Cir. 2006)

(citing *Guin v. City of Riviera Beach*, 388 So. 2d 604, 606 (Fla. 4th DCA 1980) (finding "merely entering a building without the right to do so constitutes a trespass.")). "To state a claim for trespass under Florida law, a complaint must plausibly allege facts indicating 'an unauthorized entry onto another's property.'" *Mims Invs., LLC v. Mosaic Fertilizer*, LLC, No. 8:11-cv-1093-T-17TBM, 2011 WL 6153278, at *4 (M.D. Fla. Dec. 12, 2011). According to Plaintiff's Amended Complaint, on June 2, 2020, Leduc unlawfully entered Plaintiff's residence at 7001 Applewood Court, Tampa, Florida 33615, without permission. (Dkt. 10 ¶ 13–115, 181–87.) Plaintiff is the sole owner and resident of the home. (*Id*.) Taking the well-pled allegations of Plaintiff's Amended Complaint as true due to Defendant's default, Plaintiff sufficiently states a cause of action arising under trespass. As a result, the court recommends granting Plaintiff's Motion as to Count X.

2. Trespass to Land, Vicarious Liability (Count XI)

Plaintiff seeks default judgment on Count XI against Alarm Monitoring & Service, Inc. and alleges that it is liable for Leduc's trespass. (Dkt. 10 ¶ 195.) According to Plaintiff's Amended Complaint, Leduc "utilized his position as an agent of Alarm Monitoring & Service, Inc. to contact Criticom Monitoring Services" to unlawfully bypass Plaintiff's alarm system and enter her residence without permission on June 2, 2020. *See* (Dkt. 10 ¶ 110–115.) "In Florida, an employer is vicariously liable for an employee's tortious conduct where the conduct occurs within the scope of the employment." *Fields v. Devereux Found., Inc.*, 244 So. 3d 1193, 1196 (Fla. 2d

DCA 2018) (finding "a plaintiff's mere showing that an employee was on duty at the time he assailed someone is not sufficient to establish that the conduct occurred within the scope of employment."). "Actions for trespass committed by an agent are based upon the doctrine of respondeat superior." *Lockhart v. Friendly Fin. Co.*, 110 So. 2d 478, 480 (Fla. 1st DCA 1959). To establish liability under the doctrine, the act must have occurred within the scope of employment, and "(1) have been the kind he was employed to perform; (2) have occurred within time and space limits of his employment; and (3) must have been activated at least in part by a desire to serve the master." *Ayers v. Wal-Mart Stores, Inc.*, 941 F. Supp. 1163, 1168 (M.D. Fla. 1996). Liability "does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do." *Lockhart*, 110 So. 2d at 480.

Here, Plaintiff alleges Alarm Monitoring & Services, Inc. is liable for Leduc's trespass because he is the company's agent and owner. (Dkt. 10 ¶ 195.) Although Plaintiff pleads facts sufficient to succeed on a claim of trespass against Leduc, the court recommends that Plaintiff fails to state a claim for trespass against Alarm Monitoring & Services, Inc. Specifically, Plaintiff fails to plead facts that show Leduc's entrance into Plaintiff's residence was the kind of action "he was employed to perform," occurred during the "time and space limits of his employment," and in any way served the business interests of Alarm Monitoring & Services, Inc. *Ayers*, 941 F.

Supp. at 1168. Accordingly, the court recommends denying Plaintiff's Motion as to Count XI.

