FILED 04/06/2021 12:01 PM DEBORAH A. MYERS CLERK OF COURTS ASHLAND, OHIO
Case: 20-CIV-104

IN THE COURT OF COMMON PLEAS, ASHLAND COUNTY, OHIO
GENERAL DIVISION

CATTLEMANS INC , ET AL,

Plaintiff, **CASE NO. 20-CIV-104**

vs.

ASHLAND COUNTY HEALTH DEPARTMENT , ET AL,

Defendant. **JUDGMENT ENTRY**

This matter came before the Court for a bench trial on September 25, 2020 and September 30, 2020 on Plaintiff's August 7, 2020 Complaint for Declaratory Judgment and Injunctive Relief. The bench trial was conducted by remote video with all parties participating. Upon the conclusion of the bench trial, the Court requested post-hearing legal memoranda from counsel. Defendant submitted its initial post-hearing memorandum on November 12, 2020. Plaintiff filed its post-hearing memorandum on November 19, 2020, and Defendant then filed a reply memorandum on November 25, 2020.

FACTUAL BACKGROUND

In the prayer for relief in their Complaint, Plaintiffs' request:

1. A permanent injunction prohibiting enforcement of a July 15, 2020 Cease and Desist Order issued by Defendants, or any materially identical order against Plaintiffs so long as Plaintiffs abide by the general safety strictures articulated in

Chapters 3717 of both the Ohio Revised Code and the Ohio Administrative Code;

2. A permanent injunction prohibiting Defendants or their agents from suspending business licenses (food service licenses) predicated solely on violations of the *Dine Safe Ohio Order*, including masking requirements;
3. A permanent injunction prohibiting Defendants and Defendants' agents from enforcing any Ohio Director of Health Order issued pursuant to R.C. 3701.13 to suspend business licenses (food service licenses);
4. A judgment entry declaring the Ashland County Health Department July 15, 2020 Cease and Desist Order is constitutionally and statutorily impermissible;
5. A permanent injunction prohibiting Defendants from enforcing penalties for non-compliance with any state or local order, or any other non-statutory limit, so long as Plaintiffs operate within the limits of the Ohio Revised Code and adhere to otherwise generally-appliable safety guidelines;
6. A judgment entry declaring Defendants' suspension of Plaintiffs' food service license without a prior hearing or prompt post-deprivation hearing violates Plaintiff's right to procedural due process under the Ohio Constitution; and
7. A judgment entry awarding Plaintiffs their costs, actual damages, nominal damages, and expenses incurred in bringing this action, including reasonable attorney fees, pursuant to R.C. 2335.39.

Defendants, in their responses to Plaintiffs' Complaint, filed a Settlement Memorandum (filed August 21, 2020) and a Motion to Dismiss (filed September 3,

2020). No settlement occurred and the Motion to Dismiss asserted, among other things, the following:

1. The cease-and-desist order was withdrawn by Defendants and Plaintiffs' food service license was reinstated, thereby ending the controversy;
2. That Plaintiffs' have failed to exhaust their administrative remedies;
3. Plaintiffs have failed to serve the Ohio Attorney General as required by R.C. 2721.12(A) and is therefore not entitled to any declaratory judgment relief as to the constitutionality of the Dine Safe Ohio Director of Health Order, R.C. 3701.13 or any other administrative regulations or Health Department Orders issued pursuant to R.C. 3701.13; and
4. No damages can be recovered for the alleged violations of the Ohio Constitution since no private cause of action is afforded under Article 1, Sections 1, 2, 16, 19 and 20, or Article II, Section 1.

Defendants conceded that the Court could assess court costs to the Defendants upon resolution of this matter. Defendants did not file an Answer to Plaintiffs' Complaint.

The *Dine Safe Ohio* Order issued by Ohio Department of Health Director Amy Acton on June 5, 2020, and a subsequent Ohio Department of Health Order regarding the general mandatory wearing of facial coverings issued by Interim Ohio Department of Health Director Lance D. Himes on July 23, 2020 were both stated to be issued pursuant to the authority granted the Ohio Director of Health in R.C. 3701.13 to "make special orders…for preventing the spread of contagious or infections diseases."

