Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Lionheart L.L.C. d/b/a Alibi Drinkery,

Defendant.

Court File No. 19HA-CV-20-4167

TEMPORARY INJUNCTION

The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of the District Court, on December 23, 2020, for a hearing on Plaintiff's motion for temporary injunction and Defendant's Motion to Dissolve the Ex-Parte Temporary Restraining Order. The Court previously granted an *Ex Parte* Motion for a Temporary Restraining Order on December 18, 2020 brought by the State of Minnesota, by its Attorney General Keith Ellison ("Plaintiff"), against Defendant Lionheart L.L.C. d/b/a Alibi Drinkery ("Defendant"). Assistant Attorney General Elizabeth Odette and Assistant Attorney General Jason Pleggenkuhle appeared on behalf of Plaintiff. Attorney Michael Padden appeared on behalf of Defendant.

The Court has considered the pleadings, exhibits, files, records, submissions, and the affidavits submitted to the Court. The Court accordingly makes the following findings of fact, conclusions of law, and enters the following Order.

ORDER

1.) Defendant's request to dissolve the temporary restraining order is **DENIED**.

2.) The State's request for temporary injunction pursuant to Minnesota Rule of Civil Procedure 65.02 is **GRANTED**.

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

3.) The attached memorandum is incorporated in the Order as Findings of Fact and legal rationale for the Court's decision.

BY THE COURT:

Dated: _____, 2020

_____
Jerome B. Abrams
Judge of District Court
Abrams, Jerome
Dec 29 2020 12:56 PM

Introduction

As Americans, we bristle at being told what to do—especially by government. We are a nation which treasures its freedoms. Equally, we are driven by the needs of our community when exceptional circumstances require our sacrifice. Covid-19 has presented us with a historic challenge: testing the limits of our ability to survive the disease as well as endure the restrictions necessary to fight it.

Before the Court is a request by the State of Minnesota for injunctive relief, substantially limiting the income sources and operations of Defendant, in the interests of public health and safety. No serious challenge is offered to the many affidavits which chronicle the ravages of the disease nor its transmissibility especially in environments like that found and encouraged in Defendant's bar.

Instead, Defendant argues the Executive Order promulgating these restrictions is illegal at many levels based on the protections provided by Minnesota Statutes and the State and US Constitutions which insure the freedoms for their business and their customers' right to patronize their establishment. Defendant's arguments are as explained below, without merit and are devoid

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

of factual or legal support.

Freedom means to most Americans the ability to do what we want subject to two simple limitations: first, that our activities are legal and second what we are doing doesn't cause harm to others. The actions of the Defendant in this time of unprecedented disease transmission, illness, and death are both against the law and harmful. Their blatant and intentional defiance of the law is directly promoting the spread of Covid-19, exposing their customers and employees to disease. Further this transmission immediately becomes the problem of others in the health care system, compounded in its effect by being brought home, to work, etc. In addition, they are exploiting the good conduct of others in the community who are following the law.

The economic consequences necessary to implement public health measures, including the closing of hospitality establishments to on premises service of customers, are enormous. The sacrifice is not equally borne among all businesses, even those in the hospitality industry. Yet, these burdens are legal and will have to be borne in the interests of the community. Redress may lie elsewhere. However, these economic burdens do not justify purposely defying the law.

Memorandum

Governor Tim Walz declared a peacetime emergency on March 13, 2020 due to the COVID-19 pandemic spreading across the United States. It quickly reached both the biggest cities as well as the smallest towns in Minnesota. The peacetime emergency declared by Governor Walz continues as of the date of this order to address the ongoing public health concerns. Governor Walz issued Executive Order 20-99, at issue in this case, on November 18, 2020 with restrictions for on-premises dining lasting until December 18, 2020 at 11:59 p.m.

The State of Minnesota, by and through the Minnesota Attorney General's Office ("Plaintiff") filed a Summons and Complaint against Lionheart L.L.C d/b/a Alibi Drinkery

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

("Defendant") on December 17, 2020 alleging violations of Order 20-99 and requesting relief.

