

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
THIRD DIVISION

JAMES DOCKERY

PLAINTIFF

VS.

CASE NO. CV-2009-1551

BRETT MORGAN, CRAIG CAMPBELL,
GEORGE DUNKLIN, JR., RONALD PIERCE,
RICK WATKINS, RON DUNCAN, EMON
MAHONY, AND DR. FREDERICK W. SPIEGEL,
INDIVIDUALLY AND AS COMMISSIONERS,
ARKANSAS GAME & FISH COMMISSION;
SCOTT HENDERSON, INDIVIDUALLY AND AS
DIRECTOR, THE ARKANSAS GAME & FISH
COMMISSION; AND THE ARKANSAS GAME &
FISH COMMISSION

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Pat O'Brien Pulaski Circuit Clerk
CR02

DEFENDANTS

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

On the 7th day of December, 2009, came on to be heard Defendants' Motion to Dismiss Plaintiff's Amended Complaint. Upon consideration of the pleadings filed herein, arguments of counsel, and the entire record of this matter, the Court finds that Defendants' motion should be and hereby is GRANTED. The Plaintiff's Amended Complaint is dismissed as to Brett Morgan, Craig Campbell, George Dunklin, Jr., Ronald Pierce, Rick Watkins, Ron Duncan, Emon Mahony, Dr. Frederick W. Spiegel, individually and as Commissioners of the Arkansas Game and Fish Commission (the "AGFC") (collectively "Commissioners"), and Scott Henderson, individually and as Director of the AGFC ("Director").¹

¹ Upon Plaintiff's Motion for Voluntary Non-Suit, the AGFC was dismissed from this action by this Court's Order Granting Motion for Voluntary Non-Suit that was filed on February 3, 2010.

Specifically, the Court finds as follows:

1. Plaintiff in this matter has brought suit regarding leases into which the AGFC has entered with private third parties for the right to explore for and extract natural gas on lands owned or managed by the AGFC. The private entities were not named as defendants, and Plaintiff does not ask that the Court rescind the leases.

2. The Amended Complaint raises three counts. Count I is entitled Mandate of Amendment 35. In it, Plaintiff contends that the AGFC exceeded its mandate in Amendment 35 to the Arkansas Constitution by leasing the land for drilling purposes. Plaintiff seeks “an injunction ... to restrain the AGFC from diverting and using any more revenue from the gas leases and require all such revenue be deposited into the General Fund” and “an order ... directing the refund of all gas revenues impermissibly diverted from the General Fund and directing that all [lease] money ... be returned to the General Fund.” Amended Complaint at ¶¶ 48 and 50.

3. Count II is entitled Illegal Exaction. Plaintiff challenges the AGFC’s “action in using taxpayer funds to enter into the gas leases” and its “action in spending monies and/or revenue generated from the gas leases[.]” Amended Complaint at ¶ 32. Plaintiff prays for “an Order directing that all of the money [received from the leases] be returned to the General Fund for appropriation in accordance with constitutional directives of the State Legislature and Executive Branch.” Amended Complaint at ¶ 38.

4. Count III is entitled Lands are Subject to Taxation and is brought in the alternative to Count I and II. Amended Complaint at ¶ 42. Plaintiff contends that the lands in question should not be exempt from property taxes under Article 16, Section 5(b) of the Arkansas Constitution and asks for a declaratory judgment to that effect.

5. The Director and the Commissioners have challenged both the factual sufficiency and legal sufficiency of the Amended Complaint under Rule 12(b)(6). Dismissals based upon factual insufficiency are generally without prejudice, but dismissals based upon legal insufficiency are generally with prejudice. *See*, Newbern and Watkins, Civil Practice and Procedure, § 14:7

Individual Capacity Claims (All Counts)

6. Plaintiff's initial Complaint named the Arkansas Game and Fish Commission as the only defendant. On October 1, 2009, Plaintiff filed an Amended Complaint adding the Commissioners and the Director as defendants "individually and as Commissioners" and "individually and as Director[.]" After the December 7, 2009 hearing, Plaintiff presented this Court on December 10, 2009 with a letter and proposed order requesting a voluntary dismissal of the AGFC pursuant to Ark.R.Civ.P. 41(a). That Order was filed of record on February 3, 2010 leaving the Commissioners and the Director as the only defendants in this action in both their individual and official capacities.

