

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

FILED

FEB 22 2006

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY           
DEPUTY CLERK

MARIA MUNOZ, Along with  
All Others Similarly Situated,  
Plaintiffs

v.

EDWARD T. BURKE &  
ASSOCIATES, P.C.,  
Defendant

SA-05-CA-223-RF

ORDER GRANTING PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT

Before the Court are (1) *Class Representative's Motion for Partial Summary Judgment on Liability ("Plaintiffs' Motion")* (Docket No. 23); (2) *Defendant's Response to Plaintiff's Partial Motion for Summary Judgment ("Defendant's Response")* (Docket No. 28); and (3) *Class Representative's (1) Motion to Dismiss Counterclaim, (2) Response to Defendant's Motion for Summary Judgment, and (3) Reply to Defendant's Response to Plaintiff's Partial Motion for Summary Judgment* (Docket No. 30). Motion GRANTED.

INTRODUCTION

This is a Fair Debt Collection Practices Act (FDCPA) case with no facts concerning liability in dispute. Defendant Edward T. Burke & Associates, P.C. is a debt collector who

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collects consumer debt for purposes of the FDCPA.<sup>1</sup> He sent Plaintiffs Maria Munoz and the class certified here<sup>2</sup> the following letter:<sup>3</sup>

Greetings: We have reason to believe that you are the record owner of real property. We will be contacting the tax assessor in your area to verify this information and obtain a legal description and valuation of this property. If we determine there is sufficient equity in this property to satisfy your debt to our client, we may recommend further action be taken against you in accordance with all applicable state and federal laws. At this time, I have not determined whether further action is appropriate in this matter. If you desire to honor this debt, you must contact this office at 1-800-460-0259. Sincerely, Edward T. Burke Attorney at Law.<sup>4</sup>

Plaintiffs now move for summary judgment as to whether Defendant is liable under the FDCPA for sending this letter. Plaintiffs reserve discussion of all other questions for later.

Given that all the facts concerning liability are undisputed and amply supported by the

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<sup>1</sup> The parties agree to this fact. See *Plaintiff's Second Amended Original Complaint 2* (Docket No. 5) ("Plaintiff alleges that Burke is a 'debt collector' collecting from Texans 'consumer debts' as those terms are defined by the Federal Fair Debt Collection Practices Act . . ."); *Defendant Edward T. Burke & Associates, P.C.'s Original Answer 1* (Docket No. 6) ("Defendant admits it is a 'debt collector' who collects 'consumer debts' as those terms are defined by the Fair Debt Collection Practices Act . . .").

<sup>2</sup> This Court certified this class on October 14, 2005. See *Order Granting Class Certification* (Docket No. 21).

<sup>3</sup> The parties agree to this fact. See *Plaintiff's Second Amended Original Complaint 2* (Docket No. 5) ("Burke sent to Plaintiff . . . the letter attached as Exhibit 1."); *Defendant Edward T. Burke & Associates, P.C.'s Original Answer 1* (Docket No. 6) ("Defendant admits it sent the letter referenced as 'Exhibit 1' in Plaintiff's pleading.").

<sup>4</sup> "Plaintiff's Exhibit 1," attached to *Plaintiffs' Motion* (Docket No. 23); "Exhibit B," attached to *Defendant's Response* (Docket No. 28). Thus, the parties agree to the text of this letter.

record, this issue is appropriate for summary judgment.<sup>5</sup> The only question that needs to be resolved is this: Did Defendant violate the FDCPA by sending this letter to Plaintiffs?

## REASONING

Defendant did violate the FDCPA by sending this letter to Plaintiffs. Defendant made a misleading representation in violation of Section 807 of the FDCPA, and it employed unfair methods in violation of Section 808 of the FDCPA.

### **I. Section 807 Violation: Defendant Made a Misleading Representation.**

Section 807 of the FDCPA states, “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.”<sup>6</sup> Defendant violated this provision by sending the letter to Plaintiffs. The letter (as it would be understood by a typical, unsophisticated consumer<sup>7</sup>) represents that Defendant can seize Plaintiffs’ homesteads in satisfaction of their debts. Yet in fact, it cannot do so under Texas

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<sup>5</sup> See *Templet v. HydroChem Inc.*, 367 F.3d 473, 480 (5th Cir. 2004) (“Summary judgment is appropriate where the underlying facts are undisputed, and the record reveals no evidence from which reasonable persons might draw conflicting inferences about the facts.”).

<sup>6</sup> 15 U.S.C. § 1692e (2006).

<sup>7</sup> *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488 (5th Cir. 2004) (“We must evaluate any potential deception in the letter under an unsophisticated or least sophisticated consumer standard. That is, in determining whether the defendant’s actions are deceptive under the FDCPA we must assume that the plaintiff-debtor is neither shrewd nor experienced in dealing with creditors. This standard serves the purpose of protecting all consumers, including the inexperienced, the untrained and the credulous, from deceptive debt collection practices. At the same time we do not consider the debtor as tied to the very last rung on the intelligence or sophistication ladder.”) (internal quotation marks, citations, and modifications omitted).

law.