3. Intentional Infliction of Emotional Distress (Count XVI)

Plaintiff moves for default judgment against Leduc on Count XVI and alleges Leduc's acts caused her emotional distress in the form of "a lifetime of pain and suffering, both mentally and physically" for which she has sought therapy. (Dkt. 10 ¶ 223.) Establishing a cause of action for intentional infliction of emotional distress in Florida requires proof that conduct was intentional or reckless, outrageous, and resulted in severe emotional distress. *Nassar v. Nassar*, 853 F. App'x 620, 622 (11th Cir. 2021). "What constitutes 'outrageous' conduct is a question of law for the court to resolve—not a question of fact for a jury." *Noah v. Assor*, 379 F. Supp. 3d 1284, 1299 (S.D. Fla. 2019) (holding conduct reaching the level of intentional infliction of emotional distress is that which shows relentless physical and verbal harassment). "This is an objective question, the subjective response of the victim does not control." *Frias v. Demings*, 823 F. Supp. 2d 1279, 1288 (M.D. Fla. 2011). "The standard for 'outrageous conduct' is particularly high in Florida." *LeVeille v. Upchurch*, No. 3:19-cv-908-J-39MCR, 2020 WL 10180570, at *4 (M.D. Fla. Aug. 3, 2020) (citing *Patterson v. Downtown Med. & Diagnostic Ctr., Inc.*, 866 F. Supp. 1379, 1383 (M.D. Fla. 1994)); *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278 (Fla. 1985) (to state a claim for intentional infliction of emotional distress, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency,

and to be regarded as atrocious, and utterly intolerable in a civilized community" that an "average member of the community" would find the conduct outrageous). While a defendant's actions may be "inconsistent with acceptable or decent behavior," claims for intentional infliction of emotional distress require a showing of "atrocious and outrageous acts." *LeVeille*, 2020 WL 10180570, at *5; *Carey v. Kirk*, No. 21-20408-CIV, 2022 WL 17996027, at *13 (S.D. Fla. Sept. 2, 2022) (quoting Restatement (Second) of Torts § 46 cmt. d (1965) ("To meet the objective outrageousness standard, the conduct in question must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'")).

According to Plaintiff's Amended Complaint, Leduc entered her home without consent, removed her personal belongings, and caused property damage. (Dkt. 10 ¶ 47–125.) Plaintiff states Leduc utilized his position with Alarm Monitoring & Service, Inc. to unlawfully enter her home without consent after her arrest. (*Id.*) Plaintiff testified at the hearing Leduc caused her to be arrested and battered by law enforcement, resulting in severe physical injuries and damages. Additionally, Plaintiff testified she experiences feelings of depression, disassociation, anxiety, and loneliness as a result of the incident. Plaintiff appeared credible and significantly affected by the incident at issue in the Amended Complaint. Nevertheless, although Plaintiff established that Leduc engaged in intentional acts that caused Plaintiff severe emotional distress, the conduct was not objectively outrageous and did not meet

Florida's particularly high standard for "outrageous conduct." *Bakar v. Bryant*, No. 13-21927-CIV, 2013 WL 5534235, at *3 (S.D. Fla. Oct. 7, 2013) ("allegation of verbal harassment, without significant physical attack, is insufficient to plead an intentional infliction of emotion distress claim."); *see, e.g.*, *Rubio v. Lopez*, 445 F. App'x 170, 175 (11th Cir. 2011) (finding law enforcement's action of hobble-tying arrestee on hot asphalt pavement resulting in second-degree burns was not indicative of intentional infliction of emotional distress); *LeVeille*, 2020 WL 10180570, at *5 (finding defendant's actions including posting videos on social media in which defendant made derogatory remarks about Plaintiff and Plaintiff's art, shooting the art with rounds from a shotgun and rifle, and signing his name on the art including the words "[Expletive] this dudes [sic] Paintings" were insufficient to survive a motion to dismiss as to allegations of intentional infliction of emotional distress); *Garcia v. Carnival Corp.*, 838 F. Supp. 2d 1334, 1336 (S.D. Fla. 2012) (finding allegations that defendant and his cruise board crew members kicked and punched the Plaintiff, repeatedly threw her to the ground, handcuffed her, dragged her across the floor while she was handcuffed, and confined her to her cabin and prevented her from leaving her cabin was insufficient to overcome a Motion to Dismiss for claims of intentional infliction of emotional distress); *Carey*, 2022 WL 17996027, at *2 (holding Plaintiff's allegation that defendant hit him, pulled his pants down, ripped his shirt, and poured apple juice on him, took his iPhone, cash, credit cards, and additional items, did not rise to the standard required to succeed on a claim of intentional infliction of emotional distress).

