

IN THE CIRCUIT COURT FOR HARFORD COUNTY, MARYLAND

PAUL JOHN CISAR, et al.

Plaintiffs,

v.

Case No.: C-12-CV-22-000888

F.O. MITCHELL & BRO, et al,

Defendants.

* * * * *

**PLAINTIFFS' MOTION TO STRIKE IMPROPER AND UNSUPPORTED
EXHIBITS TO AND ASSERTIONS IN DEFENDANT FREDERICK WARD'S
MOTION TO DISMISS VERIFIED AMENDED COMPLAINT.**

Plaintiffs, by and through their undersigned attorneys, move that this Court strike and not consider the documents attached to the motion to dismiss the verified amended complaint filed by Defendant Frederick Ward Associated (“FWA”), as well as the purported “facts” asserted by FWA in its motion to dismiss based on those documents. As explained more fully below, Maryland law is clear that this Court, when deciding a motion to dismiss a complaint, is to assume the truth of all well-pleaded factual allegations in the complaint in addition to any exhibits that are incorporated into the complaint. Despite this, FWA relies in its motion on several documents, attached to its memorandum of law as Exhibits A and B, and makes various “factual” assertions in that memorandum, including such asserted “facts” based on those documents.

FWA’s memorandum is plainly improper in the context of a motion to dismiss. To compound its impropriety, FWA merely attaches those documents without any attempt at authentication and asserts the purported “facts” that are outside the allegations of the

verified amended complaint with no attempt at showing their admissibility other than reference to those improper documents. Those documents and FWA's asserted "facts" outside the allegations of Plaintiffs' verified amended complaint should be stricken and should be disregarded by this Court in deciding FAW's motion to dismiss.

1. In response to Plaintiffs' verified amended complaint, FWA filed a motion to dismiss, with a memorandum of law to which were attached two Exhibits. Neither of these documents were exhibits to the verified amended complaint.

2. Throughout its memorandum of law, FWA also makes various statements of "fact" purportedly supported by Exhibits A and B, as well as additional supposed "facts" that are not supported by anything.

3. FWA's use of Exhibits A and B, and the purported "facts" contained in or derived from them, is blatantly improper in opposing a motion to dismiss. Maryland law could not any plainer that consideration of the pertinent "facts" on a motion to dismiss is limited generally to the four corners of the complaint and any exhibits incorporated into that complaint. *Converge Services Group, LLC v. Curran*, 383 Md. 462, 475, 860 A. 2d 871, 878-79 (2004). *See also, Lipsitz v. Horowitz*, 435 Md. 273, 293, 77 A. 3d 1088, 1099-1100 (2013) (reversing dismissal of complaint alleging that buyer who already owned several pieces of property in the development was nonetheless a member of the public who was entitled to statutorily-required disclosures). Indeed, FWA acknowledges that this is the rule at the beginning of its memorandum of law while then proceeding to ignore it.

4. This Court should strike and disregard those Exhibits, and any assertions in FWA's memorandum of law based on them. For the convenience of the Court, those assertions are highlighted on the copy of FWA's memorandum of law attached hereto as Exhibit 1.

5. That the documents in Exhibits A and B are not authenticated in any way compounds their impropriety. Even were FWA's use of these Exhibits appropriate in opposing a motion to dismiss, which they are not, "a document can be made part of a motion [or opposition to a motion] . . . only through affidavit, deposition, or answers to interrogatories that adequately lay the proper foundation for the documents admission into evidence." *Imbroguglio v. Great Atlantic & Pacific Tea Company*, 358 Md. 194, 203-04, 747 A. 2d 662 (2000); *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 195, 115 A. 3d 685, 707 (2015). *See also Jones v. Johns Hopkins Community Physicians*, 2009 WL 2774303 *8 (CSA 2019).

6. Similarly, even if it were proper for FWA to rely in its memorandum on "facts" that were not alleged in the verified amended complaint, which it is not, any such "facts" must be properly supported. Md. Rule 2-311(d) explicitly imposes that requirement: "A motion or response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." *Accord, Halliday v. Sturm, Ruger & Co., Inc.*, 138 Md. App. 136, 153, 770 A. 2d 1072, 1082 (2001). Accordingly, the "facts" and statements highlighted on the copy of FWA's memorandum of law that is Exhibit 1 hereto should be stricken and disregarded by this Court in deciding the motion to dismiss.

