

WILD HORSE OBSERVERS ASS'N V. N.M. LIVESTOCK BOARD

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**WILD HORSE OBSERVERS
ASSOCIATION, INC.,
Plaintiff-Appellant,
v.
NEW MEXICO LIVESTOCK BOARD,
Defendant-Appellee,
and
SUSAN BLUMENTHAL, ASH COLLINS,
SUSAN COLLINS, JON COUCH,
PETER HURLEY, JUDITH HURLEY,
ZANE DOHNER, CAROLYN E. KENNEDY,
LYNN MONTGOMERY, JOE NEAS,
MIKE NEAS, AND PAMELA NEAS,
Defendants by Intervention-Appellees.**

No. A-1-CA-36011

COURT OF APPEALS OF NEW MEXICO

September 25, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Valerie A.
Huling, District Judge

COUNSEL

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Appellant

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Appellees

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: STEPHEN G. FRENCH, Judge, HENRY M. BOHNHOFF, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Wild Horse Observers Association, Inc. (WHOA) appeals from the district court's order of dismissal without prejudice and disposing of all pending motions (the Order), entered on September 23, 2016. [4 RP 885-87] In our notice of proposed summary disposition, we proposed to affirm. In response to this Court's notice, WHOA filed a memorandum in opposition; the New Mexico Livestock Board (the Board) filed a memorandum in support; and Defendants by Intervention filed a memorandum in support. We have duly considered the responses, and for the reasons stated in the notice of proposed disposition and in this opinion, we affirm.

{2} In its docketing statement, WHOA raised a single issue: "may a party submit an affidavit in support of a motion to dismiss and request the court to rely on that affidavit and at the same time oppose and deny the opposing party discovery needed to test the information contained in the affidavit?" [DS 6] In our notice of proposed summary disposition, we proposed to affirm and stated:

Based on our review of the record, it appears that WHOA's complaint concerned the horses in Placitas, and WHOA specifically asked for an order pertaining to "the Placitas horse herd[.]" [1 RP 1-19 (¶¶ 3, 8-9, 32-35, 40, 42, 45, 47-49, 59-63, 65-66, 71, 75)] It does not appear that WHOA made claims concerning horses statewide, and it does not appear that WHOA made claims regarding the "enticement" of the Placitas horses onto private lands. [See *generally* 1 RP 1-19] Moreover, it does not appear that WHOA filed an amended complaint to add such claims. Thus, we are not persuaded that WHOA was entitled to the discovery that it sought in its motion to open discovery. [See 4 RP 707-12] Accordingly, we propose to conclude that the district court did not abuse its discretion in denying WHOA's motion to open discovery.

[CN 6]

{3} In its memorandum in opposition, WHOA continues to "argue[] that it was entitled to discovery to test the factual assertions of the [Board and Defendants by Intervention] and that the case was one of [statewide] significance affecting horses [statewide], not just horses in Placitas Open Space but on public lands near Placitas." [MIO 4; see *generally* MIO 3-9] Additionally, WHOA asserts that it did make claims regarding the "enticement" of the Placitas horses onto private lands. [MIO 9-10; see *also* 1 RP 13 (¶ 53), 14-15 (¶ 62(d)), 18 (¶ 3)] In its prayer for relief, WHOA asks this Court to "remand this action to the [d]istrict [c]ourt and allow discovery of the actions

and practices of [the Board] throughout the state and that the Court allow discovery of the actions of Defendants [by] Intervention in terms of enticing horses, capturing horses, moving horses, harassing horses, and allowing the [Board] to take possession of the horses without compliance with this Court's orders and certainly without DNA testing." [MIO 11]

{4} "Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law." *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683. With respect to WHOA's insistence that the allegations in its complaint demonstrate that this action involves the entire State of New Mexico, we are not persuaded. [See *generally* MIO 3-9] WHOA's memorandum provides no legal arguments or facts that this Court has not already considered or that persuade this Court that the complaint concerned statewide activities.

{5} With respect to "enticement" allegations, WHOA pointed out that it did allege the following:

53. On fenced and unfenced property, corrals have been set up with food and water to draw the wild horses away from nearby public lands and onto private land for impoundment and auction.

....

62. [The Board] and its agents are violating the Livestock Code by taking possession of the Placitas wild horses and selling them as if they were stray livestock. These violations include, but are not limited to:

....

d. Unlawfully impounding, removing, and putting up for sale eight wild horses that reside on public lands but were impounded on private property by [the Board] and its agents.

[MIO 9-10; see *also* 1 RP 13 (¶ 53), 14-15 (¶ 62(d))] Notably, these allegations pertain to the wild horses in Placitas [See 1 RP 12-15 (¶¶ 48-63)], while WHOA is seeking discovery regarding horses statewide. [MIO 5, 11]

{6} Based on the information before this Court, we cannot conclude that the district court erred in concluding that the issues related to the Placitas horses are moot, that there exists no reason for discovery in regard to the Placitas horses, and in denying WHOA's motion to open discovery. [See 4 RP 885-86] Accordingly, for the reasons stated in this opinion, as well as those provided in our notice of proposed disposition, we affirm.

{7} **IT IS SO ORDERED.**

JONATHAN B. SUTIN, Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

HENRY M. BOHNHOFF, Judge