Plaintiff filed an ex-parte Motion for a Temporary Restraining Order (hereinafter "TRO") and Temporary Injunction enjoining Defendant from all business operations that were in violation of Executive Order 20-99. Specifically, Plaintiff sought a TRO to stop Defendant from allowing on-premises dining in violation of Executive Order 20-99. The Court granted the request for a TRO on December 18, 2020 and set an initial hearing date of December 22 to hear argument on the temporary injunction. Counsel for Defendant appeared at the December 22 hearing and requested an additional day for the Court to consider a newly filed response from Defendant as well as to provide Plaintiff an opportunity to respond to Defendant. The request was granted and a hearing on the merits of the temporary injunction request was held on December 23, 2020 at 10 a.m.

Summary of Facts

COVID-19 is a virus and illness that had not previously been identified in humans prior to the ongoing pandemic. COVID-19 quickly spread across the globe and found its way into the United States. In the early months of the pandemic, little was known about how the virus was spread nor the kinds of treatments that could aid humans who were infected. Millions have been infected since the early days of the pandemic, and the number of people who have succumbed to the virus continues to devastate communities across the state. Over 400,000 confirmed cases have spread across Minnesota with 28,795 of those coming in the first week of December alone. At the same time, over 5,000 Minnesotans have succumbed to the virus with December being a particularly harsh month with over 1,500 individuals losing their lives. It took Minnesota over 6 months to record its first 100,000 positive COVID-19 cases, but only 41 days to add an additional 100,000 new cases. Just 16 days later, Minnesota logged another 100,000 positive

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

cases.

In the months of November and December of 2020, Minnesota recorded record numbers of daily new cases, hospitalizations, intensive care unit admissions, and deaths. On December 16, 2020, the date Defendant opened for in-person dining, there were 92 reported deaths due to COVID-19 across Minnesota. Nearby hospital Fairview Ridges in Burnsville, MN reported a 90% occupancy of ICU beds with only one bed available. These statistics not only represent the tragic loss of life of neighbors, family, and friends, they represent the challenges faced by public health officials in Minnesota to contain a virus that has plagued the state for nearly 10 months.

Public health officials have determined that COVD-19 can be spread through respiratory droplets exhaled into the air by individuals not wearing face coverings. The on-premises consumption of food and beverages at bars and restaurants in Minnesota continues to pose substantial risks to public health and safety. Bars and restaurants pose a particularly high risk of COVID-19 transmission because they allow people to gather and congregate around people from different households to eat and drink without face coverings, often for extended periods of interaction. Individuals cannot remain masked while they are eating and drinking, and many people leave their masks off in bars and restaurants while talking. Bars and restaurants can be loud, leading to a larger volume of respiratory droplets in the air as people talk, raise their voices to be heard, or laugh. **Minnesota Department of Health's contact tracing investigations have shown that apart from long term care settings, bars and restaurants are among the settings most frequently associated with COVID-19 outbreaks in Minnesota.** (emphasis added) Specifically, the Minnesota Department of Health has already traced 448 COVID-19 outbreaks and 4,145 confirmed cases of COVID-19 to bars and restaurants in Minnesota.

On December 15, 2020, Defendant publicly posted on their Facebook page an image with

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

text that included "WE ARE OPEN WEDNESDAY AT 11 AM." Plaintiff sent a letter to Defendant informing them of potential consequences for violating the Executive Order. Included in the letter was an explanation that Executive Order 20-99 is mandatory and non-compliance of the requirements can result in suspension or revocation of a liquor license. The letter requested a written response confirming compliance by noon on the following day, December 16, 2020. On Wednesday December 16, 2020, Defendant opened their business to the public in violation of the Executive Order. Many media outlets covered the crowds of mostly unmasked patrons. Defendant informed the Star Tribune newspaper that the business would continue to serve until 2 a.m. On December 17, 2020, Defendant posted again on their public Facebook page "OPEN TODAY. COME IN FOR FOOD AND DRINKS." Many media outlets again covered people within Defendant's business eating and drinking on-premises in violation of the Executive Order. The Dakota County Sherriff's Department was informed by patrol staff that Alibi was open with multiple party buses parked in front of the business. On December 17, 2020, Plaintiff emailed Defendant at its publicly-listed email address to notify them that Plaintiffs would be bringing a motion for temporary restraining order and temporary injunction. The foregoing facts have not been challenged by Defendant.