This dispute arose when the Ashland County Health Department, through its Director, issued a cease-and-desist order asserting violations by Plaintiffs of the *Dine*

Safe Ohio Oder as issued by the Ohio Director of Health, Amy Acton. It was thereafter alleged by Defendants that Plaintiffs failed to comply with the terms of the cease-and-desist order, as well as the provisions of the *Dine Safe Ohio* Order, although Plaintiffs dispute that claim. At the direction of Heather Reffett, Ashland County Director of Health, the food service license of Plaintiffs' restaurant business was revoked, without any meaningful opportunity for a pre- or post-revocation hearing. There was no meaningful evidence presented to this Court to support a finding that the license revocation (without a meaningful opportunity for hearing) was based on an immediate danger to public health as required by R.C. 3717.49.

As a result of the license revocation, Plaintiffs initiated this cause of action, and the Court issued a temporary restraining order: precluding Defendants from enforcing the July 15, 2020 cease-and desist order; reinstating the Plaintiffs' food service license; and permitting Plaintiffs to legally operate their food service business pending further order of the Court.

Following the issuance of the temporary restraining order, the Parties agreed to the terms of a stipulated judgment entry regulating the conduct of the parties for the remaining pendency of this matter. That judgment entry, which was filed on August 28, 2020, and further set forth an agreement as to method/procedure for final resolution of the pending matter.

The Court conducted a bench trial on September 25, 2020 and September 30, 2020. During the bench trial, Defendants conceded and stipulated that no further enforcement action would be taken in the future by Defendants based on any of the findings, facts, or circumstances leading to the July 15, 2020 cease-and-desist order, and that Plaintiffs'

food service license was fully reinstated and would remain so consistent with the prior orders of the Court.

LAW AND DECISION

An injunction is an extraordinary remedy, equitable in nature, that should only be granted when there is no adequate remedy at law, and where it is necessary to prevent a future wrong that the law cannot. To be entitled to an injunction, Plaintiffs must demonstrate by clear and convincing evidence that (1) the plaintiff will suffer irreparable injury if the injunction is not granted, (2) the rights of third parties will not be unjustifiably harmed if the injunction is granted, and (3) the injunction will serve the public interest. *Szuch v. FirstEnergy Nuclear Operating Co*., 2016-Ohio-620, P56, 60 N.E.3d 494, 510, 2016 Ohio App. LEXIS 539, *34-35 *Arndt v. P & M Ltd.*, 11th Dist. No. 2007-P-0037, 2008-Ohio 2316; *Novy v. Ferrara*, 11th Dist. No. 2013-P-0063, 2014-Ohio-1776; *Szuch v. FirstEnergy Nuclear Operating Co.*, 2016-Ohio-620, 60 N.E.3rd 494 (6th Dist.).

This proceeding is not a proceeding pursuant to 42 USC § 1983. There is no authority granting Plaintiffs a cause of action for damages arising from this proceeding asserting a violation of the Ohio Constitution. *Autumn Care Ctr., Inc. v. Todd*, 2014-Ohio-5235, 22 N.E.3d 1105 (5th Dist.); *PDU, Inc. v. City of Cleveland*, 8th Dist. No. 81944, 2003-Ohio-3671.

Despite Defendants' contention that the food service license was suspended pursuant to R.C. 3717.49(C)(1), the basis for the suspension was non-compliance with the *Dine Safe Ohio* Order. R.C. 3713.49(C)(1) only sets forth the ability to revoke a license without hearing upon the finding of an immediate danger to public health. This Court finds and determines that "an immediate danger to public health" was never

factually established nor scientifically demonstrated in this case, nor in support of the actions of the Ashland County Health Department.