Accordingly, the undersigned recommends that Plaintiff's Motion be denied as to Count XVI.

4. Civil Theft (Count XVII)

In Count XVII, Plaintiff alleges a claim for civil theft against Leduc. (Dkt. 10 ¶¶ 226–38.) According to Plaintiff's Amended Complaint, Leduc unlawfully removed property from Plaintiff's residence. (*Id.* ¶¶ 232–35.) Plaintiff seeks $4,050 in damages for Leduc's civil theft of her property, including $1,500 in "cash money," and an additional $12,150 in treble damages pursuant to section 772.11 of the Florida Statutes. (Dkt. 48 at 14); *see also* (Dkt. 10 at 31.)

"To establish a claim for civil theft, a party must prove that a conversion has taken place and that the accused party acted with criminal intent." *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1056 (Fla. 3d DCA 2008). To sufficiently allege a claim for civil theft, Florida statutes require proof by clear and convincing evidence that an injury has been caused by a violation of the criminal theft related statutes. Fla. Stat. § 772.11(1); *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1270 (11th Cir. 2009) (citing *Gersh v. Cofman*, 769 So. 2d 407, 409 (Fla. 4th DCA 2000) (to state a claim, the Plaintiff "must prove the statutory elements of theft, as well as criminal intent.")). A person commits criminal theft if he knowingly obtains or uses another person's property with the intent to deprive that person of the property. Fla. Stat. § 812.014; *Dixon v. Green Tree Servicing, LLC*, 859 F. App'x 373, 375 (11th Cir. 2021). Additionally, section 772.11 requires that a plaintiff, prior to filing an action for damages "make a written

demand for $200 or the treble damage amount of the person liable for damages under this section." Fla. Stat. § 772.11(1); *see Archer v. Wal-Mart Stores E., LP*, No. 8:16-cv-3067-T-36AAS, 2019 WL 3254022, at *3–4 (M.D. Fla. July 19, 2019) ("To state such a claim, Plaintiff must follow the requirements as provided by section 772.11.").

Here, Plaintiff has not established that she complied with the statutory prerequisites to maintain a cause of action for civil theft. Although Plaintiff provided evidence that she sent a demand letter to Leduc on March 18, 2021, the letter failed to make a written demand for $200 or the treble damage amount as required by the statute. *See* (Dkt. 10-1); (Dkt. 10 ¶ 231.) Instead, the letter demands that Leduc "(a) return all of undamaged items or provide payment of value for the undamaged items in lieu of return and (c) pay for all damaged items within ten (10) days of the date of this letter[.]" (Dkt. 10-1.) Thus, the letter demands only the actual damages amount rather than the treble damages amount as required by section 772.11. *See Ocala Jockey Club, LLC v. Rogers*, 981 So. 2d 1245, 1247 (Fla. 5th DCA 2008) (Section 772.11 requires that "the written demand must be for the treble damage amount, which clearly indicates that the proper amount to award under the statute is three times the actual damage amount."); *see also Prou v. Giarla*, No. 13-24266-CIV, 2014 WL 12621907, at *1 (S.D. Fla. June 25, 2014) (finding that pre-suit demand letter that demanded only the actual damages amount rather than the treble damages amount "does not satisfy the 'pre-suit demand requirements imposed by Fla. Stat. § 772.11' and effectively deprives the Court of subject-matter jurisdiction over this claim.") (citing *Allstate Ins.*