The parties present a number of arguments to the Court. Plaintiff is requesting that the Court issue a Temporary Injunction that requires Defendant to follow the terms of Executive Order 20-99 and subsequent orders, pending a trial on the merits. Defendant opposes that request and asks the Court to dissolve the TRO. As to the Temporary Injunction, Defendant argues first that, as a threshold matter, the Executive Order in question is unlawful because it does not follow the procedures set forth in Minn. Stat. § 12.31, subd. 2. Defendant further argues that the Temporary Injunction should be denied because Executive Order 20-99 violates both the Equal

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

Protection and Due Process provisions of the state and federal constitutions. Finally, Defendant requests the Court consolidate the pending motions with a decision on the merits. Plaintiff opposes all of Defendant's claims and requests.

I. Motion to Dissolve TRO

There are two types of preliminary injunctive relief in Minnesota. First, a temporary restraining order is an immediate order designed to either maintain a status quo or return to a status quo until such time that a hearing may be had where the other party may be heard. *Prolife Minnesota v. Minnesota Pro-Life Committee*, 632 N.W.2d 748, 753 (Minn. Ct. App. 2001) (discussing purpose of TRO). Second, a Temporary Injunction allows a court to delve into the issues further and make a determination of whether a longer period of enjoinment is warranted pending a full trial on the merits. *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002) (discussing purpose of temporary injunction).

In order to obtain a TRO a plaintiff must show that:

> (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition; and, (2) the applicant's attorney states to the court in writing the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required.

Minn. R. Civ. P. 65.01.

The Court found that Plaintiff made a satisfactory showing of these two elements and the Court issued a TRO on December 18, 2020. Defendant argues that the *Dahlberg* factors weigh in favor of the Defendant's position and thus the TRO should be suspended. *Dahlberg Bros. Inc. v. Ford Motor Co*., 137 N.W.2d 314, 321-22 (Minn. 1965). However, the Court did not decide the TRO on the *Dahlberg* factors but instead found that Plaintiff made a satisfactory showing of the two elements in Minnesota Rule of Civil Procedure 65.01. Since the most recent hearing deals

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

with the Temporary Injunction (as the Court has already issued a TRO), it is moot to determine whether the TRO should be dissolved. The Court will either grant Plaintiff's Motion for a Temporary Injunction, thereby affirming the TRO, or the Court will deny Plaintiff's Motion for a Temporary Injunction and the matter is resolved by operation of law.

Therefore, Defendant's Motion to Dissolve the TRO is merged into its opposition to the temporary injunction, and the motion to dissolve becomes moot.

II. Lawfulness of Executive Order 20-99

The Minnesota Emergency Management Act ("MEMA") is codified in Minnesota Statute §12.31. This statute gives the Governor the authority to act in peacetime emergencies. Through this authority, Governor Walz has issued a number of Executive Orders, including Executive Order 20-99. Defendant alleges that Governor Walz overstepped his constitutional authority in Executive Order 20-99 and violated the separation of powers making the Executive Order unconstitutional. The separation of powers principle is the foundation of American government and is enshrined not only in the U.S. Constitution, but in Minnesota's Constitution stating:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers property belonging to either of the others, except in the instances expressly provided in this constitution.

Minn. Const. art. III §1.

