

PAUL JOHN CISAR, et al.	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
F.O. MITCHELL & BRO, et al.	*	HARFORD COUNTY
Defendants.	*	
	*	Case No.: C-12-CV-22-000888
* * * * *		

**DEFENDANT F.O. MITCHELL & BRO.’S OPPOSITION TO
PLAINTIFF’S MOTION TO COMPEL AND FOR SANCTIONS AND
REQUEST FOR A HEARING**

F.O. Mitchell & Bro. (“Mitchell”), by and through their attorneys, Robert S. Lynch, Esquire, David S. Lynch, Esquire, and Stark and Keenan, P.A., oppose Plaintiff’s Motion to Compel and for Sanctions (“Motion to Compel”), stating the following:

FACTS

1. On June 7, 2022, Plaintiffs filed, in the Circuit Court for Anne Arundel County, a “Verified Complaint for Injunctive Relief and Declaratory Judgment and Private Action for Nuisance and Public Nuisance” (“Complaint”).

2. On July 15, 2022, Mitchell and Defendant Harford County, Maryland filed separate Motions to Dismiss Plaintiff’s Complaint. The Motions to Dismiss argued that the Complaint should be dismissed because there was a lack of

justiciable controversy, Plaintiffs failed to exhaust administrative remedies, and Plaintiffs failed to state a claim upon which relief could be granted.

3. On August 9, 2022, the Circuit Court for Anne Arundel County issued an Order directing that a hearing be scheduled on Defendants' Motions to Dismiss and Plaintiffs' responses thereto.

4. On September 16, 2022, the Circuit Court for Anne Arundel County issued an Order scheduling a motions hearing for December 19, 2022.

5. On October 17, 2022, one hundred thirty-two (132) days after Plaintiffs filed their Complaint and ninety-four (94) days after Mitchell and the County filed their motions to dismiss, Plaintiff 3P Protect Perryman Peninsula, Inc. propounded requests for production of documents and interrogatories on Mitchell. (Exhibits A-B to Motion to Compel).

6. On November 14, 2022, Mitchell served Plaintiff with "Defendant F.O. Mitchell & Bro.'s Responses to the First Request for Production of Documents to Plaintiff 3P Protect Perryman Peninsula" ("Mitchell's Response to Production") and "Defendant F.O. Mitchell & Bro.'s Answers to the First Set of Interrogatories to Plaintiff 3P Protect Perryman Peninsula" ("Mitchell's Answers"). (Exhibits C-D to Motion to Compel).

7. In Mitchell's Response to Production, Mitchell provided the following response to request no. 1, which response Mitchell incorporated throughout its Response:

F.O. Mitchell & Bro. objects to this Request because Plaintiff seeks to avail itself of discovery based on a lawsuit that is improperly before this Court. Indeed, Plaintiff's lawsuit seeks an advisory opinion regarding development plans (i.e. final plan approval) which have not yet been approved by Harford County. There is no justiciable controversy, and Plaintiff has failed to exhaust its administrative remedies, which, if aggrieved, would include filing a petition for judicial review in the Circuit Court for Harford County after the relevant development plan is approved. Harford County Subdivision Regulations, § 268-28(A). On judicial review, the Circuit Court for Harford County would review the administrative appeal on the record, which procedure explicitly prohibits discovery. Md. Rule 7-208; *Venter v. Bd. of Educ.*, 185 Md. App. 648, 349 (2009) (Rule authorizing the issuance of a scheduling order for civil actions filed in circuit court does not provide a right to discovery when the circuit court is reviewing the decision of an administrative agency). Furthermore, Plaintiffs have inappropriately pleaded an anticipatory private and public nuisance. Such claims are not recognized in Maryland. *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367 (1975).

(Exhibit C to Motion to Compel, pp. 2-3).

8. Similarly, in Mitchell's Answers, Mitchell provided the following answer to Interrogatory No. 1, which answer Mitchell incorporated throughout its Answers:

F.O. Mitchell & Bro. objects to this interrogatory because Plaintiff seeks to avail itself of discovery based on a lawsuit that is improperly before this Court. Indeed, Plaintiff's lawsuit seeks an advisory opinion regarding development plans (i.e. final plan approval) which have not yet been approved by Harford County.