Co. v. Palterovich, 653 F. Supp. 2d 1306, 1326 (S.D. Fla. 2009)). Because Plaintiff has not established that she satisfied the statutory perquisites to maintaining her claim, default judgment is not warranted. *E.g.*, *Archer*, 2019 WL 3254022, at * 3–4 (dismissing civil theft counts with prejudice where plaintiff failed to comply with pre-suit demand requirements); *Fagan v. Cent. Bank of Cyprus*, No. 19-80239-CIV, 2021 WL 2845034, at *13 (S.D. Fla. June 28, 2021) (recommending denial of default judgment on civil theft claim based on deficient demand letter where the complaint "does not allege that Plaintiff requested the treble damage amount, merely the $13.68 million Plaintiff had paid into the contracts."), *report and recommendation adopted,* 2021 WL 2915109 (S.D. Fla. July 12, 2021); *Prou*, 2014 WL 12621907, at *1; *cf. Fla. Recovery Adjusters, LLC v. Pretium Homes, LLC*, 261 So. 3d 664, 667 (Fla. 3d DCA 2018) (finding that "trial court abused its discretion in granting unliquidated treble damages on an erroneously alleged civil theft claim" where "demand letters were facially deficient because they requested more than the maximum treble damages amount"); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Griffis*, No. 3:20-cv-11-J-34MCR, 2020 WL 5413355, at *5 (M.D. Fla. July 30, 2020) ("Because Plaintiff has adequately alleged (and has shown) compliance with the statutory requirements for obtaining treble damages pursuant to Fla. Stat. § 772.11(1), the undersigned recommends that Plaintiff . . . be awarded such damages[.]"), *report and recommendation adopted,* 2020 WL 5407689 (M.D. Fla. Sept. 9, 2020). The court therefore recommends that Plaintiff's Motion be denied as to Count XVII.

5. Conversion (Count XVIII)

In Count XVIII, Plaintiff alleges a claim of conversion against Leduc. (Dkt. 10 ¶¶ 232–38.) "[C]onversion is an unauthorized act which deprives another of his property permanently or for an indefinite time." *Nat'l Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F.2d 873, 878 (11th Cir. 1985) (quoting *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman)*, 450 So.2d 1157, 1160–61 (Fla. 3d DCA 1984) (footnote omitted)) (citing *Star Fruit Co. v. Eagle Lake Growers, Inc.*, 33 So. 2d 858 (Fla. 1948) (en banc))); *Taubenfeld v. Lasko*, 324 So. 3d 529, 541 (Fla. 4th DCA 2021) (citing *Warshall v. Price*, 629 So. 2d 903, 904 (Fla. 4th DCA 1993)) ("Conversion is an act of dominion wrongfully asserted over another's property inconsistent with his ownership therein."); *Nat'l Union Fire Ins. Co. of Pa.*, 759 F.2d at 878 ("The essence of the tort is not the acquisition of the property; rather, it is the wrongful deprivation."). To state a claim for conversion, a plaintiff must show "(1) an act of dominion wrongfully asserted; (2) over another's property; and (3) inconsistent with his ownership therein." *Special Purpose v. Prime One*, 125 F. Supp. 2d 1093, 1099–1100 (S.D. Fla. 2000); *Kaplan v. Regions Bank*, No. 8:17-cv-2701-CEH-CPT, 2023 WL 2610155, at *8 (M.D. Fla. Mar. 23, 2023).

According to Plaintiff's Amended Complaint, Leduc knowingly obtained Plaintiff's tangible personal property including: one central vacuum, one nail gun, 75-100 DVD and Blu-Ray movies, one ladder, clothing and shoes, one drill bit kit, and a car charger without her permission. (Dkt. 10 ¶ 233.) Additionally, Plaintiff alleges

Leduc damaged her ceiling fan, Bose mouse, and television. (*Id.*) Plaintiff further alleges Leduc unlawfully entered her residence without her permission and removed $1,500 in cash, with the intent to permanently deprive her of that amount. (*Id.* ¶¶ 110–117.) Plaintiff's allegations are sufficient to state a claim for conversion, in that Leduc wrongfully asserted dominion over Plaintiff's property inconsistent with her ownership therein. The undersigned therefore recommends granting Plaintiff's Motion as to Count XVIII for conversion against Leduc, to the extent discussed in the damages section below.