The Minnesota Supreme Court has held this to mean that "the legislature . . . cannot delegate purely legislative power to any other body, person, board, or commission." *Lee v. Demont*, 36 N.W.2d 530, 538 (Minn. 1949). Purely legislative power is "the authority to make a complete law." *Lee*, 36 N.W.2d at 538–39. The Legislature may delegate authority if it gives "reasonably clear policy or standard of

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

action." *Id*. This is achieved by first granting the Governor general authority to act under Minn. Stat. § 12.21, next by granting the Governor specific peacetime emergency power in MEMA (Minn. Stat. § 12.31), and finally by providing that:

> Orders and rules promulgated by the governor under authority of section 12.21, subdivision 3, clause (1), when approved by the Executive Council and filed in the Office of the Secretary of State, have, during a national security emergency, peacetime emergency, or energy supply emergency, **the full force and effect of law**. Rules and ordinances of any agency or political subdivision of the state inconsistent with the provisions of this chapter or with any order or rule having the force and effect of law issued under the authority of this chapter, is suspended during the period of time and to the extent that the emergency exists.

Minn. Stat. § 12.32 (emphasis added).

Here, the Legislature has intended that MEMA provide the Governor with authority during a state of emergency. Minn. Stat. § 12.31, subd. 1. The process for declaring a peacetime emergency in Minnesota is specifically detailed by statute. MEMA provides for the Governor to declare a peacetime state of emergency for all or part of Minnesota:

> The governor may declare a peacetime emergency. A peacetime declaration of emergency may be declared only when an act of nature, a technological failure or malfunction, a terrorist incident, an industrial accident, a hazardous materials accident, or a civil disturbance endangers life and property and local government resources are inadequate to handle the situation.

Minn. Stat. § 12.31, subd.1

Upon declaring a peacetime emergency, the governor must immediately notify the majority and minority leaders of the Minnesota Senate and the speaker and majority and minority leaders of the Minnesota House of Representatives. Minn. Stat. § 12.31, subd. 2(a). A peacetime emergency must not be continued for more than five days, unless extended for up to thirty (30) days by resolution of the Executive Council. *Id.* An order, or proclamation declaring, continuing, or terminating an emergency must be given prompt and general publicity and filed with the

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

Secretary of State. *Id*. The legislature may terminate a peacetime emergency extending beyond thirty (30) days by majority vote. *Id*. at subd. 2(b). If the governor determines a need to extend the peacetime emergency declaration beyond thirty (30) days and the Legislature is not sitting in session, the governor must immediately issue a call for a special session convening both houses of the legislature. *Id*.

Defendant argues that Executive Order 20-99 is unlawful because Governor Walz did not follow MEMA's established protocols to extend executive orders in peacetime emergencies. Specifically, Defendant argues that the Legislature must approve any extension of an executive order past thirty (30) days, which Defendant claims did not occur in this instance.

However, Section 12.31, subd. 2 does not require action by the Legislature. Rather, the statute provides that the Legislature may terminate extensions beyond thirty (30) days, if it so desires. Minn. Stat. § 12.31, subd. 2. If the Legislature remains silent on the issue, the extension is valid, and the governor may continue to issue executive orders every thirty (30) days, ostensibly for as long a period as the emergency remains.

This Court is required to "give effect to the legislature's intent as express in the language of the statute." *Goodyear Tire & Rubber Co. v. Dynamic Air*, 702 N.W.2d 237, 242 (Minn. 2005). In doing so here, the legislature's intent concerning whether it must affirmatively approve an executive order is "clear from the unambiguous language of the statute." *Slaab v. Diocese of St. Cloud*, 853 N.W.2d 713, 716–17 (Minn. 2014). The Legislature is not required to affirmatively approve an executive order, but it is free to terminate an executive order if it wishes.

Here, the 91st Minnesota Legislature was in regular session for some of the pandemic and has held numerous special sessions since adjourning its regular session. In each Executive

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

Order extending the peacetime emergency, the legislature in regular session did not terminate the Executive Order. In each subsequent Executive Order when the legislature was not in session, Governor Walz called a special session and at no time did the Legislature terminate any executive order. As of the date of this order being issued, the Minnesota Legislature has not yet terminated any executive order.

The Legislature here has chosen to delegate authority to the Governor and it is well within its constitutional authority to do so "in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase." *Anderson v. Comm'r of Highways*, 126 N.W.2d 778, 780–81 (Minn. 1964). It has done so clearly by setting out the occasions during which a peacetime emergency may be invoked and requiring that (1) life and property must be endangered and (2) local government resources must be inadequate to handle the situation. Minn. Stat. § 12.31, subd. 2. As the Anderson court put it, "it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which it legislates." *Anderson v. Comm'r of Highways*, 126 N.W.2d at 781.