7. Pursuant to Arkansas Rules of Civil Procedure 12(b)(6) and 21, all Counts of the Plaintiff's Amended Complaint against the AGFC's Director and Commissioners in their individual capacities are dismissed for the following reasons.

8. State officials and employees are by statute "immune from liability and from suit, except to the extent that they may be covered by liability insurance, for damages for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment." Ark. Code Ann. § 19-10-305(a). *See also* Ark. Code Ann. §§ 16-120-102 & -103. Plaintiff neither alleges that the acts of which he complains are covered by

liability insurance nor avers that the AGFC's Director and/or Commissioners performed any action in a malicious, willful, wanton, or grossly negligent manner.

9. Plaintiff's Amended Complaint fails to allege that any actions of the AGFC's Director and Commissioners were conducted in their individual capacity, outside the scope of their official capacity, or under the color of state law to deprive Plaintiff of his constitutional rights. *See Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989); *Rainey v. Hartness*, 339 Ark. 293, 5 S.W.2d 410 (1999).

10. Plaintiff's Amended Complaint does not seek damages or any other relief from the Commissioners and Director personally, i.e., in their individual capacity.

11. The Commissioners and Director, in their individual capacities, are unnecessary for the injunctive and declaratory relief requested by Plaintiff. Such relief can be awarded against the agency itself or, as Plaintiff has voluntarily dismissed the AGFC, against the Commissioners and Director in their "official" capacities.

12. Official capacity suits are "but another way of pleading an action against the entity of which the officer is an agent." *Crawford County v. Jones*, 365 Ark. 585, 232 S.W.3d 433 (2006).

13. For these reasons, all Counts of the Plaintiff's Amended Complaint against the AGFC's Director and Commissioners in their individual capacities are factually insufficient and would be dismissed without prejudice on this basis if it were not for the legal insufficiencies of Counts I, II, and III discussed herein. As a result of the legal insufficiencies of Counts I, II, and III of Plaintiff's Amended Complaint, the AGFC's Director and Commissioners in their individual capacities are dismissed with prejudice under Ark.R.Civ.P. 12(b)(6).

Official Capacity Claims

Count I

14. Pursuant to Arkansas Rules of Civil Procedure 12(b)(6) and 8, Count I of Plaintiff's Amended Complaint against the AGFC's Director and Commissioners in their official capacities is dismissed because Plaintiff fails to plead facts upon which the relief can be granted and because the relief requested by Plaintiff cannot be granted by this Court.

15. The AGFC is given very broad discretion in determining how to carry out its constitutional mandate, and its decisions are not to be measured by mere doubt-creating suggestions. *W.R. Wrape Stave Co. v. Arkansas Game and Fish Comm'n*, 215 Ark. 229, 219 S.W. 2d 948 (1949); *Arkansas Game and Fish Comm'n v. Stanley*, 260 Ark. 176, 538 S.W.2d 533 (1976).

16. To sustain Count I of his Amended Complaint, Plaintiff must plead that the AGFC acted in an arbitrary, capricious, unreasonable, and unlawful manner by pleading facts that demonstrate that the AGFC's acts were "decisive but unreasoned, or arising from an unrestrained exercise of will, caprice or personal preference, based on random or convenient selection or choice rather than on reason or nature" or "without being guided by steady judgment or purpose." *See Stanley, supra*.

17. Plaintiff fails to plead facts sufficient to satisfy this requirement or to satisfy Rule 12 and Rule 8.

18. This Court "may treat only the facts alleged in the [amended] complaint as true but not [] [P]laintiff's theories [or] speculation...[.]" *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999).

