UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHELLE IRIZARRY, VALERIE WILLIAMS, and JOANNE NIXON,

Plaintiffs,

vs. CASE NO.: 6:19-cv-00268-Orl-37TBS

ORLANDO UTILITIES COMMISSION, LENNAR CORPORATION, U.S. HOME CORPORATION, AVALON PARK GROUP MANAGEMENT, INC., D/B/A AVALON PARK GROUP, and BEAT KAHLI,

Defendants.
_____/

DEFENDANTS LENNAR CORPORATION AND U.S. HOME CORPORATION'S DISPOSITIVE MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Defendants Lennar Corporation and U.S. Home Corporation (collectively "Lennar Defendants") move the Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing Counts III and IV, thereby dismissing the Lennar Defendants from this action. Plaintiffs have alleged no violation of the Water Quality Assurance Act of 1983, §§ 376.30–376.317, Florida Statutes, (the "WQAA") by the Lennar Defendants. The WQAA creates a cause of action for damages resulting from the discharge of pollutants and hazardous materials—not for developing, promoting, or managing a community near a power plant.

I. INTRODUCTION

Plaintiffs fail to allege any cause of action against Lennar. Plaintiffs allege contamination of Plaintiffs' properties by airborne coal dust and other coal-combustion residuals emitted by the Curtis H. Stanton Energy Center (the "Stanton Power Plant"), owned and operated by the Defendant Orlando Utilities Commission ("OUC"). Plaintiffs acknowledge that the sole source of the alleged "contaminants" is the Stanton Power Plant, yet they seek to hold the Lennar Defendants liable under the WQAA. The only allegation made against the Lennar Defendants is that they planned, marketed, built, and managed residential communities near the Stanton Power Plant. None of these allegations state an action for violation of the WQAA.

II. MOTION TO DISMISS STANDARD

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) tests the sufficiency of the plaintiff's complaint. *La Gresta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). Mere "blanket assertions of entitlement to relief" will not do because Rule 8(a)(2) requires the plaintiff to "show[]" that he is entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 n. 3 (2007). To survive dismissal under Rule 12(b)(6), a plaintiff must plead facts which, "accepted as true, 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

A claim is "plausible on its face" when its factual content permits a "reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In evaluating a complaint under this standard, the Court must accept all well-pleaded factual

allegations as true and construe them in the light most favorable to the plaintiff. *Id.*; *Ironworkers Local Union 68 v. AstraZeneca Pharms., LP*, 634 F.3d 1352, 1359 (11th Cir. 2011). Legal conclusions devoid of any factual support are not entitled to an assumption of truth. *Mamani v. Berzain*, 654 F.3d 1148, 1153 (11th Cir. 2011) (citing *Iqbal*, 556 U.S. at 679).

III. ARGUMENT

A. Plaintiffs Allege No Violation of the WQAA by the Lennar Defendants.

Counts III and IV of the Complaint fail because none of the alleged acts or omissions attributed to the Lennar Defendants are covered by the WQAA. Section 376.313(3), Florida Statutes, creates an individual cause of action for violation of the WQAA. In pertinent part, that section states that nothing in the WQAA prohibits any person from bringing a cause of action for damages "resulting from a discharge or other condition of pollution covered by §§ 376.30–376.317 [the WQAA]." *Id.* To state a cause of action, a plaintiff must plead and prove the facts of a discharge or condition of pollution prohibited by the WQAA and that said discharge or pollution occurred. *Id.* In other words, only damages resulting from acts prohibited by the WQAA are recoverable.

The WQAA was enacted out of a concern for the preservation of the lands and waters of Florida, which are unique and delicately balanced resources vital to the economy of the state. *Id.* §§ 376.30(1)(a)–(b). The Legislature found that the "storage, transportation, and disposal of pollutants" is a hazardous undertaking, and that "[s]pills, discharges, and escapes of pollutants . . . that occur as a result of procedures taken by private and governmental entities involving the storage, transportation, and disposal of such products pose threats of

great danger and damage to the environment of the state." *Id.* §§ 376.30(2)(a)–(b). Thus, the Legislature enacted the WQAA to address the hazards associated with storing, transporting, or disposing of pollutants. *Id.* § 376.30(2)(d).

