

Civil Action No. 4:18-cv-4543

United States Courts
Southern District of Texas
FILED

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David J. Bradley, Clerk of Court

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 4:18-cv-04543

Joanna Burke and John Burke

Plaintiffs,

vs.

Hopkins Law, PLLC, Mark Daniel
Hopkins and Shelley Luan Hopkins,

Defendants.

} PLAINTIFFS MOTION AND
} INCORPORATED MEMORANDUM TO
} INVITE THE VIEWS OF THE
} ATTORNEY GENERAL FOR THE
} STATE OF TEXAS

**PLAINTIFFS MOTION AND INCORPORATED MEMORANDUM TO
INVITE THE VIEWS OF THE ATTORNEY GENERAL
FOR THE STATE OF TEXAS**

Plaintiffs Joanna & John Burke (“Plaintiffs”) hereby move the Court to invite the Attorney General for the State of Texas to participate in the above styled civil action wherein the Burkes have; (1) Challenged the constitutionality of Texas Finance Code section 392 (“Section 392”), which has been questioned and (2) Section 392 is questioned as unconstitutional because of its vagueness in clarifying the terms “debt collector”, “third-party debt collector” and “debt collection”

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pursuant to foreclosure, surety bonds and attorneys involved in debt collection. (See *Biggers* and *Allen* cited herein).

Inviting the views of the Attorney General is consistent with the purpose of 28 U.S.C. § 2403, which requires district courts to notify the Attorney General of a constitutional challenge in any action in which the United States or any agency is not a party. The Burkes today served and sent the Court (as PACER/ECF filing has been denied) a Notice of Constitutional Challenge to Ken Paxton, Attorney General for the State of Texas, Dkt. No. to be assigned.

The Office of the Attorney General and the Supreme Court of Texas have never addressed the question, resulting in the unconstitutional illegal takings of homesteads under the order of foreclosure - by attorneys who are classified and operate as debt collectors, yet vehemently deny they are debt collectors per the statute(s).

It is time this vague, overbroad and unconstitutional statute is addressed, hence the Burkes have now submitted a Rule 5.1 challenge, and which the Burkes have just uncovered, as *pro se*, is the legal process to invite the Attorney General.

"But § 392.304(b) provides that "Subsection (a)(4) does not apply to a person servicing or collecting real property first lien mortgage loans or credit card debts." *Id.* (emphasis added). That the Texas Legislature exempted persons servicing or collecting real property first lien mortgage loans from § 392.304(a)(4), which only applies "in debt collection or obtaining information concerning a consumer," indicates that collecting real property first lien mortgage loans is a form of debt

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collection. And one way, of course, of collecting a real property first lien mortgage loan is through foreclosure. In fact, because under Texas law a notice of default and opportunity to cure must precede a foreclosure sale, see Tex. Prop. Code Ann. § 51.002(d) (West Supp. 2010), foreclosure actions inevitably involve a debt collection aspect. Therefore, it appears that the TDCPA applies to foreclosure actions.” - See *Biggers v. BAC Home Loans Servicing, LP*, 767 F. Supp. 2d 725 (N.D. Tex. 2011)

And:

“The TDCPA requires “[t]hird-party debt collectors” to obtain a \$10,000 “surety bond” from an authorized surety company and file a copy with the secretary of state prior to engaging in debt collection. Tex. Fin. Code Ann. § 392.001 (West 2006).” – See *Allen v. Dovenmuehle Mortg., Inc.*, Civil Action No. 3:13-CV-4710-L (N.D. Tex. Jul. 21, 2014)

The State, one of its agencies, or one of its officers or its employees in its official capacity is not a party to these proceedings. The failure by the State of Texas in addressing this constitutional challenge has resulted in horrific injury to the Burkes who are Senior Citizens of the State and interfered with their constitutional rights.¹ The Burkes meet the 5th Circuit’s requirements as opined in *Harmon v. Broussard*, CIVIL ACTION NO. 14-2874, at *14-15 (W.D. La. Nov. 17, 2014), as discussed herein. Their homestead is currently in a cloud, with a [wrongful] judgment of foreclosure entered by this court on instruction from the Court of Appeals for the Fifth Circuit (Case; 18-20026, 5th Cir. 2018), despite overwhelming

¹ A federal law claim under 42 U.S.C. § 1983 for violation of constitutional rights, for deprivation of property rights without due process. See *Zinerman v. Burch*, 494 U.S. 113 (1990) - Holding that when a plaintiff brings an action under § 1983 for procedural due process violations, he must show that the state deprived him of a constitutionally protected interest in life, liberty, or property without due process of law.

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evidence that the attorney in this matter is a debt collector, but fails to hold the required Surety Bond with the State of Texas (See *Allen*).

