

IN THE CIRCUIT COURT OF NEWTON COUNTY, ARKANSAS

C&H HOG FARMS, INC.

PLAINTIFF

VS.

CASE NO. 51CV-18-68

**ARKANSAS DEPARTMENT OF
ENVIRONMENTAL QUALITY**

DEFENDANT

RESPONSE TO ALTERNATIVE MOTION TO DISMISS

Comes now the plaintiff, C & H Hog Farms, Inc., and for its response to the alternative motion to dismiss filed by the Arkansas Department of Environmental Quality, states:

1. Paragraphs 8-16 of ADEQ's Motion for Change of Venue or, Alternatively, Motion to Dismiss argue that C & H's complaint should be dismissed for improper venue pursuant to Ark. R. Civ. P. 12(b)(3) or for failure to state facts upon which relief can be granted pursuant to Ark. R. Civ. P. 12(b)(6). C & H respectfully submits that the alternative motion to dismiss should be denied on each of the grounds asserted.

2. In ¶ 8 of its motion, ADEQ restates its argument about venue, including its belief that Ark. Code Ann. § 16-60-201(e)(2) requires that this case be transferred to Pulaski County. C & H denies ADEQ's argument and incorporates herein its separate response to the motion for change of venue. ADEQ admits that venue is proper in Newton County in ¶¶ 4, 5 and 8 of its motion. Therefore, the contention that this case should be dismissed for improper venue is without any basis in law or fact, and ADEQ's motion should be denied. Further, even if venue were improper, which is not the case, Ark. R. Civ. P. 12(h)(3) permits the Court to transfer the case rather than dismiss it.

Here, venue is proper in Newton County, and the motion to dismiss pursuant to Ark. R. Civ. P. 12(b)(3) should be denied.

3. In ¶¶ 9-12, ADEQ argues that C & H's complaint should be dismissed for failure to state facts upon which relief can be granted pursuant to Ark. R. Civ. P. 12(b)(6). However, ADEQ's motion is actually an argument of its factual position, not a demonstration that C & H has failed to state facts upon which relief can be granted. C & H's complaint provides detailed facts regarding ADEQ's conduct that constitutes a failure to comply with Arkansas Freedom of Information Act. *See* Complaint, ¶¶ 5-14. It then states how that conduct violates the FOIA in ¶¶ 13-20. Treating the facts alleged in the complaint as true, viewing them in a light most favorable to C & H, and liberally construing the facts in C & H's favor, which is the required standard of review, *Panhandle Oil & Gas, Inc. v. BHP Billiton Petroleum (F'ville), LLC*, 2017 Ark. App. 201, 520 S.W.3d 277, the complaint clearly states facts upon which relief can be granted. Therefore, ADEQ's motion should be denied.

4. Finally, in ¶¶ 13-16, ADEQ argues that the complaint should be dismissed because it seeks relief that is allegedly not proper on the facts stated. In these paragraphs, ADEQ states that the relief beyond an order for production of the requested documents is "baseless," that the complaint is "a transparent attempt to improperly use a FOIA claim against ADEQ to subvert a pending administrative action," and the case "was initiated for frivolous or dilatory purposes in contravention of the purposes of FOIA." However, as noted in C & H's response to the motion for change of venue, which is incorporated herein, the Court may order relief beyond the express relief provided by the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-107. In *Rehab Hosp.*

Services Corp. v. Delta-Hills Health Systems Agency, Inc., 285 Ark. 397, 401, 687 S.W.2d 840, 842-843 (1985), the Arkansas Supreme Court stated as follows, before deciding that additional relief was not appropriate in that case:

Some states hold that when the “public meeting” statute sets out specific remedies, the courts are limited to those remedies set out. For a listing of those jurisdictions see *Annotation—Statutes—Proceedings Open to Public*, 38 A.L.R.3d 1070, § 7. We decline to take such a limited approach but instead, in order to effectuate the laudable public purposes of the act, hold that some actions taken in violation of the requirements of the act may be voidable. It will be necessary for us to develop this law on invalidation on a case-by-case basis.

Perhaps ADEQ overlooked that case in making its accusations, but it undercuts ADEQ’s arguments. As a matter of law, the Court can grant the relief requested by C & H regarding the comment period and related permitting decision pending ADEQ’s production of the requested documents.

WHEREFORE, C & H Hog Farms, Inc. prays that ADEQ’s alternative motion to dismiss be denied and for all other proper relief to which C & H may be entitled.

Respectfully submitted,

/s/ William A. Waddell, Jr.

William A. Waddell, Jr., AR Bar No. 84154
FRIDAY, ELDREDGE & CLARK, LLP
400 West Capitol Ave, Ste. 200
Little Rock, Arkansas 72201
(501) 370-1510
waddell@fridayfirm.com

AND

Charles R. Nestrud, AR Bar No. 77095
BARBER LAW FIRM PLLC
425 West Capitol Ave, Ste. 3400
Little Rock, Arkansas 72201
(501) 372-6175
cnestrud@barberlawfirm.com

Attorneys for C&H Hog Farms, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following attorney by electronic mail on this 12th day of November, 2018:

Daniel Pilkington
ADEQ Attorney Specialist
5301 Northshore Drive
North Little Rock, AR 72118-5317

/s/ William A. Waddell, Jr.
William A. Waddell, Jr.