19. Plaintiff's allegations in Count I are not factual in nature. They are only conclusory theories regarding the AGFC's alleged arbitrary, capricious, unreasonable, and unlawful actions. For instance, Plaintiff pleads in paragraph 17 that he reasonably believes "[t]he results of drilling are obvious; the area will be destroyed as a wildlife habitat; species will be uprooted and driven out of the environment; and trees will be cut, trampled, and destroyed." He also reasonably believes that "[t]he damage done to the land and environment will most likely require reconstruction by departments within the state of Arkansas at significant expense and may become a burden on Arkansas taxpayers." *Id.* at ¶ 17.

20. As alleged in Plaintiff's Amended Complaint, it is mere speculation that the AGFC abused its discretion and breached the public trust. Plaintiff's allegations in Count I of the Amended Complaint are speculative conclusions not supported by factual allegations and do not meet the requirements of fact-based pleadings in Arkansas.

21. For these reasons, Count I of Plaintiff's Amended Complaint is factually deficient and would be dismissed without prejudice on this basis if it were not for the legal insufficiencies discussed below.

22. Even if Plaintiff had pled sufficient facts to maintain a cause of action, the relief requested by Plaintiff's Amended Complaint that all the revenues from the current oil and gas leases be diverted to the general coffers of the State of Arkansas is legally insufficient. *See* Amended Complaint at ¶¶ 48 and 50. As discussed below, neither the Legislature nor the Courts may divert the funds received by the AGFC from the oil and gas leases to any other state agency for any other state purpose because any such diversion would be unconstitutional and violate Arkansas statutes and federal regulations. As such, this Court

cannot grant the relief requested even if the facts alleged by Plaintiff are more than mere theories or speculation.

23. Amendment 35 to the Arkansas Constitution controls this matter and states that the AGFC is granted broad discretion and authority to manage, restore, conserve, and regulate wildlife resources on all property that is owned by the AGFC. *See Ark. Const. Amend. XXXV, § 1.*

24. Section 8 of Amendment 35 specifically states that “[t]he fees, monies, or funds arising from all sources by the operation and transaction of the said Commission and from the application and administration of the laws and regulations pertaining to birds, game, fish, and wildlife resources of the State and the sale of property used for said purposes shall be expended by the Commission for the control, management, restoration, conservation, and regulation of the birds, fish, and wildlife resources of the State, including the purchases or other acquisitions of property for said purposes and for the administration of the laws pertaining thereto and for no other purposes.”

25. Regarding Amendment 35, the Arkansas Supreme Court has stated that, “[a]lthough appropriations must come from the General Assembly, funds received from sources mentioned in the Amendment are not available—even with legislative approval—for any uses other than those expressly or necessarily implied[.]” *W.R. Wrape Stave Co., supra*. Thus, the Arkansas Supreme Court has recognized that under the language of Amendment 35, all fees, monies, and funds received by the AGFC from all sources must be expended only by the AGFC for the purposes enumerated in Amendment 35 and for “no other purposes.”

26. The monies received by the AGFC from the oil and gas exploration companies fall squarely under the ambit of Amendment 35 as they are “fees, monies or funds arising from all sources by the operation and transaction of the [AGFC]...[.]” Accordingly, all monies derived from mineral exploration and production on AGFC-owned property must be “expended by the [AGFC] for the control, management, restoration, conservation and regulation of the birds, fish and wildlife resources of the State...and for no other purposes.”

27. Neither the General Assembly nor the judicial branch has the power to change this constitutionally mandated result. *See Stanley, supra*.

28. The money that the AGFC has received, and all money it may receive as royalties thereafter, may be expended only by the AGFC for the purposes enumerated in Amendment 35. *See Ark. Op. Att’y. Gen. No. 2006-169, 2006 WL 3391326 (2006)*.