Accordingly, as discussed above, the undersigned recommends that Plaintiff is entitled to final default judgment on Counts X and XVIII. The undersigned further recommends finding that Plaintiff failed to establish Defendants' liability as to Counts XI, XVII, and XVI, and recommends that Plaintiff's Motion be denied as to those counts.

D. Damages

"Where default judgment is warranted, the Court must then determine the amount and character of damages." *Indiana Farmers Mut. Ins. Co. v. Hernandez*, No. 8:19-cv-61-T-36CPT, 2020 WL 8970597, at *2 (M.D. Fla. Mar. 26, 2020) (citing *Armadillo Distrib. Enters., Inc. v. Hai Yun Musical Instruments Manufacture Co. Ltd.*, 142 F. Supp. 3d 1245, 1255 (M.D. Fla. 2015)). "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c).

In her Motion, Plaintiff seeks $3,250 in actual damages as to Count X for damage to her doorframe and the cost to replace her alarm system. (Dkt. 48 at 7–8.) Plaintiff also seeks actual damages on Count XVIII against Leduc for conversion in the amount of $6,400, including $4,900 for her tangible personal property and $1,500 in cash. (*Id.* at 11.) Finally, Plaintiff seeks punitive damages in the amount of $100,000, and attorneys' fees and court costs. (*Id.* at 14, 17–19.) Plaintiff provided a personal declaration in support of her request for default judgment and damages. (Dkt. 48-3.) Plaintiff also credibly testified concerning her damages claims during the hearing on December 18, 2023. *See* (Dkt. 59.) Upon consideration of the Amended Complaint, Plaintiff's testimony, and the evidence submitted in support of her Motion, the court recommends Plaintiff be awarded damages as follows.

1. Count X (Civil Trespass)

Plaintiff's Motion seeks damages in Count X in the amount of $3,250. (Dkt. 48). "The usual measure of damages for trespass to real property is the difference in value of the property before and after the trespass." *Delk v. Bank of Am., N.A.*, No. 5:14-cv-469-OC-32PRL, 2016 WL 70617, at *8 (M.D. Fla. Jan. 6, 2016) citing *Horn v. Corkland Corp.*, 518 So. 2d 418, 420 (Fla. 2d DCA 1988) (finding testimony as to the difference in value or opinion as to the value of property is sufficient to prove these damages). However, a default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Fed. R. Civ. P. 54(c). According to Plaintiff's Motion, Defendant's unlawful entrance to the property resulted in damages

totaling $250 for Plaintiff's front door and $3,000 in damages for Plaintiff's alarm system. (Dkt. 48.) Plaintiff also references these amounts in her declaration. Likewise she testified concerning the damage to her alarm system which required her to replace it, and her door jamb. However, while Plaintiff sufficiently pled facts to establish Leduc's liability for trespass, she failed to allege facts related to damage caused by the trespass, or specify monetary damages of $3,250 in her Amended Complaint. Because a default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings, the court recommends denying Plaintiff's request for damages in the amount of $3,250. Fed. R. Civ. P. 54(c); *see, e.g.*, *Pinnacle Towers LLC v. airPowered, LLC*, No. 5:15-cv-81-OC-34PRL, 2015 WL 7351397, at *2 (M.D. Fla. Nov. 20, 2015) (holding because plaintiffs' assertion of facts in their motion for default judgment and damages affidavit were inconsistent with and differed from those alleged in their complaint, they failed to provide a legitimate basis for their damages); *Stewart v. Sterling Tech. Sols., LLC*, No. 6:10-cv-630-ORL-28, 2012 WL 2680798, at *5 (M.D. Fla. June 12, 2012), *report and recommendation adopted,* 2680548 (M.D. Fla. July 6, 2012) (holding because plaintiff did not make a demand for liquidated damages in the complaint, an award of liquidated damages was not warranted on default judgment).