The nature of this case is not one new to the courts in Ohio. Similar cases raising similar challenges to COVID-19-related orders of the Director of the Ohio Department of Health have met challenge in Lake County, Ohio [*Rock House Fitness, Inc. et al. v. Amy Acton, Director of the Ohio Dept. of Health, et al.*, Lake C.P. No. 20CV000631 (May 20, 2020)], and Erie County, Ohio [*ILMV DEV SPE, LLC, DBA Kalahari Resorts & Conventions, et al. v. Amy Acton, et al.*, Erie C.P. No. 2020-CV-0201]. In those cases, the respective courts found the COVID-19 related orders of the Ohio Department of Health to be unconstitutional, whether authorized by R.C. 3701.13 or arguably R.C. 3701.14(A). While this Court generally agrees with the positions expressed by the common pleas courts of both Lake County and Erie County, it is more inclined to agree with the Erie County Common Pleas Court that R.C. 3701.13 grants no authority to the Director of the Ohio Department of Health to issue or enforce mandatory mask, social distancing, or other similar type orders since there is ***no*** stated or implied authority in R.C. 3701.13 which authorizes any action to prevent the spread of contagious or infectious disease (the orders' express purpose). Under R.C. 3701.13, the Ohio Department of Health only has ultimate authority in matters of ***quarantine and isolation***. Furthermore, the orders at issue in Erie County, Lake County, as well as the *Dine Safe Ohio* Order in this case, fail to accomplish anything scientifically demonstrable, or otherwise corroborated with empirical data, to prevent the spread of contagious or infectious disease even if that purpose were authorized by R.C. 3701.13.

That being said; this Court does not believe it needs to render a lengthy decision on the lack of validity of the Ohio Department of Health mask mandates or the *Dine Safe Ohio* Order, since in this case, there is no justiciable issue remaining.

This case was initiated due to what this Court finds to be improper conduct on the part of the Director of the Ashland County Department of Health. However, the improper conduct has been cured and the ability of Plaintiffs to operate their food service establishment was reinstated. Contrary to the assertions of Plaintiffs, the fact that there remains an asserted claim for damages does not cause the justiciability of the declaratory judgment causes of action to survive, when that asserted claim for damages is not a matter for which this Court can exercise jurisdiction. This Court has no authority to award damages in this matter.

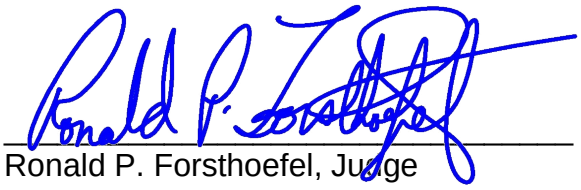
And as conceded by Plaintiffs, despite being given repeated opportunity to join the Ohio Attorney General as a party in this matter, or to otherwise serve the Attorney General with summons and notice of the proceeding, Plaintiffs have declined to do so, thereby denying this Court jurisdiction to issue declaratory judgments regarding the orders of the Ohio Department of Health. R.C. 2721.12(A); *Avery v. Rossford Ohio Transportation Improvement Dist.*, 145 Ohio App.3d 155; 2001 Ohio App. LEXIS 3443 (6th Dist. 2001).

Regarding injunctive relief, with the concessions already made by the Ashland County Department of Health, this Court cannot make the requisite finding that Plaintiffs will suffer irreparable harm if an injunction is not granted, since there is no pending enforcement action currently being pursued against Plaintiffs by the Ashland County Department of Health, there is no current threat of enforcement, and the food service

licensure of Plaintiffs has been restored. Under current circumstances, Plaintiffs are operating as they were prior to the cease-and-desist order and should not be subject to any further enforcement action. As the position of this Court has been made known, any further attempt to enforce Ohio Department of Health Orders relating to COVID-19 mask restrictions, will likely result in further restraint of any such attempt.

Consistent with this opinion, the Court finds there is no justiciable controversy currently pending, hereby dismisses the Complaint of Plaintiffs, but assesses the costs of these proceedings to the Defendants.

It is so ordered.



Ronald P. Forsthoefel, Judge