The acts prohibited by the WQAA are consistent with the relatively narrow concerns of the Legislature. In pertinent part, the WQAA prohibits the discharge of "pollutants or hazardous substances into or upon the surface or ground waters of the state or lands, which discharge violates any departmental 'standard'[ ] as defined in § 403.803(13)." *Id.* § 376.302. Thus, section 376.313(3) creates an individual cause of action for damages resulting from the non-negligent discharge of pollution. *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1221–22 (Fla. 2010) (citation omitted).

Here, there is no allegation that the Lennar Defendants discharged[1] anything. Instead, the Plaintiffs allege that the Lennar Defendants:

- "planned, marketed, built, and managed residential neighborhoods close to the Stanton Power Plant without addressing the risks and harms posed by" pollution from the Stanton Power Plant;
- "did not take adequate steps to protect residents who bought homes in the Class area from Contaminants generated by the Stanton Power Plant, or take the actions needed to remediate the harms caused by the Contaminants;"
- "provided residents of the Class Area with a false sense of security by promoting area communities as being safe for Class Area families," and
- did not "warn residents of the hazards associated with pollution from the Stanton Power Plant, do anything to address the pollution that existed within these communities, or take measures to address the harms that resulted from pollution."

[1] "'Discharge' includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing, or dumping of any pollutant or hazardous substance which occurs and which affects lands and the surface and ground waters of the state not regulated by §§ 376.011-376.21." § 376.301(13), Fla. Stat.

(Compl. ¶¶ 2, 37, 41). Notably absent is any allegation of a statutory violation or that the Lennar Defendants caused harm to the Plaintiffs' property. *Pinares v. United Techs. Corp.*, 10-80883-CIV, 2011 WL 240522, at *3 (S.D. Fla. Jan. 19, 2011) (dismissing plaintiffs' section 376.313 action when there was no allegation that the defendant caused harm to the plaintiffs' property). None of these allegations is an act or omission covered by the WQAA. And the private cause of action provided under section 376.313(3) does not provide a remedy for damages resulting from acts or omissions that are not covered by the WQAA. *Pinares*, 2011 WL 240522 at *3. Thus, Plaintiffs' claims against the Lennar Defendants fail.

B. The Damages Remedy Under the WQAA Does Not Extend to Non-Discharging Developers, Builders, or Marketers of Land.

Plaintiffs concede that the Lennar Defendants have not discharged anything in violation of the WQAA. (Compl. ¶¶ 4, 23, 87 ("The only source of these Contaminants is the Stanton Power Plant;" "the Stanton Power Plant is the only plausible source of Contaminants in the Class Area;" "Plaintiffs and each putative class member have suffered damages to their properties as a result of the Contaminants from the Stanton Power Plant blowing Contaminants onto the Class Area.")). Instead, Plaintiffs allege that the Lennar Defendants are strictly liable for the "conditions of pollution" attributable to the Stanton Power Plant simply because the Lennar Defendants "developed, built, and marketed homes . . . and did not take adequate steps to prevent homes from being exposed to the Contaminants." (Compl. ¶¶ 104–105, 109–110). Essentially, Plaintiffs seek to hold the Lennar Defendants strictly

liable for failing to remediate, or warn of the hazards of, pollution discharged by the Stanton Power Plant.[2] Such claims stretch the provisions of the WQAA too far.

In *Aramark*, the Florida Supreme Court recognized that the Legislature created the WQAA in an effort to protect Florida's surface and groundwaters by prohibiting the discharge of pollutants and other hazardous substances. *Aramark*, 894 So. 2d at 22. The court found that, in furtherance of that goal, the Legislature created a damages remedy for the non-negligent discharge of pollution without proof of causation. *Id.* at 23–24. The court concluded that the lack of a causation requirement reflected the Legislature's intent to balance the competing interests of "owners of contaminated property and victims of contamination" by placing the burden on "owners of polluting property to prove they did not cause the pollution, rather than require innocent victims of pollution to prove they did." *Aramark*, 894 So. 2d at 25. Thus, the court concluded that the legislature intended to create a statutory strict liability cause of action against owners of polluting property, derogating common law in favor of those affected by pollution.