2. Count XVIII (Conversion)

In Count XVIII, Plaintiff seeks $6,400 in damages for Leduc's conversion of her property. (Dkt. 10 ¶¶ 233–35); (Dkt. 48 at 11.). Traditionally, the measure of damages in an action for conversion is the property's market value at the time of the conversion.

Taylor Rental Corp. v. J.I. Case Co., 749 F.2d 1526, 1530 (11th Cir. 1985). As alleged in her Amended Complaint, Leduc's actions caused the following damages for which Plaintiff seeks redress:

- Central vacuum: $1,000
- Nail gun: $250
- 75-100 DVD and Blu-Ray movies: $350
- Ladder: $150
- Clothing and shoes: $500
- Drill bit kit and car charger: $300
- Cash: $1,500
- Bose mouse damage: $200
- Garage fan damage: $150
- Television damage: $2,000

(Dkt. 10 ¶ 233.)

Upon consideration of the evidence presented by Plaintiff in support of her requested damages, the court finds that Plaintiff has sufficiently established the value of the above-listed tangible items at the time they were taken or damaged. *See* (Dkt. 48-3.) However, the court finds that Plaintiff has failed to establish sufficient facts to support her claim for conversion of cash totaling $1,500. Although tangible property is typically the only property that could be converted, money can also be the subject of conversion if it is "capable of identification." *Belford Trucking Co. v. Zagar*, 243 So.

2d 646, 648 (Fla. 4th DCA 1970) ("Money is capable of identification where it is delivered at one time, by one act and in one mass, or where the deposit is special and the identical money is to be kept for the party making the deposit, or where wrongful possession of such property is obtained."). To sufficiently establish a claim for monetary conversion, "a plaintiff must demonstrate, by a preponderance of the evidence: (1) specific and identifiable money; (2) possession or an immediate right to possess that money; (3) an unauthorized act which deprives plaintiff of that money; and (4) a demand for return of the money and a refusal to do so." *United States v. Bailey*, 288 F. Supp. 2d 1261, 1264 (M.D. Fla. 2003), *aff'd,* 419 F.3d 1208 (11th Cir. 2005). "Florida courts have long held that when money is the subject of claims for conversion or civil theft, there must be an obligation to keep intact or deliver the specific money in question, so that the money can be identified." *Opus Grp., LLC v. Int'l Gourmet Corp.*, No. 1:11-cv-23803-UU, 2013 WL 12383483, at *5 (S.D. Fla. Mar. 12, 2013).

While Plaintiff has sufficiently established facts to identify the tangible personal property in her Amended Complaint and in her testimony, Plaintiff has failed to sufficiently identify the money allegedly taken by Leduc and therefore has not established damages for conversion with regard to the $1,500 in cash money. *See, e.g.*, *Al-Babtain v. Banoub*, No. 8:06-cv-1973-T-TGW, 2010 WL 767046, at *9 (M.D. Fla. Mar. 5, 2010) (holding there was not a sufficient evidentiary basis to find a defendant liable for conversion when funds wired in two separate transactions to the defendant's

bank account were not specific and identifiable, or kept intact), *aff'd,* 410 F. App'x 179 (11th Cir. 2010); *Taubenfeld v. Lasko*, 324 So. 3d 529, 543 (Fla. 4th DCA 2021) (finding the complaint sufficiently stated a claim for ownership of tangible personal property for five tractor-trailers and their contents, and failed to state a claim for "the conversion of cash" because the complaint failed to allege any specific money capable of identification). Accordingly, the undersigned recommends that plaintiff be awarded $4,900 in actual damages as to Count XVIII, and Plaintiff's request for $1,500 in monetary damages for the loss of cash be denied.