7. FWA's violation of the Rules and established Maryland case law should not be permitted. This Court should enter an order granting Plaintiffs' motion to strike Exhibit A B and the assertions highlighted on the attached Exhibit 1, and should disregard those documents and assertions in ruling on FWA's motion to dismiss the verified amended complaint.

/s/ Rignal W. Baldwin
Rignal W. Baldwin V, CPF No. 1212110046
Baldwin | Seraina, LLC
111 South Calvert Street, Suite 1805
Baltimore, Maryland 21202
Telephone (410) 385-5695
Facsimile (443) 703-7772
rbaldwinv@baldwin-seraina.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March 2023, a copy of the forgoing Motion to Strike, with proposed Order, was efiled with MDEC, which will provide electronic notice to all counsel of record.

/s/ Rignal W. Baldwin

EXHIBIT 1

**[HIGHLIGHTED COPY OF MEMORANDUM
SHOWING PORTIONS THAT SHOULD BE STRICKEN]**

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* CIRCUIT COURT
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* * * * *

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 Amended Complaint (“Amended Complaint”). In support thereof, Defendant FWA states as follows:

INTRODUCTION

Plaintiffs’ Amended Complaint still 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”). Amended Complaint ¶ 1. According to the Amended Complaint, FWA is the engineer for the Development and, along with the other Defendants, has “begun development of the [the Development] by seeking and in some instances receiving approvals for the Freight Terminal...” by “...among other things, submit[ing] concept plans, Forest Stand Delineation Plans, Forest Conservation Plans, Preliminary Plans, Stormwater Management Plans and presented multiple versions of a traffic impact study.” Amended Complaint, ¶ 34. The

Development “is zoned ‘Light Industrial’ or ‘L1’ pursuant to the Harford County Zoning Code. Amended Complaint, ¶ 42.

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’ Amended Complaint¹ 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).

¹ Defendant previously filed a Motion to Dismiss Plaintiff’s Complaint on or about January 12, 2023. Defendant incorporates the arguments in that Motion herein.

ARGUMENT

I. No Justiciable Controversy is Present

Plaintiffs have again 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' Amended 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.; Motion to Dismiss and 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 and in some instances receiving approvals for the Freight Terminal...” by “...among other things, submit[ing] concept plans, Forest Stand Delineation Plans, Forest Conservation Plans, Preliminary Plans, Site Plans, Stormwater Management Plans, and presented multiple versions of a traffic impact study.” Amended Complaint, ¶ 34. Plaintiffs further contend that FWA has “...undertaken significant work on and around [the Development] in relation to the construction and development of the Freight Terminal including constructing and installing utility features.” *Id.* at ¶ 35.

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. The only approval that the County has issued was for the Forest Stand Delineation and it was issued back on May 11, 2022. *See Exhibit A.* Harford County recently provided correspondence stating that there is a temporary moratorium on such warehouses and will not yet be processing any plans related to this Development. *See Exhibit B.* Finally, FWA is not a construction company. As such, Plaintiffs’ contention that FWA is “constructing and installing utility features” is completely unfounded and inaccurate.

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 Amended 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' Amended Complaint must be dismissed.

Furthermore, FWA hereby adopts by reference herein Defendant F.O. Mitchell & Bros.; Motion to Dismiss and accompanying Memorandums.

Conclusion

WHEREFORE, for the reasons stated above, Defendant Frederick Ward Associates, Inc., respectfully requests that this Court dismiss the Amended 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.

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**ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE EXHIBITS
AND IMPROPER ASSERTIONS BY DEFENDANT FREDERICK WARD.**

This Court, having considered the motion of Plaintiffs to strike the exhibits attached to Defendant Frederick Ward's memorandum in support of its motion to dismiss the amended complaint, to strike the factual assertions made in that memorandum that are outside the four corners of the amended complaint, and to disregard those documents and assertions in ruling on that motion to dismiss, it is, this day of _____, 2023.

ORDERED that the motion to strike is, hereby **GRANTED**, that all exhibits to Frederick Ward's memorandum of law are stricken, that the assertions highlighted on Exhibit 1 to Plaintiffs' motion to strike are stricken, and the exhibits and the stricken assertions will not be considered by this Court in ruling on the motion to dismiss.

Circuit Court Judge