Notably, it is the owner of property discharging pollution that is liable without regard to causation, not owners of land that pollution is discharged upon. *Id.* at 26–27 (finding that a cause of action existed when chemical solvents on defendant's property seeped into groundwater flowing to plaintiff's property); *see also Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1219–22 (Fla. 2010) (finding that a cause of action existed when the defendant discharged pollutants); *Kaplan v. Peterson*, 674 So. 2d 201, 202, 205 (Fla. 5th DCA 1996)

[2] It is worth noting that Plaintiffs cite the incorrect definition of "pollution" in the Complaint. Plaintiffs allege that the "contaminants" are "pollution" as defined in section 376.031(17), a section that falls outside the WQAA. (Compl. ¶¶ 104, 109). Thus, Plaintiffs have not alleged a condition of pollution under the WQAA and the Complaint should be dismissed for that reason alone.

(holding that a cause of action existed against a defendant who owned a property at the time underground petroleum storage tanks on the property leaked); *Ward v. Lockheed Martin Corp.*, 805CV1878T17TGW, 2006 WL 889729, at *2 (M.D. Fla. Mar. 31, 2006) (finding plaintiffs stated a claim when hazardous chemicals emanated from the defendant's property onto surrounding residential communities). Indeed, only those discharging prohibited pollutants are charged with remediation by the WQAA. The WQAA provides that "[a]ny person **discharging a pollutant** as prohibited by §§ 376.30-376.319 shall immediately undertake to contain, remove, or abate a discharge to the satisfaction of the department." § 376.305, Fla. Stat. (emphasis supplied).

Put simply, the WQAA provides no cause of action against a "developer, builder, or marketer" simply because a third party discharged pollution onto its community. Plaintiffs' claims against the Lennar Defendants fail as a matter of law and must be dismissed.

C. The Lennar Defendants Are Not "Persons" Liable Under the WQAA.

Even if Plaintiffs had properly alleged a cause of action under the WQAA, the Lennar Defendants fall outside of the category of those who can be held liable under the WQAA. Section 376.308 identifies those entities liable under the WQAA. In pertinent part, that section provides that the following "persons" shall be liable for discharges:

> (a) Any person who caused a discharge or other polluting condition or who owned or operated the facility, or the stationary tanks or the nonresidential location which constituted the facility, at the time the discharge occurred.
>
> (b) In the case of a discharge of hazardous substances, all persons specified in § 403.727(4).

Id. at §§ (1)(a)–(b).[3] Section 403.727(4) provides that the following persons are liable for the discharge of "hazardous substances":

> (a) The owner and operator of a facility;
>
> (b) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substance was disposed of;
>
> (c) Any person who, by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person or by any other party or entity at any facility owned or operated by another party or entity and containing such hazardous substances; and
>
> (d) Any person who accepts or has accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person,

Id.

There is no allegation that the Lennar Defendants fall within any of the categories in section 376.308.[4] The Plaintiffs do not allege the Lennar Defendants caused a discharge, owned or operated a facility or stationary tanks at the time of a discharge or disposal of hazardous substances, agreed to arrange for disposal, treatment, or transportation of hazardous substances, or accepted hazardous substances for transportation. Therefore, the Lennar Defendants, as "developers, builders, and marketers" cannot be liable under the WQAA and the Plaintiffs' claims fail as a matter of law.

[3] Although section 376.308 defines those who might be liable to the Florida Department of Environmental Protection, the Florida Supreme Court has stated that there is no distinction between those liable to the Department under section 376.308 and to individuals under 376.313. *Aramark*, 894 So. 2d at 27.

[4] In *Aramark*, the defendant was ultimately liable under section 376.308(1)(b), for damages arising from the discharge of "hazardous substances" as an "owner and operator of a facility" under section 403.727(4). *Aramark*, 894 So. 2d at 27. That is not the case for the Lennar Defendants here.

D. The Lennar Defendants Owed Plaintiffs No Duty to Disclose the Stanton Power Plant to Plaintiffs.

As a matter of law, Plaintiffs cannot establish that the Lennar Defendants owed any duty to disclose any issue related to the Stanton Power Plant. Nowhere in the WQAA is there any indication that it derogated the common law duty to disclose established in *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). In *Johnson*, the Florida Supreme Court abrogated the doctrine of caveat emptor and replaced it with an affirmative duty owed *only* by a *seller* to a *buyer* of property to disclose *known facts* materially affecting the value of the property. *Id.* at 629.

