

ST. PAUL PLAZA OFFICE TOWER, LLC, *
et al

IN THE
CIRCUIT COURT

Plaintiffs

v.

DEPARTMENT OF GENERAL
SERVICES, et al

FOR
BALTIMORE CITY

Defendants

Case No.: 24-C-10-009242

* * * * *

OPINION AND ORDER

Before the Court is Defendants, State Center, LLC, PSP First Phase Parcel G. Office, LLC and PSP First Phase Parcel I Office, LLC’s Motion to Dismiss Plaintiffs’ Amended Complaint for Declaratory Relief and Injunctive Relief (Docket Entry #13). On April 6, 2011, the Court held a hearing and heard oral argument on Defendants’ Motion.

DISCUSSION

I. Standing

In order to establish taxpayer standing, a taxpayer plaintiff must allege: (1) an action by a municipal corporation or public official that is illegal or ultra vires, and (2) that the action may injuriously affect the taxpayer’s property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes. *120 W. Fayette Street, LLLP v. Mayor and City Council of Baltimore*, 407 Md. 253, 266 (2009), quoting *Inlet Assoc. v. Assateague House*, 313 Md. 413, 440-441 (1988). Defendants assert that Plaintiffs do not have standing to maintain this action because Plaintiffs have failed to allege that they may sustain a pecuniary loss or an increase in taxes, distinct from that of the general public. Defendants further argue that Plaintiffs’ allegations of potential harm are speculative and conclusory.

The Court of Appeals has recognized, however, that “the extent to which a taxpayer is capable of detailing the damage anticipated from an illegal and ultra vires act may be rather limited at the time the suit is initially filed.” *Id.* at 266-267. Thus, the Court has held that “the taxpayer plaintiff is not required to allege facts which *necessarily* lead to the conclusion that the taxes will be increased; rather, the test is whether the taxpayer reasonably *may* sustain a pecuniary loss or a tax increase - - whether there has been a showing of *potential* pecuniary damage.” *Id.*

Plaintiffs have pled that State agencies engaged in illegal and ultra vires acts that could potentially cause Plaintiffs pecuniary harm or an increase in taxes. This Court finds that the allegations contained in Plaintiffs’ Amended Complaint are sufficient to establish taxpayer standing.

II. Exhaustion of Administrative Remedies

Defendants argue that since Plaintiffs have alleged that the Master Development Agreement and subsequent amendments were subject to State procurement procedures, Plaintiffs must first exhaust administrative remedies prior to pursuing their claims in this Court. In support of this argument, Defendants assert that where it is reasonably debatable that a contract is subject to the procurement law, the Maryland State Board of Contract Appeals has primary jurisdiction. See COMAR 21.02.02.02; *State v. State Board of Contract Appeals and Law Offices of Peter G. Angelos*, 364 Md. 446, 458 (2001). While Defendants are correct in their assertion, this Court finds that the *Angelos* case is distinguishable in that Plaintiffs are not a party to the contracts at issue in the case *sub judice*. Furthermore, Plaintiffs are neither assignees nor parties in line to benefit from the contracts at issue.

Upon review of MD. CODE ANN., STATE FIN. & PROC., §§15-215, 217 and COMAR 21.02.02.02, this Court finds that Plaintiffs are not required to bring their claims before the Maryland State Board of Contract Appeals. While it is arguable that Plaintiffs' complaint may be in the nature of a "protest," given that Plaintiffs are not prospective bidders or offerors, or bidders or offerors, they would not be entitled to submit such a protest to the Appeals Board. Further, the absence of a procurement contract arguably precludes the submission of a contract claim. With regard to a contract claim, the Board clearly has jurisdiction over disputes arising out of the performance, breach, modification or termination of a procurement contract. Plaintiffs allege that certain contracts and/or agreements entered into by the State were not made in accordance with procurement law. Arguably, Plaintiffs take issue with the *formation* of these contracts, to which they are not a party. Therefore, it appears that this is not the type of "contract claim" contemplated to be within the Board's jurisdiction.

III. Latches

The doctrine of latches applies when there has been an "unreasonable delay in the assertion of one's rights" and when "that delay results in prejudice to the opposing party." *Liddy v. Lamone*, 398 Md. 233, 244 (2007). Defendants argue that Plaintiffs adopted a "wait and see attitude" and should have brought their claims following the issuance of the Request for Qualifications in 2005. Conversely, Plaintiffs assert that the Master Development Agreement, executed and approved in June 2009, was the first binding agreement related to the State Center Project and that the operative documents giving rise to this suit were the September 1, 2010 First Amendment to the Master Development Agreement and the Phase I Occupancy Leases, approved July 28, 2010 and amended on December 15, 2010.

When considering a motion to dismiss, the court must assume the truth of Plaintiffs' well-pleaded factual allegations in the complaint. *McDaniel v. Am. Honda Fin. Corp.*, 400 Md. 75, 83 (2007). As Plaintiffs' initial complaint was filed on December 17, 2010, this Court finds that Plaintiffs' claims are not barred by laches.

IV. Standing to Challenge Contracts to Which Plaintiffs Are Not Parties

In Count III of the Amended Complaint, Plaintiffs seek a declaration that the State's commitment to pursue future Occupancy Leases is unenforceable because they are "agreements to agree." Because the Occupancy Leases at issue in Count III are contracts between certain state agencies and the Department of General Services, Defendants argue that Plaintiffs lack standing to sue on these contracts to which they are not parties and Count III therefore should be dismissed.

With respect to the Occupancy Leases, Plaintiffs challenge the agreements as being ultra vires acts, which are part of an "unlawful procurement conspiracy." Plaintiffs are neither required to be a party to the contract nor in privity with a party to the contract in order to make such a challenge. Further, as discussed *supra*, Plaintiffs' claim does not fall within the primary jurisdiction of the Board of Contract Appeals.

CONCLUSION

Upon consideration of all arguments raised in Defendants' Motion, all responsive memoranda, and oral arguments heard on April 6, 2011, this Court finds that Plaintiffs have properly pled their claims for declaratory and injunctive relief. Accordingly, it is this 13th day of July, 2011, by the Circuit Court for Baltimore City, hereby

ORDERED that Defendants, State Center, LLC, PSP First Phase Parcel G. Office, LLC and PSP First Phase Parcel I Office, LLC's Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory Relief and Injunctive Relief (Docket Entry #13) is hereby **DENIED**.

THE JUDGE'S SIGNATURE APPEARS ON
THE ORIGINAL DOCUMENT ONLY.

ALTHEA M. HANDY
Judge

cc: Alan M. Rifkin, Esquire
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