There is no justiciable controversy and Plaintiff has failed to exhaust its administrative remedies, which, if aggrieved, would include filing a petition for judicial review in the Circuit Court for Harford County after the relevant development plan is approved. Harford County Subdivision Regulations, § 268-28(A). On judicial review, the Circuit Court for Harford County would review the administrative appeal on the record, which procedure explicitly prohibits discovery. Md. Rule 7-208; *Venter v. Bd. of Educ.*, 185 Md. App. 648, 349 (2009) (Rule authorizing the issuance of a scheduling order for civil actions filed in circuit court does not provide a right to discovery when the circuit court is reviewing the decision of an administrative agency). Furthermore, Plaintiffs have inappropriately pleaded an anticipatory private and public nuisance. Such claims are not recognized in Maryland. *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 367 (1975).

(Exhibit D to Motion to Compel, p. 3).

9. The County also responded to Plaintiff's requests for production of documents and interrogatories on November 14, 2022. ("Defendant Harford County, Maryland Responses to Plaintiff 3P's First Set of Interrogatories," attached as "Exhibit 1;" "Defendant Harford County, Maryland Responses to Plaintiff 3P's First Request for Production of Documents," attached as "Exhibit 2"). In its responses, the County provided nearly identical objections as Mitchell:

Harford County objects to each interrogatory as improper under the circumstances of this case. Plaintiffs improperly filed this case in Anne Arundel County without exhausting administrative remedies and without waiting for a final administrative decision. Had Plaintiffs followed the required process under established Maryland law, Plaintiffs would have waited for the administrative decision(s), and (if aggrieved) their remedy would have been to seek judicial review in the Circuit Court for Harford County pursuant to Chapter 200 of Title 7 of the Maryland Rules, which proceeding would not provide for discovery under Chapter 400 of

Title 2 of the Maryland Rules. Plaintiffs, therefore, are seeking to use an improper procedure to obtain discovery to which they are clearly not entitled under Maryland law. Harford County will not respond to Plaintiffs' improperly issued document requests and will continue to follow the administrative process as required by law.

(Ex. 1, p. 2).

Harford County objects to each document request as improper under the circumstances of this case. Plaintiffs improperly filed this case in Anne Arundel County without exhausting administrative remedies and without waiting for a final administrative decision. Had Plaintiffs followed the required process under established Maryland law, Plaintiffs would have waited for the administrative decision(s), and (if aggrieved) their remedy would have been to seek judicial review in the Circuit Court for Harford County pursuant to Chapter 200 of Title 7 of the Maryland Rules, which proceeding would not provide for discovery under Chapter 400 of Title 2 of the Maryland Rules. Plaintiffs, therefore, are seeking to use an improper procedure to obtain discovery to which they are clearly not entitled under Maryland law. Harford County will not respond to Plaintiffs' improperly issued document requests and will continue to follow the administrative process as required by law.

(Ex. 2, pp. 1-2).

10. Thereafter, on Friday, November 18, 2018, counsel for Mitchell received an email from Plaintiff's counsel seeking a time to discuss Mitchell's response.

11. The parties' respective counsel engaged in a telephone conversation on November 29, 2022, at 3:00 p.m. regarding Mitchell's responses. During that conversation, counsel for Mitchell explained the rationale for its response, which in

addition to its written responses, included Mitchell's position that it was premature and overly burdensome for all parties to engage in discovery while well-founded Motions to Dismiss remained pending. At the conclusion of that conversation, counsel for Plaintiff assured Mitchell's counsel that he would send an email confirming the content of the conversation. Counsel for Mitchell never received such an email.

12. On December 19, 2022, the Circuit Court for Anne Arundel County transferred this case to the Circuit Court for Harford County.

13. Plaintiffs filed an Amended Complaint on February 1, 2023, and Mitchell filed a Motion to Dismiss the Amended Complaint on February 15, 2023. The County moved to dismiss the Amended Complaint on February 22, 2023. A hearing is not yet scheduled on the motions to dismiss.

14. The next communication from Plaintiff's counsel regarding the discovery dispute between Mitchell and Plaintiff 3P was 3P's filing of this instant Motion to Compel on February 23, 2023, eighty-six (86) days after the parties spoke on the telephone to discuss the dispute.