29. Thus, the relief requested by Plaintiff is contrary to the mandate of Amendment 35 to the Arkansas Constitution.

30. Moreover, the Arkansas Legislature has enacted statutes which specifically grant the AGFC authority and responsibility for the issuance of leases for mineral rights. These statutes also make it clear that the AGFC is to retain any and all funds received from the leasing of these mineral rights. *See Ark. Code Ann. § 22-5-801 et seq.*

31. These provisions are found in Title 22, Chapter 5, Subchapter 8. Title 22 is entitled “Public Property.” Chapter 5 of that Title concerns “State Lands,” and Subchapter 8 references “Mineral, Timber and Other Resources.”

32. Ark. Code Ann. § 22-5-802(c) provides that the AGFC “shall retain control over the procedures for awarding and shall retain the authority over the issuance of leases for the mineral rights and of permits for the rights to produce and sever minerals from Lands

held in its name or managed by it." Thus, the Legislature recognizes that the AGFC has control over the awarding of mineral leases on AGFC lands.

33. Next, Ark. Code Ann. § 22-5-804(e) provides as follows:

(e) The Arkansas State Game and Fish Commission shall have the authority, for all lands held in the name of and managed by its agency:

(1) To establish a schedule of minimum fees and royalties, as well as the terms and conditions for various types of permits and leases for Arkansas State Game and Fish Commission lands;

(2) To take bids on and to award the leases and permits to produce or sever minerals from those lands and to set up application procedures and fees for those leases and permits;

(3) To set the length of time for leases or permits to expire and the terms and conditions for their transfer or renewal;

(4) To set the minimum fees and royalties for leases and permits and to ensure that severance taxes on minerals from such leases or permits are paid to the proper agencies; and

(5) Shall have such other duties, responsibilities, and authority required for the issuance of mineral leases and permits under §§ 22-5-801--22-5-813 for other state lands.

In this section, the Legislature recognized specifically that the AGFC has the authority to (1) establish fees and royalties and the terms of conditions for mineral leases, (2) take bids on and award mineral leases, and (3) set up application procedures for those mineral leases for lands held in the name of the AGFC.

34. Pursuant to Ark. Code Ann. § 22-5-809(4), "[a]ll funds received by the Arkansas State Game and Fish Commission as fees, compensation or royalties, including any application or bid fees, for leases or permits issued for the taking of any minerals for lands held in the name of the commission shall be special revenues and shall be deposited into the State Treasury and credited to the Game Protection Fund for the use of the Commission." Thus, with specific reference to the leasing of mineral rights, the Legislature has codified the requirements set forth in Amendment 35 about how funds received from AGFC activities

must be spent. They must be spent by the AGFC.

35. In Ark. Code An. § 22-5-812(c), the Legislature provided that “[t]he Arkansas Game and Fish Commission shall promulgate rules and regulations necessary to lease mineral rights and to issue permits to produce and sever minerals on commission lands[.]”

36. These statutes enacted by the Arkansas Legislature contradict Plaintiff’s allegations in the Complaint with specific reference to the leasing of mineral rights on AGFC property. The Legislature has authorized the AGFC to enter into the leases that Plaintiff now claims are “illegal.” The Legislature has stated that the funds received by the AGFC from those leases are “special revenues” to be “credited to the Game Protection Fund for the use of the Commission.” This contradicts Plaintiff’s allegations and requested remedy.

37. The diversion requested by the Plaintiff also is prohibited by Federal regulations. Pursuant to United States Fish and Wildlife Service (“FWS”) regulations, “[r]evenues from license fees paid by hunters and fishermen shall not be diverted to purposes other than administration of the State fish and wildlife agency.” 50 C.F.R. 80.4 (August 25, 2008). The license revenues that may not be diverted “include income from [the] [s]ale, lease, rental, or other granting of rights of real...property acquired or produced with license revenue.” 50 C.F.R. 80.4(a)(2). Therefore, license revenue is not only funds collected from the hunting and fishing licenses sold but also the funds received from leasing real property which includes mineral rights and other energy resources associated with the property.

