

PAUL JOHN CISAR, et al.

Plaintiffs,

v.

F.O. MITCHELL & BRO, *et al.*

Defendants.

* IN THE
* CIRCUIT COURT
* FOR
* HARFORD COUNTY
* CASE NO.: C-12-CV-22-000888

* * * * *

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant Frederick Ward Associates, Inc. (“FWA”), by and through its undersigned counsel, respectfully submits this Memorandum of Law in support of its Motion to Dismiss Plaintiffs’ Verified Complaint (“Complaint”). In support thereof, Defendant FWA states as follows:

INTRODUCTION

Plaintiffs’ Complaint improperly seeks an advisory opinion from this Honorable Court regarding the Harford County Zoning Code, injunctive relief, and finding of an anticipatory nuisance and nuisance *per se* regarding the proposed development in Harford County, Maryland. More specifically, “this action relates to the planned development and construction of a multi-building, 5.2 million square foot Freight Terminal on a collection of parcels in Harford County.” (“the Development”). Complaint ¶ 1. According to the Complaint, FWA is the engineer for the Development and, along with the other Defendants, has “begun development of the [the Development] by seeking approvals for the Freight Terminal...” by “...among other things, submit[ing] concept plans, Forest Stand Delineation Plans, Preliminary Plans, and presenting a traffic impact study.” Complaint, ¶ 32. The Development “is zoned ‘Light Industrial’ or ‘L1’ pursuant to the Harford County Zoning Code. Complaint, ¶ 40.

In addition, at the time of this filing, the development plans have not yet been approved, nor is there any certainty that they will be approved. As such, Plaintiffs have improperly sought relief from this Court as well as failed to plead any viable tort claim against FWA. For these reasons, Plaintiffs' Complaint should be dismissed with prejudice.

STANDARD OF REVIEW

Under Maryland Rule 2-322 (b)(2) a defendant is permitted to move to dismiss a complaint or counts in a complaint when that Complaint fails "to state a claim upon which relief can be granted." A motion to dismiss for failure to state a claim "...asserts that even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law." *Lubore v. RPM Assocs. Inc.*, 109 Md. App. 312, 322 (1996) (citing *Hrehorovich v. Harbor Hosp. Ct.*, 93 Md. App. 772, 784 (1992)).

In reviewing a motion to dismiss, a Circuit Court, "...examines only the sufficiency of the pleadings." *Lubore*, 109 Md. App. at 322. The court "accept[s] all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Lipitz v. Hurwitz*, 435 Md. 273, 293 (213) (citations omitted). To survive a motion to dismiss, the Plaintiff must allege facts with specificity, and the court need not consider wholly conclusory charges in the complaint that have no factual support or basis, and any ambiguity or uncertainty in the allegations must be construed against the pleader. See *Bobo v. State*, 346 Md. 706, 708-09 (1997).

ARGUMENT

I. No Justiciable Controversy is Present

Plaintiffs have failed to allege any justiciable controversy and have improperly requested that this Honorable Court provide an advisory opinion based upon proposed use of the Development. The Development has not yet been approved and as such, none of Plaintiffs' allegations rise to the level of an actual dispute. There are no facts that suggest that Harford County intends to approve the Development and therefore the allegations in Plaintiffs' Complaint are not ripe for adjudication.

Moreover, Plaintiffs have failed to exhaust their administrative remedies for any opposition to the Development and must do so before resorting to this litigation. Plaintiffs, as citizens, have opportunities to raise objections to the Development along the plan approval and review process and those individuals affected by any such approval have the right to appeal to the Circuit Court of Harford County. *See* Harford County Code §268-19(C), 268-28(A). The Code "provides an administrative remedy as the exclusive or primary means by which an aggrieved party may challenge a government action." *Priester v. Baltimore Cnty., Maryland*, 232 Md. App. 178, 193 (2017). Intervention at this stage is premature as there is no final administrative decision for this Court to even review. "To be 'final,' the order or decision must dispose of the case by deciding all question of law and fact and *leave nothing further for the administrative body to decide.*" *Willis v. Montgomery Cnty.*, 415 Md. 523, 535 (2010) (emphasis added). Harford County has not yet adopted or approved any plans and any plans that may be adopted could be different than the plans currently being considered. Plaintiffs must exhaust their administrative remedies before bringing suit in the Circuit Court.

