

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

Plaintiffs

v.

DEPARTMENT OF GENERAL
SERVICES, et al

Defendants

* * * * *

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No.: 24-C-10-009242

OPINION AND ORDER

Before the Court is Defendants, Department of General Services and Department of Transportation’s Motion to Dismiss Amended Complaint (Docket Entry #14). 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. Political Question

The Court of Appeals has “adopted a two-part framework for determining whether an issue is one that is a political question and, accordingly, nonjusticiable.” *Smigiel v. Franchot*, 410 Md. 302, 324 (2009); *see Lamb v. Hammond*, 308 Md. 286, 293 (1987). As to the first part of the framework, the court is required to evaluate “whether the claim presented and the relief sought are of the type which admit of judicial resolution.” *Id.*, *citing Lamb* at 293. The second part requires the court to determine whether the structure of government, the separation of powers provided by the Constitution, renders the issue a political question. *Id.* at 325.

Here, Plaintiffs seek relief from alleged ultra vires and unlawful acts of public officials and State agencies for failing to comply with State procurement laws. “Courts have inherent power by mandamus, injunction or otherwise to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts of an administrative agency, but care must be taken not to interfere with the legislative prerogative or with exercise of sound administrative discretion.” *Schade v. Md. State Bd. of Elections*, 401 Md. 1, 38 (2007) (citations omitted). This Court finds

that Plaintiffs' claims, concerning the interpretation and implementation of State procurement laws, and seeking declaratory and injunctive relief, are within the province of judicial review.

III. Sovereign Immunity

In assessing whether the doctrine of sovereign immunity applies, the Court of Appeals utilizes a two-part test: "(1) whether the entity asserting immunity qualifies for its protection; and, if so, (2) whether the legislature has waived immunity, either directly or by necessary implication, in a manner that would render the defense of immunity unavailable." *Stern v. Bd. of Regents*, 308 Md. 691, 700-701 (2004), quoting *ARA Health Services, Inc. v. Dep't of Public Safety and Correctional Services*, 344 Md. 85, 91 (1996). The parties do not dispute that the doctrine of sovereign immunity is applicable to the State and its agencies, specifically the Department of General Services and the Maryland Department of Transportation.

Contrary to Defendants' assertions, Plaintiffs' claims and allegations against the State and its agencies do not sound in either a contract or tort. As stated above, Plaintiffs challenge the ultra vires and unlawful acts of public officials and State agencies for failing to comply with State procurement laws. Sovereign immunity is not a bar to Plaintiffs challenging "the legality of State laws and regulations, or the alleged unlawful implementation of such law and regulations by a State official." *Stern v. Bd. of Regents*, 380 Md. 691, 725 (2004). See also *Glover v. Glendening*, 376 Md. 142 (2003); *Jackson v. Millstone*, 369 Md. 575 (2002). Accordingly, this Court finds that Plaintiffs' claims for declaratory and equitable relief are not barred by the doctrine of sovereign immunity.

IV. 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.

V. 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.

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, Department of General Services and Department of Transportation’s Motion to Dismiss Amended Complaint (Docket Entry #14) 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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