**A. Defendant's Letter Represents that Defendant Can Seize Plaintiffs' Homesteads in Satisfaction of Their Debts.**

Defendant's letter represents that Defendant can seize Plaintiffs' homesteads in satisfaction of their debts. It starts, "We have reason to believe that you are the record owner of real property." To the typical, unsophisticated consumer who owns a homestead but little other real property, this means, "We are onto you; you may claim not to have cash, but we know that you have a home that is worth some money." After all, a debt collector's entire mission is to collect the consumer's debt. When a debt collector refers to anything of value held by the consumer, therefore, one naturally assumes that the debt collector intends to take it in satisfaction of the debt.

The letter then states, "We will be contacting the tax assessor in your area to verify this information and obtain a legal description and valuation of this property." To the ordinary consumer, this means, "We are going to determine how much your home is worth, and we are going to start getting the formal paperwork together." The natural assumption is that the debt collector wants to know how much he is going to collect through the seizure of the home, and he is getting things ready for legal action.

The letter continues: "If we determine there is sufficient equity in this property to satisfy your debt to our client, we may recommend further action be taken against you in

accordance with all applicable state and federal laws.” This means, “If your home is worth anything, then we are going to take vigorous action to seize it towards payment of the debt.” Here, the letter specifically ties the worth of the property to the payment of the debt. No normal person would doubt at this point that the debt collector planned to seize the home as payment of the debt. Nor would any normal person doubt that the second half of the sentence constituted a serious threat; “further action taken against you” sounds intensely unpleasant, and “in accordance with all applicable state and federal laws” sounds like a lawsuit in which the debt collector throws the book at the consumer.

The letter then says, “At this time, I have not determined whether further action is appropriate in this matter,” which to an ordinary, unsophisticated consumer means, “You still have time – until I get the required papers together – to remedy the situation.” This sentence must be read bearing in mind that the consumer by now is convinced that the debt collector will, given the opportunity, seize the homestead and more. Given this clear intention, along with the debt collector’s previous statement that he is still getting the formal paperwork in order, the debt collector’s expression of hesitation here can only be understood to be based on a lack, as yet, of all the required paperwork.

Indeed, this interpretation is consistent with the next, and final, sentence in the letter: “If you desire to honor this debt, you must contact this office at 1-800-460-0259.” The message is that legal action is on its way pending the gathering of the required papers, but time still remains to rectify the situation, so the consumer should go ahead and take that step

by calling the number listed.

In short, Defendant's letter (as it would be understood by a typical, unsophisticated consumer) threatens to seize Plaintiffs' homesteads.<sup>8</sup> In doing so, it implies in turn that

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<sup>8</sup> Defendant contests this conclusion, offering instead the following argument: The letter only speaks of Plaintiffs' "real property," which is a general term not to be automatically equated with their homesteads. And it states that Defendant still has to "verify" whether Plaintiffs even own real property at all, which indicates that Defendant is some distance from concluding that Plaintiffs own homesteads. Defendant's statement that it "may recommend" further action is far from a definite threat, and Defendant's stating that it would proceed "in accordance with all applicable state and federal laws" implies that it would not do anything illegal – including foreclosing Plaintiffs' homesteads. Therefore, "nowhere in the letter to Plaintiff is it stated, or implied, that Defendant might attempt to seize, repossess and/or sell Plaintiff's homestead." *Defendant's Response* at 3-4.

Defendant's argument fails. No normal person, sophisticated or unsophisticated, would construe the letter with such a precise eye to making Defendant's threat appear as narrow as possible. Normal people – and in particular, normal people untutored in the law – would instead construe the text *reasonably*, weighing the probable meanings of the words in a balanced way so as to predict what the sender *probably* means. And such a reading goes squarely against the Defendant here.

With respect to Defendant's "real property" argument, for example: Most people in the world, if they are lucky, own a homestead. Most, however, do not own additional real property. And very few people in serious credit card debt do. One does not assume, then, that when Defendant speaks of "real property," it refers not to the debtor's homestead, but only to his lodge up in Aspen, Colorado. Being realistic, a person's real property does usually equate to his homestead, and that is exactly how an unsophisticated consumer would understand the term.

Even setting this aside, Defendant's use of the term "real property" gets him into trouble. "Real property" is not *equivalent* to the term "homestead," but it certainly *encompasses* it. When Defendant indicates awareness of Plaintiffs' "real property," then, it includes Plaintiffs' homesteads. And when Defendant then says that he will seek a valuation of "*this* property," that includes the homestead. The only sensible construction of "real property" thus at the very least includes, if not exclusively refers, to the homestead.

Turning to Defendant's "verify" argument: Defendant misunderstands the nature of a threat. First of all, a threat predicated on the occurrence of another event is still a threat – especially when the party receiving the threat knows that the event will occur. Thus, Defendant's stating that it will seize the homesteads *if* it turns out that Plaintiffs own them is no less a threat on account of the word "if." Particularly given that Plaintiffs know for sure that they own homesteads, it is a threat that is alive and well.