First, the Lennar Defendants never sold the Plaintiffs real estate, and the Complaint is devoid of any allegations otherwise. Plaintiffs only allege that they "own[] property located within" their respective communities. (Compl. ¶¶ 7–9). As the Eleventh Circuit has recognized, Florida's "District Courts of Appeal have extended *Johnson*'s duty to disclose to real estate brokers acting as seller's agents. But the District Courts of Appeal have gone no further." *Virgilio v. Ryland Group, Inc.*, 680 F.3d 1329, 1336 (11th Cir. 2012) (citations omitted); *see Virgilio v. Ryland Group, Inc.*, 695 F. Supp. 2d 1276, 1283–84, n. 14 (M.D. Fla. 2010). Therefore, absent a seller-buyer relationship, the Lennar Defendants owe no duty to disclose under Florida common law and certainly owe no duty under the WQAA.

Lennar further had no duty to warn the plaintiffs of *anything* about their home purchase because irrefutable public records establish that Lennar did not sell plaintiffs the properties which are at the center of the lawsuit. Plaintiff Irizarry purchased her home from Ryan Romasko and Sheena Romasko in 2013, who purchased the home from Jeffery McGowan and Tonya McGowan in 2010, who purchased the home in 2001. *See* **Composite**

Exhibit A.[5] Plaintiff Williams purchased a one-half interest in her home from Renar Golf Communities L.L.C. in 2001, as a co-grantee with Plaintiff Joanne Nixon.[6] *See* **Exhibit B**. The Complaint is silent as to how Plaintiff Williams participated in the purchase or under what circumstances any home seller would have had a duty to warn Plaintiff Williams about anything. Plaintiff Nixon also has an indivisible one-half interest in another home. *See* **Composite Exhibit C**. Ms. Nixon originally purchased a one-quarter interest in the home in 1997 from Engle Homes/Orlando, Inc. *See* Ex. C at 4. Ms. Nixon re-assigned the value of her interest in the home in 2001 as reflected in Warranty Deed at page one of Exhibit C. There is simply no connection between Lennar and the current plaintiffs. There no duty for a person who, at one time, in the distant past, owned a parcel to warn unknown future buyers that someday in the future something currently unknown might be wrong with the land.

Second, the duty to disclose only extends to *known* facts at the time of the sale. *Jensen v. Bailey*, 76 So. 3d 980, 983 (Fla. 2d DCA 2011) ("to hold the seller liable under *Johnson*, the buyer must prove the seller's actual knowledge of an undisclosed material defect"). Here, the Plaintiffs have not alleged, and cannot allege, that the Lennar Defendants *knew* that the purported contaminants allegedly discharged by the Stanton Power Plant would

[5] Attached hereto as Exhibits A, B, and C are copies of official public records from the Orange County Comptroller's Office proving the sales transactions through Warranty Deeds. The contents of the deeds should be recognized under Federal Rules of Evidence 201(b)(2) and 803(14) and (15). Generally, Federal Rule of Civil Procedure "12(d) requires that courts treat a motion to dismiss as a motion for summary judgment if 'matters outside the pleadings are presented to and not excluded by the court.' Notwithstanding Rule 12(d), courts may 'take judicial notice of matters of public record without converting a Rule 12(b)(6) motion to a Rule 56 motion.'" *Stanifer v. Corin USA Ltd., Inc.*, 6:14-CV-1192-ORL, 2014 WL 5823319, at *3 (M.D. Fla. Nov. 10, 2014) (Dalton, J.) (citations omitted). Moreover, "in ruling upon a motion to dismiss, the district court may consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged." *SFM Holdings, Ltd. v. Banc of Am. Sec.*, LLC, 600 F.3d 1334, 1337 (11th Cir. 2010) (citations omitted). The attached Warranty Deeds fall under both of these exceptions.

[6] The Complaint is notably silent about the fact that Plaintiff Nixon co-owns the Williams property.

fall onto the communities at issue and present a hazard. To do so, Plaintiffs would have to allege that the Lennar Defendants had *actual knowledge* that the Stanton Power Plant's operation within the emissions limits and enforceable restrictions required by the Florida Department of Environmental Regulation Bureau of Air Quality Management's permit PSD-FL-084 would fail to adequately protect the communities surrounding the Stanton Power Plant.[7] (Compl. ¶ 35). Moreover, the Plaintiffs would have to allege that the Lennar Defendants had *actual knowledge* that the specific conditions listed within that permit would fail to "minimize fugitive dust emissions" and allow the release of coal-burning residuals at a hazardous rate. *Id.* The Plaintiffs have not and cannot allege as much. The Complaint should be dismissed.