III. Legal Standard for Temporary Injunction

Plaintiff argues that the Court does not need to consider the *Dahlberg* factors and analysis. Plaintiff, rather, contends that the Court must only consider whether Defendant has, or is about to, violate Executive Order 20-99. *State v. Minnesota Sch. of Bus., Inc.*, 899 N.W.2d 467, 472 (Minn. 2017) (an injunction sought under Minn. Stat. § 8.31, subd. 3 does not require an analysis of the *Dahlberg* factors) and *State ex. rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 573 (Minn. App. 2005) (the district court need only consider whether the statutes were violated or about to be violated and whether injunctive relief fulfilled the legislative purpose). Defendant moves the Court to apply the *Dahlberg* factors and argues that those factors

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

weigh in Defendant's favor. *Dahlberg Bros. Inc. v. Ford Motor Co*., 137 N.W.2d 314, 321-22 (Minn. 1965).

A district court must consider the *Dahlberg* factors, except when a statute provides for injunctive relief. *Wadena Implement Co. v. Deere & Co.,* 480 N.W.2d 383, 388-89 (Minn. App. 1992). Only when a law does not provide for injunctive relief are courts to evaluate the *Dahlberg* factors to determine whether sufficient grounds exist to issue a TRO or temporary injunction. *Cross Country Bank*, 703 N.W.2d at 573 (when statutes specifically provide for injunctive relief court is "not required to make findings on the *Dahlberg* factors to enjoin violation of the statute."). Where a party "legitimately disputes" the applicability of the underlying statute authorizing injunctive relief, a district court "is not required" to grant a temporary injunction without consideration of the *Dahlberg* factors. *See State v. Int'l Assoc. of Entrepreneurs of Am.*, 527 N.W.2d 133, 137 (Minn. App. 1995) (citing *Pac. Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 918 (Minn. App. 1994)).

Executive Order 20-99 provides that the Attorney General may "seek any civil relief available pursuant to Minnesota Statutes 2020, section 8.31, for violations or threatened violations of this Executive Order * * *." Executive Order 20-99. The Attorney General may "sue for and have injunctive relief in any court of competent jurisdiction against any such violation or threatened violation without abridging the penalties provided by law." Minn. Stat. § 8.31, subd. 3. Executive Order 20-99 provides Plaintiff injunctive relief for the types of action Defendant undertook. For reasons stated throughout this decision, Defendant does not dispute the applicability of the underlying statute authorizing injunctive relief. However, the Court will still examine the *Dahlberg* factors as if an adequate showing was made.

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

A. Dahlberg Factor Analysis

The Court considers the five interdependent Dahlberg factors below.

1. The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;
2. The harm to be suffered by Plaintiff if the temporary restraint is denied as compared to that inflicted on Defendant if the injunction issues pending trial;
3. The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief;
4. The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in state and federal statutes; and,
5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros. Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965).

I. Nature and Background of the Relationship between Parties

The first Dahlberg factor requires the Court to examine "[t]he nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief." *Dahlberg Bros*., 137 N.W.2d at 321. When the parties' background and relationship is that of regulator and non-complaint regulated entity, the factor favors the regulator. *Swanson v. CashCall, Inc*., Nos. A13-2086, A14-0028, 2014 WL 4056028, *5 (Minn. App. Aug. 18, 2014), rev. denied (Minn. Nov. 17, 2015).

The parties do not dispute that Defendant owns and operates a business in Lakeville. The parties do not dispute that Defendant opened for in-person dining in defiance of Executive Order

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

20-99. Plaintiff enforces non-compliance of the regulated activity as ordered in Executive Order 20-99. As a result, the first *Dahlberg* factor favors Plaintiff as a regulator of Defendant, a non-complaint regulated entity.