15. Plaintiff did not file a Motion to Compel and for Sanctions against Defendant Harford County, Maryland.

ARGUMENT

Mitchell urges this Court to deny Plaintiff's Motion to Compel for three reasons. First, Plaintiff failed to make good faith efforts to resolve the discovery dispute. This is evidenced by the fact that Plaintiff made no attempt after counsel's singular phone call with Mitchell to further discuss the discovery dispute. Plaintiff made no attempt to follow up by telephone or email with Mitchell's counsel until Plaintiff filed this instant Motion to Compel eighty-six (86) days later. Given the exorbitant amount of time that passed, Mitchell understood that Plaintiff had abandoned their issue with Mitchell's discovery responses. It is improper for Plaintiff to suggest that one phone call in November 2022 between counsel satisfies the requirement that Plaintiff engage in a good faith effort pursuant to Md. Rule 2-431 to resolve the discovery dispute prior to filing a Motion to Compel and for Sanctions nearly three months later. For this reason alone, Mitchell urges this Court to deny the Motion to Compel.

Second, despite Plaintiff's assertion at paragraph 7 of their Motion to Compel that Mitchell "flatly states that it refuses to respond to 3P's requests," Mitchell's objection was premised on the well-founded argument set forth in its Motion to Dismiss that the lawsuit is improperly before the Court. Indeed, Mitchell (and the County) objected to Plaintiff's discovery requests because Plaintiffs' lawsuit ignored the basic principles of justiciability and administrative exhaustion and seeks

discovery that is not permitted in a challenge to an administrative process. Mitchell also objected to Plaintiff's requests because Plaintiffs improperly plead an anticipatory nuisance. Mitchell and the County presented these exact issues to the Court in its respective motions to dismiss and until the Court resolves the dispositive motions, it is inequitable to require Mitchell to respond to Plaintiff's discovery requests. In *North River Ins. Co. v. Mayor of Balt.*, 343 Md. 34, 47 (1996), the Supreme Court of Maryland wrote, "[w]e fully recognize that ruling on discovery disputes, determining whether sanctions should be imposed, and if so, determining whether what sanction is appropriate, involve a very broad discretion that is to be exercised by the trial court." Further, Md. Rule Md. Rule 2-432(b)(2) provides in part, "If the court denies the motion in whole or in part, it may enter any protective order it could have entered on a motion pursuant to Rule 2-403." In this case, at a minimum, Mitchell urges this Court to deny Plaintiff's Motion to Compel and stay discovery until the resolution of the pending dispositive motions. If Defendants are unsuccessful in their dispositive motions, then Mitchell urges this Court to issue a scheduling order setting forth the time in which Mitchell shall respond to Plaintiff's discovery requests.

Lastly, Plaintiffs assertion at paragraph 17 of their Motion to Compel that "Plaintiff requires the answers and documents responsive to its requests to prosecute this action because these requests and interrogatories are reasonably calculated to

lead to the discovery of admissible evidence” is not supported by the allegations in Plaintiffs’ Complaint or Plaintiff’s conduct in this case. Plaintiffs’ Complaint is premised entirely on the fact that Mitchell and the developer of the Subject Property, Defendant Chesapeake, seek to develop the Subject Property and have taken actions to achieve that goal by submitting Development Plans to Harford County. Plaintiffs’ Complaint acknowledges that the Development Plans have not yet been approved. If those Development Plans are approved, Plaintiff has an administrative remedy to challenge the approvals. Such a remedy does not allow for discovery, which Plaintiff improperly seeks as part of this lawsuit. To require Mitchell to respond to Plaintiff’s improperly issued discovery requests and to impose sanctions on Mitchell prior to a ruling from this Court on the pending dispositive motions would be unduly burdensome and cause significant unnecessary expense and oppression to Mitchell.

CONCLUSION

For all the reasons set forth above Mitchell respectfully urges this Court to deny Plaintiff’s Motion to Compel and for Sanctions.

Respectfully submitted,

/s/

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REQUEST FOR A HEARING

Mitchell requests a hearing on its Opposition to Plaintiff's Motion to Compel and for Sanctions.

/s/

David S. Lynch, Esquire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 9th day of March, 2023, that a copy of the foregoing F.O. Mitchell & Bro.'s Opposition to Plaintiff's Motion to Compel and for Sanctions and Request for a Hearing was served on all parties registered for services via MDEC e-filing

/s/

David S. Lynch, Esquire
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