38. For these reasons, Count I of Plaintiff’s Amended Complaint is both factually and legally insufficient because Plaintiff failed to state facts upon which relief may be granted and because Plaintiff’s requested relief is prohibited by Amendment 35, Arkansas

statutes, and federal regulations. For these reasons, Count I of Plaintiff's Amended Complaint is dismissed with prejudice.

Count II

39. Pursuant to Arkansas Rule of Civil Procedure 12(b)(6), Count II of Plaintiff's Amended Complaint against the AGFC's Director and Commissioners in their official capacities is dismissed because Plaintiff fail to allege facts sufficient to state an illegal exaction claim, because the facts alleged by Plaintiff do not amount to "illegal" conduct, and because the relief requested by Plaintiff cannot be granted even if sufficient facts had been alleged.

40. There are two types of illegal exaction cases that may be brought by a taxpayer: (1) a public-funds case in which the taxpayer contends that such funds are being misapplied or illegally spent and (2) an illegal tax case in which the taxpayer asserts that a tax itself is illegal or contrary to a constitutional or statutory provision. *See Brewer v. Carter*, 365 Ark. 531, 231 S.W.3d 707 (2006).

41. Citizens have standing to bring a public-funds case because taxpayers have an interest in how the money they contribute to the state or local government is spent. *See Brewer, supra*. In the case at bar, Plaintiff is not challenging a tax so Count II must sound as a "public funds" case if an illegal exaction case exists at all.

42. In *Brewer, supra*, the Arkansas Supreme Court stated:

It is axiomatic that before a public-funds type of illegal exaction will be allowed to proceed, there must be facts showing that monies generated from tax dollars or arising from taxation are at stake. As the plaintiff in this case, it was incumbent upon Brewer to demonstrate his standing to bring an illegal-

exaction claim. Under our case law, this requires a showing that the funds were generated from tax dollars or otherwise arising from taxation.

43. The monies received by the AGFC pursuant to the leases challenged by Plaintiff arose not from taxation but rather from private third-parties. As such, the challenged monies are not generated from tax dollars and do not otherwise arise from taxation. Plaintiff has failed to plead the necessary facts to maintain an illegal exaction suit.

44. While Plaintiff's claims are directed at the gas lease revenues, Plaintiff also challenges "[t]he Commission's action in using taxpayer funds to enter into the gas leases." Plaintiff's Amended Complaint ¶ 32. However, Plaintiff fails to allege facts demonstrating how the AGFC used taxpayer funds to enter into gas leases thereby misappropriating those funds in a way not authorized or contrary to law. Also, Plaintiff fails to request any relief regarding any funds used to enter into the gas leases.

45. If Plaintiff is challenging the fact that salaries were paid to persons that worked on the gas leases, Plaintiff fails to allege the necessary facts for a public funds' illegal exaction claim based on this theory. *See Biedenharn v. Thicksten*, 361 Ark. 438, 206 S.W.3d 837 (2005).

46. In his Response Brief, Plaintiff argues that "[a]ny revenues and/or monies generated from the gas leases should be returned to the taxpayers if an illegal exaction is found." Response Brief at 19. However, there is nothing to "return" to the taxpayers. The monies came from private third-parties.

47. For these reasons, Count II of Plaintiff's Amended Complaint is factually insufficient and would be dismissed without prejudice if it were not for the legal insufficiencies discussed below.

48. Plaintiff actually requests that the money from the leases be "moved" from the AGFC so that it can be spent by the Legislature and/or Executive Branch. Amended Complaint at ¶¶ 38, 39, 48 and 50. No "return" of any money to taxpayers is requested even if the monies had come from taxpayers in the first place. Thus, the relief requested by Plaintiff cannot be granted by this Court even assuming the factual allegations were sufficient to state an illegal exaction claim.

49. Further, Plaintiff does not claim that anything the AGFC plans to do with the money received from the leases is outside the AGFC's constitutional mandate in Amendment 35. Rather, Plaintiff wants the money used by a different branch of the State. Once Plaintiff concedes that the State should keep the money from the leases and the drilling activities can continue, there is no basis in the law to shift that money away from the AGFC to a different branch of the government.