Furthermore, FWA hereby adopts by reference herein Defendant F.O. Mitchell & Bros. and Harford County's Motions to Dismiss and their accompanying Memorandums.

II. Plaintiffs have Failed to State a Claim Upon Relief Can Be Granted

Plaintiffs merely allege that FWA, along with the other Defendants, have "begun development of the [the Development] by seeking approvals for the Freight Terminal..." by "...among other things, submit[ing] concept plans, Forest Stand Delineation Plans, Preliminary Plans, and presenting a traffic impact study." Complaint, ¶ 32. Plaintiffs further contend that FWA "...began constructing and installing utility features on and around [the Development] in anticipation of the Freight Terminal's construction." *Id.* at ¶ 32-33.

The work performed by FWA merely includes action necessary to engage in the statutory development process in Harford County. These actions cannot be found to "cause substantial and unreasonable injury and inference" with Plaintiffs' use and enjoyment of their property nor do they constitute an "invasion to Plaintiffs' interest in their private use and enjoyment of their land." Complaint, ¶ 71-75. Plaintiffs have failed to plead any facts sufficient to support a claim for private or public nuisances as FWA has simply engaged in engineering services for the lawful venture of seeking approvals for the proposed Development.

Moreover, Plaintiffs and FWA have no relationship, contractual or otherwise. Plaintiffs did not engage or retain FWA nor were any services provided by FWA to Plaintiffs. As such, Plaintiffs lack standing to bring suit against FWA. Therefore, Plaintiffs' have failed to state a claim upon which relief can be granted against FWA.

III. Count Four of the Complaint Fails to Allege a Case of Action

An injunction is a remedy, not a cause of action and cannot stand on its own. *Orteck Int'l Inc. v. Transpacific Tire Wheel, Inc.*, 704 F. Supp. 2d 499, 521 (D. Md. 2010), *aff'd sub nom.*

Orteck Int'l v. TransPacific Tire & Wheel, Inc., 457 F. App'x 256 (4th Cir. 2011). *See also Fare Deals Ltd. v. World Choice Travel.Com, Inc.*, 180 F. Supp. 2d 678, 682 n.1 (D. Md. 2001) (“request for injunctive relief does not constitute an independent cause of action” but “is merely the remedy sought for the legal wrongs alleged”). As such, Count Four of Plaintiffs’ Complaint must be dismissed.

FWA also hereby adopts by reference herein Defendant F.O. Mitchell & Bros. and Harford County’s Motions to Dismiss and their accompanying Memorandums.

IV. The Complaint Fails to Name a Required Party

Plaintiffs failed to join one of the owners of the property, Charles A. Maslin III, who is a necessary party. Any “person who has or claims any interest which would be affected by the declaration shall be made a party.” Md. Code Ann., Cts. & Jud. Proc. § 3-405(a). Similarly, Maryland Rule 2-211(a)(2) requires joinder of any person if “disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action.” Such failure warrants Plaintiffs’ claims to be dismissed.

FWA against adopts by reference herein Defendant F.O. Mitchell & Bros. and Harford County’s Motions to Dismiss and their accompanying Memorandums.

Conclusion

WHEREFORE, for the reasons stated above, Defendant Frederick Ward Associates, Inc., respectfully requests that this Court dismiss the Complaint against it with prejudice.

Respectfully submitted,

/s/

Andrew T. Stephenson, Esq., (0006210412)

Jessica D. Corace, Esq., (1012140158)

FRANKLIN & PROKOPIK, P.C.

Two North Charles Street, Suite 600

Baltimore, Maryland 21201

[t] (410) 752-8700

[f] (410) 752-6868

astephenson@fandpnet.com

jcorace@fandpnet.com

Counsel for Frederick Ward Associates, Inc.