E. Remedies Sought by Plaintiffs Are Not Available Under Section 376.313(3).

Section 376.313(3) does not create a private cause of action for equitable relief. Rather, that section only provides for *damages*. § 376.313(3), Fla. Stat.

Here, Plaintiffs seek "permanent injunctive relief"[8] (Compl. Prayer for Relief p. 41 ¶ B), which is an equitable remedy not provided for by section 376.313(3). *Ramsey v. Lovett*, 89 So. 2d 669, 670 (Fla. 1956) (injunctive relief is equitable relief). Further, Plaintiffs seek relief in the form of requiring prompt "testing, assessment, excavation, and removal" of alleged contaminants—i.e., remediation. (Compl. Prayer for Relief p. 41 ¶ B). But section 376.313 does not provide for that either. Therefore, Plaintiffs' claims must be

[7] Permit PSD-FL-084 is integrated into the Complaint at paragraph 35 and available at http://arm-permit2k.dep.state.fl.us/psd/0950137/0000D8F6.pdf. For the convenience of the Court, it is attached as **Exhibit D**.

[8] It is unclear what exactly Plaintiffs seek to enjoin the Lennar Defendants from doing. Plaintiffs allege that, the Lennar Defendants have been uninvolved in the Stoneybrook community since at least 2013. (Compl. ¶ 38.)

dismissed insofar as they seek remedies not provided for in a private cause of action under section 376.313(3).

Moreover, Florida's statutory scheme places "the power to assess the degree of pollution, which is inherent in its duty to control and prohibit pollution," in the State's executive branch. *Sher v. Raytheon Co.*, 8:08-CV-889-T-26TGW, 2008 WL 2756570, at *2 (M.D. Fla. July 14, 2008);[9] *see also* § 403.061, Fla. Stat. (giving the executive branch the duty to control and prohibit pollution of air and water in accordance with the law); *id.* § 376.30701(2) (giving the state's executive branch the authority to establish rules for site-specific remediation). Therefore, this Court is an inappropriate forum for the remedial relief requested by Plaintiffs under the primary jurisdiction doctrine.

"The primary jurisdiction doctrine applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . ." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). "Pursuant to the doctrine, [j]udicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government." *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1037 (Fla. 2001) (citations and quotations omitted). The State of Florida has specified the regulating authority with special competence for the issues alleged here.

[9] In *Sher*, the court did not dismiss the action in deference to the State of Florida, but only because the action was one for damages, not injunctive relief or forced remediation. *Sher*, 2008 WL 2756570 at *1.

F. Plaintiffs' Allegations Clearly Establish the Lennar Defendants' Entitlement to the Third-Party Defense in Section 376.308(2)(d).

It is undisputed that the Lennar Defendants did not cause contamination. According to the Complaint, "The only source of [the alleged] Contaminants is the Stanton Power Plaint." Compl. ¶ 4. The third-party defense found in section 376.308(2)(d), Florida Statutes, "allows defendants to escape liability if they can show that a third party's act or omission caused the contamination." *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 24 (Fla. 2004). The third-party cannot be an employee or someone whose act occurs in connection with a contractual relationship to the defendant. *Id.*

Taking the Plaintiffs' allegations as true, the Plaintiffs agree that the only source of the alleged contamination is a third party—not the Lennar Defendants. Therefore, the Plaintiffs' claims fail.

IV. CONCLUSION

The Plaintiffs are attempting to stretch the WQAA and the private cause of action it creates beyond what they prohibit. The Plaintiffs have not alleged that the Lennar Defendants discharged anything, and no allegation related to the Lennar Defendants is a violation of the WQAA. Moreover, there is no allegation that Lennar Defendants fall within any of the categories of persons liable defined in section 376.308 of the WQAA. Finally, the Plaintiffs seek permanent injunctive relief and remediation—remedies unavailable under section 376.313(3). Therefore, the Plaintiffs' claims against the Lennar Defendants, Counts III and IV, must be dismissed.

WHEREFORE, Defendants Lennar Corporation and U.S. Home Corporation respectfully request that the Court dismiss Counts III and IV of the Complaint with prejudice, and attorneys' fees and costs associated with bringing this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 15, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I e-mailed the foregoing document to the following non-CM/ECF participants: **David A. Theriaque, Esquire** at dat@theriaquelaw.com; **Lauren D. Brooks, Esquire** at lbrooks@bakerdonelson.com.

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