50. Plaintiff wants the Court to hold that the AGFC acted in an arbitrary, capricious, unreasonable, and unlawful manner and abused its constitutional discretion by entering into the oil and gas leases. However, Plaintiff does not seek to have these leases set aside in any manner and does not name these third-parties as defendants. Thus, there is no challenge to the very acts Plaintiff complains that taxpayer funds should not have been used to accomplish.

51. Lastly, as discussed above regarding the dismissal of Count I, the conduct of the AGFC's Director and Commissioners is not illegal. Indeed, the Arkansas Legislature has specifically authorized the AGFC to enter into mineral leases on lands that it owns or manages and to retain the funds received pursuant to those leases. *See Ark. Code Ann. § 22-5-801 et seq.* In light of Amendment 35 and these statutes, the retention of the funds from

the gas leases can hardly be described as “illegal.” The people of Arkansas and the Arkansas Legislature have addressed this situation and enacted a constitutional amendment and statutes that allow the AGFC to engage in the exact activities that the Plaintiff is now challenging.

52. Count II of Plaintiff’s Amended Complaint is dismissed for failure to state facts upon which relief can be granted and because there is no basis in the law for the relief requested by Plaintiff. For these reasons, the Amended Complaint is both factually and legally insufficient and is dismissed with prejudice.

Count III

53. Pursuant to Arkansas Rules of Civil Procedure 12(b)(1) and 12(b)(6), Count III of Plaintiff’s Amended Complaint against the AGFC’s Director and Commissioners in their official capacities is dismissed.

54. Count III of Plaintiff’s Amended Complaint is made in the alternative to Counts I and II. *See* Amended Complaint at p. 9, ¶ 42.

55. If the activities of the AGFC are not prohibited by Amendment 35, Plaintiff challenges the AGFC’s tax exempt status under Article 16, Section 5(b) of the Arkansas Constitution. In other words, Plaintiff claims that the AGFC should be required to pay property taxes because the lands are not being used for public purposes. *Id.* at ¶ 45.

56. By necessity, Plaintiff’s request would require the Court to determine whether the local tax assessors in the counties where the leased properties are located are properly assessing their *ad valorem* taxes.

57. However, the Arkansas Constitution provides that “[t]he County Courts shall have exclusive original jurisdiction in all matters relating to county taxes...[.]” ARK. CONST., Art. 7, § 28. See *Hambay v. Williams*, 373 Ark. 532, 285 S.W.3d 239 (2008); *Pockrus v. Bella Vista Property Owners' Association*, 316 Ark. 416, 872 S.W.2d 416 (1994). Plaintiff's claim that the AGFC's leased lands should be subject to property taxes is within the exclusive jurisdiction of the county courts, not the circuit courts.

58. In addition, the determination of whether property is “public property used exclusively for public purposes” must be made by the local assessor on a case-by-case basis. Ark. Code Ann. § 26-26-1001. See Ark. Atty Gen. Op. 2008-155 (2008).

59. Plaintiff does not allege that the property in question here lies in Pulaski County. Plaintiff also does not allege that any local tax assessor has failed at his duties.

60. As Count III is a claim that is in the exclusive jurisdiction of the county courts where the property lies and is a determination left to the local tax assessor on a case-by-case basis, this Court has no jurisdiction.


61. Even if this Court had jurisdiction, Plaintiff lacks standing to challenge the AGFC's tax exemption in counties outside of Pulaski County.

62. For these reasons, Count III of Plaintiff's Amended Complaint is dismissed with prejudice.

Conclusion

63. In sum, Plaintiff's Amended Complaint is hereby DISMISSED WITH PREJUDICE for the reasons stated above.

IT IS SO ORDERED this 4 day of MARCH, 2010.



THE HONORABLE JAY MOODY
PULASKI COUNTY CIRCUIT JUDGE

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