3. Punitive Damages

In her Amended Complaint, Plaintiff seeks $100,000 in punitive damages against Defendants in Counts X, XI, and XVI. (Dkt. 10 ¶¶ 225, 48.) Punitive damages are appropriate when the defendant's conduct is "fraudulent, malicious, deliberatively violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others." *AMG Trade & Distribution, LLC v. Nissan N. Am., Inc.*, 813 F. App'x 403, 409 (11th Cir. 2020) (citing *W.R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 503 (Fla. 1994)). "[N]o claim for punitive damages shall be permitted [in any civil action] unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages." *Bulk Express Transport Inc. v. Diaz*, 343 So. 3d 646 (Fla. 3d DCA 2022). Punitive damages are appropriate in an action for trespass when the act is committed "in a rude, aggravating, or insulting manner." *Smith v. Wade*, 461 U.S. 30, 79, 103 S.

Ct. 1625, 1654, 75 L. Ed. 2d 632 (1983) (citing *Roberts v. Heim*, 27 Ala. 678, 683 (1855)). However, "[p]unitive damages are not a certain or ascertainable sum, and cannot be entered without a hearing." *Jenkins v. Clerk of Ct., U.S. Dist. Ct., S. Dist. of Fla.*, 150 F. App'x 988, 989–90 (11th Cir. 2005).

According to Plaintiff's Amended Complaint and hearing testimony, Leduc told Perera that he lived in Plaintiff's home, despite having never lived at the residence. (Dkt. 10 ¶ 22.) Thereafter, Leduc demanded to be let into the residence and began to rummage through Plaintiff's belongings over Plaintiff's vehement, tearful objections. (*Id.* ¶ 28–31.) Perera and Leduc briefly stepped outside of the residence, but Leduc repeatedly attempted to force his way inside. (*Id.* ¶ 38.) As Plaintiff tried to close the door, Leduc aggressively stood in the doorframe, preventing its closure. (*Id.* ¶ 40.) Brizendine arrived and instructed Leduc to retrieve a drill to open the front door, causing Plaintiff to open the door to prevent significant damage. (*Id.* ¶ 54–58.) According to Plaintiff, Leduc, Perera, and Brizendine then forced their way inside, and detained Plaintiff against her will. (*Id.* ¶ 73.) Leduc continued removing Plaintiff's items as Brizendine placed his hand on his firearm in a threatening manner, causing Plaintiff distress. (*Id.* ¶ 68–83.) Leduc removed additional belongings, leaving Plaintiff alone with Perera and Brizendine who restricted her to her dining room area. (*Id.* ¶ 87.) Thereafter, Brizendine knocked Plaintiff's right leg from beneath her, pushed her to the ground, and placed both knees on her right shoulder, applying all of his bodyweight onto her back. (*Id.* ¶ 97.) Perera placed one foot on Plaintiff's lower spine.

(*Id.* ¶ 98.) As a result, Plaintiff's forehead, shoulders, neck, spine, back, chest, right hip, arm, and head were injured and she believes she lost consciousness. (*Id.* ¶ 99–104.) During the evidentiary hearing in this matter, Plaintiff appeared elderly, weak, tearful, and emotionally affected by the incident. She appeared credible.

In light of Defendant Leduc's alleged actions, default, and Plaintiff's testimony, the undersigned recommends awarding $5,000 in punitive damages to Plaintiff. *See, e.g.*, *Murphy v. Rich*, 95 FJVR 11-25, 1995 WL 730867 (Fla. Cir. Ct. Sep. 27, 1995) (awarding a verdict of $5,000 in punitive damages for claims arising from trespass, assault, battery, and defamation); *Rosario R. Castro v. Timothy E. Trimble*, No. 06-CA-002912, 2011 WL 1250263 (Fla. Cir. Ct. Feb. 23, 2011) (awarding $5,000 in punitive damages for civil trespass claim); *Boca Woods Country Club Ass'n v. Denahan*, No. 50-2013-CA-014152, 2017 WL 11567290 (Fla. Cir. Ct. Oct. 30, 2017) (awarding $2,000 in punitive damages for civil trespass).