II. Balance of Harms

Second, the Court must consider the "harm suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial." *Dahlberg Bros*., 137 N.W.2d at 321. Plaintiff must show an injury that is "real, substantial and irreparable." *Indep. Sch. Dist. No. 35, Marshall County v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966). More specifically, the party seeking the injunction must show that a legal remedy (e.g. monetary damages) is not adequate and that the injunction is necessary to prevent great and irreparable injury. *AMF Pinspotters, Inc. v. Harkins Bowling, Inc*., 110 N.W.2d 351 (Minn. 1961); *North Central Public Service Co., v. Village of Circle Pines*, 224 N.W.2d 741, 746 (Minn. 1974).

The parties do not dispute that Executive Order 20-99 imposes restrictions on businesses across the state similarly positioned to Defendant. The pandemic and ensuing closures impact the income sources and operations of Defendant in the interests of public health and safety. Those concerns are not simply words on paper; they impact the lives of the 23 employees Defendant has either temporarily or permanently let go. The closures also impact the owners and operators of Defendant who made financial risks to open a business. None of these harms are overlooked by the Court.

However, the COVID-19 pandemic has been, and continues to be, a public health crisis not seen in this country in a century. No serious challenge is offered to the many affidavits which chronicle the ravages of the disease nor its transmissibility especially in environments like that

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

found and encouraged in Defendant's bar.

The Minnesota Department of Health has determined that in-person dining creates a significant risk for community spread of COVID-19 at a time when, at the time of filing this case, nearby Fairview Ridges hospital in Burnsville, MN reported a 90% occupancy of ICU beds with only one bed available. This risk is higher than that in other types of in-person transactions like grocery shopping or take-out dining. The evidence is persuasive that if Defendant remains open to in-person dining, the health and safety of Minnesotans is at increased risk. The Court finds that the harm of increased community spread from Defendant's non-compliance presents a real and substantial harm. Increased infections imposes stress on local hospitals, limits the availability of healthcare (especially in rural areas), creates an ongoing financial drain on the economy, and has a negative ripple effect on other community activities (e.g. keeping schools open). The Court finds that the balance of harm weighs in favor of Plaintiff as the pandemic continues to ravage our communities.

III. Likelihood of Success on the Merits

The Court must consider "[t]he likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief." *Dahlberg Bros*., 137 N.W.2d at 321. Defendant brings a claim of an Equal Protection violation and a Regulatory Taking as evidence that Defendant will succeed on the merits of the case.

Equal Protection Violation

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of*

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). The parties seem to disagree on the standard the Court must apply to Defendant's Equal Protection claim. Defendant made both arguments that the highest level of strict scrutiny applies and that the lower standard of rational basis applies. Plaintiff, correctly, argues that a lower standard of rational basis applies.

There is a sliding scale of judicial scrutiny applied in cases that, like this case, challenge constitutional rights. That scale ranges from "rational basis" scrutiny at the lowest end, to "intermediate scrutiny," to "strict scrutiny" at the most severe end based on the right alleged to be infringed. Determining the proper scrutiny is important because a rational basis review places the burden on the Defendant, whereas the higher levels place the burden on Plaintiff. See *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."); see also *FCC v. Beach Comm, Inc*., 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.").

Defendant's argument that strict scrutiny must apply here as the Supreme Court applied in *Roman Catholic Diocese of Brooklyn* is an effort to create similarities in two cases where there is none. No similar fundamental right exists in this case of economic liberties analogous to the religious liberties addressed in *Roman Catholic Diocese of Brooklyn. Roman Catholic Diocese of Brooklyn v. Cuomo,* 2020 WL 6948354, 582 US ___ (Nov. 25, 2020). As a result, Plaintiff's argument that the rational basis standard applies is correct.

The rational basis standard is appropriate and the burden is on Defendant to show that Executive Order 20-99 is not rationally related to a legitimate government interest. *Heller*, 509 U.S. at 320; *Beach Comm*., 508 U.S. at 315. Typically, a challenge to government action survives Equal Protection as long as it "is rationally related to a legitimate governmental

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

purpose." *Scott v. Minneapolis Police Relief Ass'n, Inc*., 615 N.W.2d 66, 74 (Minn. 2000). Specifically, in terms of public health restrictions during a pandemic, most state action is vulnerable to constitutional challenge only if: (1) it has no real or substantial relation to the object of protecting the public health, safety, or morals; or (2) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Jacobson*, 197 U.S. at 31. The U.S. Supreme Court noted in *Jacobson*—which dealt with an unsuccessful challenge to compelled vaccinations during the smallpox outbreak in the early 1900s—that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. at 27.

