

[Holton v. Exp. Realty, LLC](#)

United States District Court for the Middle District of Florida, Tampa Division

December 28, 2023, Decided; December 28, 2023, Filed

CASE NO. 8:23-cv-734-SDM-AEP

**Reporter**

2023 U.S. Dist. LEXIS 233394 \*; \_\_ F.Supp.3d \_\_

DAVID HOLTON, Plaintiff, v. eXp REALTY, LLC, Defendant.

**Counsel:** [\*1] For David Holton, individually and on behalf of all others similarly situated, Plaintiff: Manuel Santiago Hiraldo, LEAD ATTORNEY, Hiraldo PA, Ft. Lauderdale, FL; Avi Robert Kaufman, Kaufman P.A., Coral Gables, FL; Jibrael S. Hindi, The Law Offices of Jibrael S. Hindi, Fort Lauderdale, FL.

For EXP Realty LLC, Defendant: Sara F. Holladay, LEAD ATTORNEY, Emily Yandle Rottmann, McGuireWoods LLP, Jacksonville, FL; Kathleen Danielle Dackiewicz, McGuireWoods, FL.

For Jack Townsend, Mediator: Jack Light Townsend Sr., Law Office of Jack L. Townsend Sr PA, Tampa, FL.

**Judges:** STEVEN D. MERRYDAY, UNITED STATES DISTRICT JUDGE.

**Opinion by:** STEVEN D. MERRYDAY

**Opinion**

**ORDER**

The Florida legislature recently amended the Florida Telephone Solicitation Act (FTSA). The amendment, [Section 501.059\(10\)\(c\), Florida Statutes](#), requires that to state a claim under FTSA, as amended, a plaintiff must allege receiving at least one text message from an automated system within fifteen days after the plaintiff affirmatively replies "STOP" to an unsolicited message. Under

Section 2, Florida House Bill 761 (2023), enacted as Chapter 2023-150, Section 2, Florida Laws, the amended FTSA applies "to any suit filed on or after the effective date of this act and to any putative class action not certified on or before the effective date of this act." The effective date [\*2] of the amended FTSA is May 25, 2023.

Before May 25, 2023, David Holton, on behalf of himself and putative class members comprising "all persons within Florida who were sent more than one text message regarding Defendant's property, goods, and/or services using the same equipment or type of equipment utilized to call Plaintiff," sued eXp Realty, LLC, and alleged that eXp's text messages violated FTSA. eXp removed (Doc. 1) under the Class Action Fairness Act. eXp moves (Doc. 18) for judgment on the pleadings or to strike class allegations.

eXp argues that because Holton never alleged replying "STOP" and because Holton failed to certify his class action on or before May 25, 2023, the amended FTSA bars both Holton's individual claim and his class action. Holton responds (Doc. 20) that "retroactively" applying the amended FTSA unconstitutionally infringes his and each class member's vested rights. Also, Holton argues that the amended FTSA fails to apply to his uncertified class action because [Rule 23, Federal Rules of Civil Procedure](#), governs Holton's ability to represent a class. eXp replies (Doc. 35) that Holton enjoys no vested right to represent a class.

The amended FTSA applies "to any putative class action not certified on [\*3] or before the effective date of this act." In other words, the amended FTSA's application to a class is wholly prospective

and the amended FTSA applies only to a class certified after May 25, 2023. Holton's proposed class remains uncertified; the amended FTSA applies to Holton's proposed class. Holton fails to allege that he replied "STOP" to an unsolicited message. Holton fails to allege (and presumably cannot allege) that each member of his proposed class replied "STOP" to an unsolicited message. Holton's proposed class fails the pleading requirements under the amended FTSA. Therefore, the amended FTSA bars Holton's class action (absent "STOP" allegations) for the class and the class representative.

Holton possesses no vested and inviolable right to represent a class. [\*Bowen v. First Fam. Fin. Servs., Inc.\*, 233 F.3d 1331, 1337-38 \(11th Cir. 2000\)](#) (concluding that "[a]n intent to create such a 'blanket right,' a non-waivable right, to litigate by class action cannot be gleaned from the text and the legislative history of the TILA"). Similarly, the proposed class members hold no vested and inviolable right, free from lawfully imposed requirements, to coalesce and litigate as a class. Because Holton fails to plead the requirements necessary to pursue a class action [\*4] under the amended FTSA, the Class Action Fairness Act no longer supports subject matter jurisdiction. Under [\*28 U.S.C. § 1447\(c\)\*](#), a district court must remand a removed action if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction."

## CONCLUSION

eXp's motion (Doc. 18) to strike Holton's class allegations is **GRANTED**, and Holton's class allegations are **STRICKEN**. Because no class allegations remain, the Class Action Fairness Act no longer applies to support subject matter jurisdiction.\* This action is **REMANDED** to the

circuit court in Polk County, Florida. The clerk must close the case.

ORDERED in Tampa, Florida, on December 28, 2023.

/s/ Steven D. Merryday

STEVEN D. MERRYDAY

UNITED STATES DISTRICT JUDGE

---

End of Document

---

\* Because no subject matter jurisdiction exists, this order cannot — and does not — include any determination about Holton's individual claim or the individual claim of any class member. This order finds only (1) that the amended FTSA applies to preclude Holton's now

---

certifying a class without complying with the amended FTSA and (2) that — without class allegations — the Class Action Fairness Act is unavailable to support subject matter jurisdiction, a deficiency that requires immediate remand.