E. Attorneys' Fees and Costs

Plaintiff also seeks an award of attorneys' fees in the amount of $25,575 in Count XVII for civil theft pursuant to section 772.11 of the Florida Statutes. (Dkt. 48 at 14.) However, as discussed above, Plaintiff has failed to state a claim for civil theft against Leduc. Accordingly, the court recommends that Plaintiff is not entitled to an award of attorneys' fees against Leduc.

Plaintiff also seeks $531.40 in taxable costs, which includes a filing fee, service of process charges, and costs for a public records request. (Dkt. 48 at 14; Dkt. 48-4 at

3.) Federal Rule of Civil Procedure 54(d)(1) states that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorneys' fees—should be allowed to the prevailing party . . . . The clerk may tax costs on 14 days' notice." Fed. R. Civ. P. 54(d)(1). Taxable costs under Rule 54 are enumerated in 28 U.S.C. § 1920 and include fees of the clerk and marshal and fees for the costs of making copies of any materials where the copies are necessarily obtained for use in the case. 28 U.S.C. § 1920. However, "[w]hile Section 1920 allows for the taxation of costs, the Clerk must initially tax costs." *Lowe v. STME, LLC*, No. 8:18-cv-2667-T-33SPF, 2019 WL 2717197, at *3 (M.D. Fla. June 28, 2019) (citing Fed. R. Civ. P. 54(d)(1)). Section 1920 further provides that "[a] bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree." 28 U.S.C. § 1920. Plaintiff has not filed a bill of costs for consideration by the Clerk. "Therefore, the proper procedure is for [Plaintiff] to file a verified bill of costs with the Clerk. If the Clerk taxes costs upon the filing of that bill of costs, [Defendant] may object and seek judicial review within [seven] days." *Lowe*, 2019 WL 2717197, at *3; *see also Neurocare Inst. of Cent. Fla., P.A. v. US Cap. Access, Inc.*, No. 6:13-cv-1233-Orl-31DAB, 2014 WL 12873038, at *5 (M.D. Fla. May 14, 2014), *report and recommendation adopted*, 2014 WL 12873040 (M.D. Fla. May 30, 2014) (denying request to tax costs without prejudice to party's filing of bill of costs with clerk). The undersigned therefore recommends that Plaintiff's request for costs be denied without prejudice subject to Plaintiff's filing of a verified bill of costs and sufficient supporting documentation with the Clerk.

Accordingly, it is **RECOMMENDED** that:

1. Plaintiff's Motion for Default Judgment (Dkt. 48) be **GRANTED in part** and **DENIED in part.**
2. The Clerk be directed to enter judgment in favor of Plaintiff and against Defendant Leduc as to Count X in Plaintiff's Amended Complaint (Dkt. 10) and Plaintiff be awarded $5,000 in punitive damages as described herein.
3. The Clerk be directed to enter judgment in favor of Plaintiff and against Defendant Leduc as to Count XVIII in Plaintiff's Amended Complaint (Dkt. 10) and Plaintiff be awarded $4,900 in actual damages as described herein.
4. The court find Plaintiff is not entitled to reasonable attorneys' fees and that Plaintiff's request for costs be denied without prejudice subject to her filing of a verified bill of costs and sufficient supporting documentation with the Clerk.

IT IS SO REPORTED in Tampa, Florida, on February 29, 2024.

JULIE S. SNEED
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

A party has 14 days after being served with this Report and Recommendation to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right

to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Copies furnished to:
The Honorable Kathryn Kimball Mizelle
Counsel of Record
Unrepresented Parties:

David Leduc at 6734 Twelve Oaks Blvd., Tampa, FL 33634
Alarm Monitoring & Service Inc. at 6734 Twelve Oaks Blvd., Tampa, FL 33634