Here, the Court finds a rational relationship between the temporary limits in Executive Order 20-99 and the legitimate government interest of protecting public health. Executive Order 20-99 temporarily restricts on-premises dining in an effort to slow or stop the spread of COVID-19. The executive order allows restaurants to serve take-out orders or provide delivery service and is tailored to temporarily restrict the kind of environment epidemiologists find easily transmits COVID-19. Minnesota courts have already repeatedly rejected the argument that the temporary restrictions placed on bars and restaurants violate equal protection. *See, e.g.*, *State v. Schiffler, et al.*, No 73-CV-20-3556 at 13-14 (June 2, 2020) (Odette Aff. Ex. 8 at 17-18; Ex. 9 at 15-17); *State v. Southwest School of Dance, LLC*, d/b/a Havens Garden, No. 62-CV-20-5691 (Dec. 16, 2020) (Odette Aff. Ex. 8); *State v. Boardwalk Bar and Grill, LL*C, No. 60-CV-20-2039 (Dec. 22, 2020) at 13-14 (Odette 2nd Aff. Ex. 8.)

Defendant contends that all businesses with indoor service should be treated the same. However, that is not the proper legal argument for the Court. Rather, the issue is whether the

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

restrictions placed against in-person indoor dining are rationally related to slowing the spread of COVID-19. In this case, many of Defendant's issues are addressed in the text of Executive Order 20-99 itself. In pages one through three of Executive Order 20-99, Governor Walz explains the science, data, and reasoning for the specific restrictions and he connects that information with the restrictions imposed in the executive order. Specifically, he references the increase in community spread of COVID-19 and the need to limit further spread. EO 20-99, pages 1-2. The Minnesota Department of Health has traced a number of significant outbreaks to bars and restaurants. EO 20-99, page 2. There are fewer outbreaks in retail settings. EO 20-99, page 3. Restrictions on activities within tribal reservations are left to tribal authorities. EO 20-99, pages 9-10.

The Court finds that there is a rational basis between the restrictions on the kind of business that Defendant operates and the legitimate state interests of reducing the spread of COVID-19.

Due Process Violation – Takings

Defendant argues that a temporary injunction is an unlawful taking within the meaning of the 14th Amendment to the Constitution and Article I, § 2 of the Minnesota Constitution. Defendant argues that the restrictions in Executive Order 20-99 constitute a taking and that Defendant has not been awarded just compensation. The Supreme Court contemplated the merits of a taking and failed to find a categorical taking for a 32-month moratorium on development in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002). The *Tahoe-Sierra* Court emphasized that a categorical taking requires a determination that the regulatory action denies "*all* economically beneficial uses" of the entire property. *Id.* (emphasis original). *See also Elmsford Apt. Assocs., LLC v. Cuomo*, 2020 WL 3498456 at *9 (S.D.N.Y. June 29, 2020). Executive Order 20-99 may temporarily decrease the economic benefits of the

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

business compared to normal operations, but Defendant's ability to provide take-out and delivery service permits economically beneficial uses. The restrictions in Executive Order 20-99 do not meet the legal requirements of a taking.

Further, Regulatory takings are analyzed under the three-part *Penn Central* test. Under *Penn Central*, a court considering a takings claim must review: (1) the economic impact of the regulation on the person suffering the loss; (2) the extent to which the regulation interferes with distinct investment backed expectations; and (3) the character of the government action to assess whether the complained of regulatory action is a taking. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The first *Penn Central* factor weighs in favor of Defendant. The economic impact of the pandemic and the ensuing closures impact countless businesses across Minnesota and the United States. The parties themselves do not necessarily disagree as to businesses like Defendant bearing the brunt of the economic hardship during the pandemic. The second *Penn Central* factor also weighs in favor of Defendant. Defendant, presumably like all business owners, opened their business expecting the investments and hard work put into the business to pay off over time. The COVID-19 pandemic and resulting closures not only impede those expectations but delayed them altogether. The regrettable reality exists that the type of business Defendant owns and operates is of the kind that public health officials believe spread COVID-19 at higher rates than others.

