

I. SUMMARY

1. The Burkes' Response fails to articulate any basis in law or fact as to how their Complaint against Defendant has merit and should not be dismissed, with prejudice. Instead, the Burkes' Response does nothing other than re-hash the Burkes' grievances with the judiciary and their far-fetched idea that somehow the prior judgments are void due to alleged actions of the Fifth Circuit Clerks. The Burkes even plainly admit that their lawsuit is not directed at any defendant, but instead is aimed at overturning a valid judgment due to actions of the "judicial machinery." *See* Burkes' Response at Page 24 [Doc. 32].

2. The Burkes' Response details the Burkes' complete misunderstanding of the law. Defendant's Motion for Judgment on the Pleadings sets out clearly that the Burkes' lawsuit fails, as a matter of law, as it is an impermissible collateral attack on valid judgments and to the extent the suit seeks other relief, such relief is barred by res judicata. Plaintiffs' suit is ripe for dismissal with prejudice under Fed. R. Civ. P. 12(c).

II. ARGUMENT AND AUTHORITIES

A. Burkes Admit That Their Lawsuit is Not Aimed at Defendants

3. Though the Burkes' rambling response addresses a multitude of items not relevant to this lawsuit or Defendant's Motion, the Burkes do provide this Court with clarity – the Burkes have no claims as to PHH. In their Response, the Burkes admit repeatedly that their complaint is with the judiciary and the alleged actions or inactions of the Clerks of the Fifth Circuit – none of whom are parties in this lawsuit. *See* Burkes' Response [Doc. 32] at Pages 4-5, 7, 10, 12, and 24.

4. The Burkes clearly admit that their intention with the suit is to overturn prior judgments and to right the wrongs they believe transpired at the Fifth Circuit in the prior lawsuits.

The Burkes state that their complaint “sufficiently pleads conspiracy and fraud by the Fifth Circuit.” *See* Burkes’ Response at Page 12. The Burkes seek redress from the alleged wrongdoings at the Fifth Circuit by seeking to set aside prior valid judgments as void. The Burkes’ Response fails to explain how the Clerks’ alleged actions on a Fifth Circuit motion equate to void judgments and liability or damages against PHH. Based on the Burkes’ admission that this lawsuit is not directed at PHH, the suit must be dismissed as to PHH with prejudice.

B. Rule 12(c) Motion Addressed All Claims

5. The Burkes incorrectly assert that PHH’s Motion is premature and must fail because PHH did not dispute all of the Burkes’ allegations in PHH’s Answer. This is incorrect. PHH’s Motion encompasses all claims made by the Burkes as to PHH (inclusive of Ocwen). The Burkes’ complaints about the “judicial machinery” and the perceived injustice they suffered at the hands of the Court are not complaints or actions over which PHH had control and/or that the Burkes’ seek redress from PHH. While PHH fully supports the action of the courts in the past litigation, PHH cannot be held civilly liable for the actions of the Court.

C. Impermissible Collateral Attack

6. As detailed in PHH’s Motion, the Burkes’ lawsuit is, on its face, improper. The Burkes admit throughout their Response that the sole purpose in filing and maintaining this lawsuit is to overturn the prior judgments. *See generally* Plaintiffs’ Response. Yet, the Burkes offer no cognizable reason within the law as to why the judgments, affirmed on appeal, are void, outside of a far-fetched scenario in which the Fifth Circuit Clerks conspired to deceive the Burkes. The Burkes even admit that they were unable to locate any case law supporting their allegations. *See* Burkes’ Response at Page 5. The Burkes surmise, incorrectly, that since there is no case law to support this scenario then the judgments must be void. *Id.*

7. The prior judgments dismissing Plaintiffs' lawsuits are not void and are not subject to collateral attack. The Court had jurisdiction over the parties and the subject matter of the Second Lawsuit (*Burke v. Ocwen*)² and the Third Lawsuit (*Burke v. Hopkins*)³ and both cases were properly affirmed on appeal.⁴ See *Litton v. Waters*, Tex. Civ. App., 161 S.W.2d 1095 (1942); *Bass v. Hoagland*, 172 F.2d 205, 208 (5th Cir. 1949).

D. Res Judicata Applies to Bar Claims as to PHH.

8. This is the Burkes' third lawsuit as to PHH (formerly Ocwen and/ or its privies) and all elements of res judicata are present. To the extent that any claims may be asserted in the Amended Complaint not now disclaimed by the Burkes' Response,⁵ they are barred by res judicata.

9. Elements required for res judicata include: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005). In reviewing the elements of res judicata herein, the Court may consider documents attached or incorporated in the complaint and matters of which judicial notice can be taken. *United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 379 (5th Cir.2003).

10. When all of the elements of res judicata are present and apparent on the face of the pleadings, dismissal is appropriate. Such is the case with the Burkes' lawsuit and therefore dismissal is required. All elements of res judicata are met as detailed in PHH's Motion and all claims asserted by the Burkes therefore are barred.⁶

² Cause No. 4:18-cv-4544 in the U.S. District Court for the Southern District of Houston.

³ Cause No. 4:18-cv-4543 in the U.S. District Court for the Southern District of Houston.

⁴ *Burke v. Ocwen*, 855 Fed. Appx. 180 (5th Cir. Mar. 30, 2021).

⁵ See Burkes' Response [Doc. 32] at Pages 4-5, 7, 10, 12, and 24

⁶ See generally *Marsh v. U.S. Bank, N.A. as Trustee to LaSalle Bank National Association*, 2021 WL 3115978 (W.D. Tex. July 20, 2021)(dismissing Plaintiffs' third suit contesting foreclosure as barred by res judicata); *U.S. Bank, N.A. v. Lamell*, 2021 WL 954848 (S.D. Tex. Jan. 18, 2021)(finding res judicata barred borrowers claims in second lawsuit

**III.
PRAYER**

Pursuant to the reasons set out herein, Defendant PHH prays that the Court grant PHH's Motion for Judgment on the Pleadings, dismiss Plaintiffs' Amended Complaint against it with prejudice, and for any further relief, at law or in equity, to which PHH may show itself justly entitled.

Respectfully Submitted,

HOPKINS LAW, PLLC

By: /s/ Mark D. Hopkins
Mark D. Hopkins, *Attorney in Charge*
State Bar No. 00793975
SD ID No. 20322
Shelley L. Hopkins
State Bar No. 24036497
SD ID No. 926469
3 Lakeway Centre Ct., Suite 110
Austin, Texas 78734
(512) 600-4320
mark@hopkinslawtexas.com
shelley@hopkinslawtexas.com

ATTORNEYS FOR DEFENDANT

to prevent foreclosure); *Sissom v. Countrywide Home Loans, Inc.*, 833 Fed. Appx. 405 (5th Cir. 2021)(affirming dismissal of borrower suit based upon res judicata).

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and will send a true and correct copy to the following:

VIA CM/RRR # 7021 1970 0000 4526 6590

AND VIA REGULAR MAIL:

John Burke
46 Kingwood Greens Drive
Kingwood, Texas 77339
PRO SE PLAINTIFF

VIA CM/RRR # 7021 1970 0000 4526 6606

AND VIA REGULAR MAIL:

Joanna Burke
46 Kingwood Greens Drive
Kingwood, Texas 77339
PRO SE PLAINTIFF

/s/ Mark D. Hopkins

Mark D. Hopkins