In conjunction with this motion, the Burkes refer to their first amended complaint in this case, Doc. 27, which questioned the constitutionality of the statute, as identified in the Burkes direct correspondence with the Office of the Attorney General (which remains unanswered to this day), along with the evidence confirming Hopkins fails to hold a Surety Bond. The Burkes have been instructed to submit a motion by Judge Bray (Doc. 50) and they will reiterate the unconstitutionality of the statute therein. In the alternative, on order of this Court, the Burkes will directly reply to any clarification or order as advised.

For further undisputable background, the Plaintiffs have previously requested repeatedly, and without response, a direct answer from the Office of the Attorney General in relation to Section 392 relative to Hopkins Law, PLLC failure to hold a Surety Bond [Section 392.101] as a debt collection law firm. In stark contrast, Barrett, Daffin, Frappin, Turner and Engel, LLP, does hold a Surety Bond in the State of Texas and, with whom, Hopkins Law, PLLC has a direct and dual working relationship as outlined throughout this civil action. As stated, the Plaintiffs did not receive any direct response to their communication(s).

This failure by the State of Texas, to answer the specific questions raised in these communications breaches the Plaintiffs constitutional rights to file a claim

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against Hopkins Law, PLLC by reliance on Section 392, 392.101 [Bond Requirement] and 392.102 [Claim against Bond]. It also affects Plaintiffs constitutional and consumer rights in these civil proceedings against Hopkins.²

Furthermore, the Burkes' asked for a 60-day extension, due, in part, to a pending response to question(s) before the Attorney General's Office which involves interpretation of legislative acts relevant to both Plaintiffs' cases. As this Court knows, the Texas Constitution and government legislation exercises final and binding authority over Texas Court(s).

See *Burke v. Hopkins*, Doc. 27, page 4, footnote – Judge Hittner denied this time.

⁷ The plaintiffs are not lawyers, but they wish to provide this court with as detailed an account of the injury and claims as possible and, with the good intention of aiding the court, have set out to reference the law as much as possible. In other words, this filing includes a *pro se* level of understanding of the law. If this court is in conflict, has any doubts or misunderstands any of the arguments, interpretations or references to the law herein, the Plaintiffs would respectfully ask the court to allow the Plaintiffs the opportunity to clarify any concerns via motion(s) or to be allowed to amend their pleadings so that due process and justice may be served.

⁸ See EXHIBIT # 2018-SOS-SURETYBOND – Proof Hopkins Law, PLLC does not hold a surety bond.

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See *Burke v. Hopkins*, Doc. 27, page 7, footnote.

Per the Burkes review, this court has previously stated in *Biggers v. BAC Home Loans Servicing, LP*, 767 F. Supp. 2d 725 (N.D. Tex. 2011), the Texas Supreme Court has not yet addressed whether the act of foreclosure is a "debt collection" ... "however, foreclosure is considered a debt collection in Texas Law".


² Under 1983, any person who, under color of state law, deprives another of "any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997) (citing 42 U.S.C. § 1983).

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Under these circumstances, inviting the Attorney General for the State of Texas to participate ensures “a proper presentation of the facts and law relating to the question of constitutionality.” 28 U.S.C. § 2403.

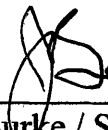
RESPECTFULLY submitted this 17th day of September, 2019.

I declare under penalty of perjury that the foregoing and following is true and correct. (28 U.S.C. § 1746 - U.S. Code.)



Joanna Burke / State of Texas
Pro Se

I declare under penalty of perjury that the foregoing and following is true and correct. (28 U.S.C. § 1746 - U.S. Code.)



John Burke / State of Texas
Pro Se

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CERTIFICATE OF CONFERENCE

We, Joanna Burke and John Burke hereby certify that we have not conferenced with Mark Daniel Hopkins, Shelley Luan Hopkins of Hopkins Law, PLLC, as they have previously refused to discuss the case or provide adequate time to reply to procedural matters in this court as evidenced on the record. Hopkins has also stated on the record he/she/they prefer to answer written communications from the *pro se* Burkes'. Also, in all other recent requests, Hopkins has indicated they are OPPOSED. In light of this, the Burkes will assume Hopkins is OPPOSED to this Motion and Incorporated Memorandum.

CERTIFICATE OF SERVICE

We, Joanna Burke and John Burke hereby certify that on September 17, 2019, we posted the attached document via USPS Priority Mail to the US District Court;

Clerk of Court
United States District Court
515 Rusk St
Courtroom 703, 7th Floor
Houston TX 77002

And also served copies to the following parties, by USPS Mail:

Mr. Mark Hopkins,
Mrs. Shelley Hopkins
& Hopkins Law PLLC
Hopkins Law PLLC
3809 Juniper Trce, Suite 101
Austin, TX 78738