The third *Penn Central* factor is where Defendant's argument fails. Where "the health, safety, morals, or general welfare" of the public are promoted by prohibiting particular acts, Minnesota courts hold that the laws imposing such prohibitions do not result in a taking even where they destroy or adversely affect property interests. *Zeman*, 552 N.W.2d 548, 552 (Minn.

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

1996); *accord Minnesota Sands, LLC v. County of Winona*, 940 N.W.2d 183, 200-01 (Minn. 2020). The express purpose of Executive Order 20-99 is to prevent harm to the public and protect public health and safety from the ongoing pandemic. By temporarily restricting the high-risk activity of on-premises dining within bars and restaurants during a deadly pandemic, Executive Order 20-99 requires that Defendant not put their property to what public health officials have declared a dangerous use. *See Keystone*, 480 U.S. at 492.

Other Minnesota courts, and courts across the country, have found COVID-19 executive orders (including Minnesota's on-premises dining restrictions on bars and restaurants) do not constitute a taking. *E.g., Schiffler,* No. 73-cv-20-3556 (Nov. 2, 2020) (Odette Aff. Ex. 9 at 17); *Buzzell,* No. 62-cv-20-3623 (October 9, 2020) (Odette 2nd Aff. Ex. 9); *State v. Boardwalk Bar and Grill, LLC*, No. 60-CV-20-2039 (Dec. 22, 2020) at 15-16 (Odette 2nd Aff. Ex. 8); *Oregon Rest. & Lodging Ass'n v. Brown*, 2020 WL 6905319, at *5 (D. Or. Nov. 24, 2020); *TJM 64, Inc. v. Harris*, 2020 WL 4352756, at *5 (W.D. Tenn. July 29, 2020); *Lebanon Valley Auto Racing Corp. v. Cuomo,* 2020 WL 4596921, at *7 (N.D.N.Y. Aug. 11, 2020).

Like the many courts who have previously considered the question, this Court similarly finds that Executive Order 20-99 does not constitute a taking.

IV. Public Interest and Policy Considerations

The fourth *Dahlberg* factor requires consideration of any public interest or public policy expressed in applicable statutes. *Dahlberg Bros.*, 137 N.W.2d at 321-22. The Governor issued Executive Order 20-99 to slow the spread of a deadly infectious disease that continues to date. Defendant violated the safety restrictions by remaining open to the public on December 16 and December 17, 2020 and allowing more than five members of the public in its restaurant at one time. Public policy weighs in favor of temporary injunctive relief that requires Defendant to

Filed in District Court
State of Minnesota
12/29/2020 1:22 PM

temporarily restrict its services to the public in accordance with Executive Order 20-99.

V. Administrative Burden on the Court

Finally, the Court must consider the administrative burdens a temporary injunction may impose upon the Court. *Dahlberg Bros*., 137 N.W.2d at 322. Here, issuing a temporary injunction will impose minimal to no administrative burdens on the Court because Plaintiff's request is that Defendant obey the Governor's Executive Order 20-99. Issuing injunctive relief requires Defendant to conform its conduct to that which is expected of other restaurants in Minnesota. This final *Dahlberg* factor favors granting the State's requested temporary injunctive relief.

Consolidation Request

The Court finds that it would be inappropriate to consolidate the motions with a trial on the merits. The parties are entitled to complete the discovery process, to call witnesses to testify, and to present additional documentary evidence. Defendant's memorandum suggests that discovery is not needed, but stated at the December 23 hearing that discovery and expert witness testimony would be needed in a trial As such, Defendant's request to consolidate is denied.

JBA **12/29/2020**

Abrams, Jerome
Dec 29 2020 12:57 PM