The same goes for Defendant's "may recommend" argument: A threat is no less a threat just because it fails to convey with 100% certainty that an unhappy action is going to be taken. If someone says, "I am going to flip a coin, and if it comes down heads, then I will hurt you," this is a threat, even though there is only a 50% chance that the unhappy action will be taken. A statement is a threat so long as it conveys an increased probability than before of an unhappy action's occurrence. Here, the letter stated that Defendant, instead of *not* recommending further action, *may* recommend further action. This is a threat.

Defendant *could* seize Plaintiffs' homesteads if it wanted to.

**B. Defendant Cannot Seize Plaintiffs' Homesteads Under Texas Law, However.**

Texas law makes clear, however, that Defendant cannot seize Plaintiffs' homesteads in satisfaction of their debt. Article XVI, Section 50(a) of the Texas Constitution lists the *limited* contexts in which a creditor may foreclose a homestead in satisfaction of a debt.<sup>9</sup> Being owed credit card debt is not on the list.<sup>10</sup>

**C. Therefore, Defendant Violated Section 807 by Sending the Letter to Plaintiffs.**

Defendant therefore violated Section 807 by sending the letter to Plaintiffs. A plain reading of Section 807 itself confirms this. As noted, Section 807 forbids making misleading representations, and here, Defendant's letter did misleadingly represent that Defendant could

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Finally, Defendant's "in accordance with law" argument fails. Read in context, this clause does not qualify the threat; it amplifies it. If Defendant had wanted the clause to qualify the threat, he should have separated the clause from the main sentence and inserted qualifying language: "we may recommend further action – in accordance, *of course*, with all applicable state and federal laws." Read all as one sentence, however, the clause indicates that Defendant plans to dig out every state and federal law it can find and use it against Plaintiffs.

Defendant's arguments fail.

<sup>9</sup> *Sloan v. Owners Ass'n of Westfield, Inc.*, 167 S.W.3d 401, 405 (Tex. App.–San Antonio 2005, no pet.) ("Foreclosure of a person's homestead may only be sought for certain types of debt specifically delineated in the constitution.").

<sup>10</sup> *Sloan*, 167 S.W.3d at 405 n.3 ("The Texas Constitution enumerates eight exceptions to homestead protection from forced sale, including: (1) purchase money security; (2) taxes due on the homestead; (3) certain owelty on partition; (4) refinancing of certain liens; (5) security for improvements; (6) certain extensions of credit in the nature of an equity loan; (7) reverse mortgages; and (8) special financing concerning manufactured homes.").

seize Plaintiffs' homesteads.

Even looking past the plain text of Section 807, however, Subsections 807(4), 807(5), and 807(10) specify certain actions that particularly constitute violations of Section 807. Subsection 807(4) prohibits "[t]he representation or implication that nonpayment of any debt will result in the . . . seizure, garnishment, attachment, or sale of any property . . . unless such action is lawful and the debt collector or creditor intends to take such action."<sup>11</sup> Subsection 807(5) prohibits "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken."<sup>12</sup> And Subsection 807(10) prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt . . . ."<sup>13</sup>

And Defendant's representing that it could seize Plaintiffs' homesteads towards repayment of their debts did all these things. It represented that nonpayment of the debts would result in the seizures of property – Plaintiffs' homesteads – even though such seizures would not be lawful. It threatened to take an action – foreclose on Plaintiffs' homesteads – that could not legally be taken. And it used a false representation – that it could foreclose Plaintiffs' homesteads – to attempt to collect Plaintiffs' debts.

Accordingly, Defendant's sending the letter violated Section 807 of the FDCPA.

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<sup>11</sup> 15 U.S.C. § 1692e(4) (2006).

<sup>12</sup> 15 U.S.C. § 1692e(5) (2006).

<sup>13</sup> 15 U.S.C. § 1692e(10) (2006).

## **II. Section 808 Violation: Defendant's Sending the Letter Was an Unfair Method.**

Indeed, Defendant's sending the letter also violated Section 808 of the FDCPA. Section 808 says, "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt."<sup>14</sup> Subsection 808(6) makes clear that a debt collector violates this provision if he "[t]ak[es] or threaten[s] to take any nonjudicial action to effect dispossession or disablement of property," where "(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement."<sup>15</sup> And here, Defendant threatened to nonjudicially dispossess Plaintiffs of their property – seize their homesteads – even while the property was exempt by law from such dispossession – the Texas Constitution protected the homesteads from such foreclosure.

Defendant therefore also violated Section 808 of the FDCPA.

### **CONCLUSION**

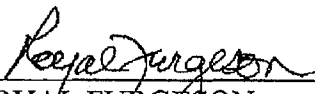
In summary, Defendant violated both Sections 807 and 808 of the FDCPA by sending the letter to Plaintiffs. Defendant is therefore liable under the FDCPA for these actions, and Plaintiffs' motion for summary judgment is GRANTED.

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<sup>14</sup> 15 U.S.C. § 1692f (2006).

<sup>15</sup> 15 U.S.C. § 1692(f)(6) (2006).

SIGNED this 22<sup>nd</sup> day of February, 2006.

  
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ROYAL FURGESON  
UNITED STATES DISTRICT JUDGE