Vermont Superior Court
Filed 09/29/20
Rutland Unit

VERMONT SUPERIOR COURT

RUTLAND UNIT
CIVIL DIVISION

State of Vermont, Plaintiff v. Club Fitness of Vermont, Inc. and Sean Manovill, Defendants and Counter Plaintiffs v. State of Vermont, Governor Philip B. Scott, and Attorney General Thomas J. Donovan, Jr., Counter Defendants	Docket No. 202-5-20 Rdcv

RULING ON MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM
(Motion # 6)

The core issue in this case is whether certain executive orders, issued by Vermont Governor Philip B. Scott in response to the outbreak of COVID-19 in Vermont, constitute an unconstitutional governmental taking of private property. For the reasons set forth herein, this court concludes that they do not.

Plaintiff, the State of Vermont, commenced this suit on May 15, 2020, as an enforcement action against Defendant Club Fitness of Vermont, Inc. and its owner, Defendant Sean Manoville, who own and operate fitness centers in Rutland and Castleton, Vermont. The State seeks civil penalties and injunctive relief, among other things, for Defendants' alleged violation of Addenda 4 and 6 of Governor Scott's Executive Order 01-20, ordering all "gymnasiums, fitness centers and similar exercise facilities" to "cease all in-person operations" on account of Vermont's COVID-19 outbreak.

On May 27, 2020, the Defendants filed a Counterclaim alleging that the actions taken by the State, Governor and Attorney General since March 23, 2020, to promulgate and enforce the Executive Order, constitute an "unlawful taking" of Defendants' business, in violation of Chapter I, Article 2 of the Vermont Constitution and the Fifth Amendment of the United States Constitution. Defendants seek an award of damages under 20 V.S.A. § 11(5) and 42 U.S.C.A. §§ 1983 and 1985 from the State, Governor and Attorney General for the "economic and emotional distress losses suffered by [the Defendants] as a result of the ... unlawful taking without compensation" of their business.[1]

Presently before the court is a motion filed by the State, Governor and Attorney General pursuant to V.R.C.P. 12(b)(6) to dismiss Defendants' Counterclaim for failure to state a claim upon which relief may be granted. The movants contend that the Counterclaim must be dismissed because the Counterclaim fails to allege any unlawful governmental taking of the Defendants' business. Defendants oppose the motion.

A hearing on the motion was held on August 12, 2020, and the motion was taken under advisement.[2] For the reasons discussed below, the motion to dismiss is now *granted.*

---

[1] On August 5, 2020, Defendants moved to amend their Counterclaim to add facts concerning events which occurred after the filing of their original Counterclaim, and to clarify their various legal and Constitutional claims against the State, Governor and Attorney General.

[2] The procedural posture of this case is somewhat complex. The State of Vermont filed a motion for a Temporary Restraining Order ("TRO") on May 15th. The State's request for a TRO was granted. In response, Defendants filed their own motion for a preliminary injunction. In light of the Governor's subsequent easing of restrictions on fitness centers, the parties withdrew their motions for preliminary injunctions and the TRO expired on its own, but the State declined to withdraw its Complaint for civil penalties and costs. The Defendants then filed their Counterclaim against the State, and they filed a motion to add Governor Scott and Attorney General Donovan individually as additional counter defendants. At the oral argument held on August 12, 2020, the court orally granted Defendants' motion to add the Governor and Attorney General as parties and also granted Defendants' motion to amend their Counterclaim.

Standard of Review

When ruling on a motion to dismiss under V.R.C.P. 12(b)(6), the court is required to take all the facts alleged in the claimant's pleading as true. The court must determine whether, assuming the facts alleged are true, the allegations are sufficient to state a legal claim upon which relief may be granted. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5 n.1, 184 Vt. 1. Also, the court must make all reasonable inferences of fact from the pleading in favor of the claimant, and the court must treat all contravening assertions in the moving party's pleadings are false. Reynolds v. Sullivan, 136 Vt. 1, 3 (1978) (citing 5 C. Wright & Miller, Federal Practice and Procedure s 2713, at 691, 693 (1969)). The court must not dismiss a claim under V.R.C.P. 12(b)(6) unless "it appears beyond doubt that there exist no facts or circumstances that would entitle the [claimant]to relief." Murray v. City of Burlington, 2012 VT 11. "The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it." Powers v. Office of Child Support, 173 Vt. 390, 395 (2002) (citations omitted).

Statement of Facts

For purposes of the motion to dismiss, the court assumes the following alleged facts to be true:

Sean Manovill is the owner of Club Fitness of Vermont, Inc., which owns and operates a fitness center providing exercise facilities to clients, many of whom consider Defendants' facilities essential to their health and well-being (Amended Counterclaim ¶¶ 1-6). Club Fitness is an immaculately clean fitness center, with several stations for cleaning equipment and sanitizing hands (Id. ¶ 7). Club Fitness has been open since 2016 and had built up a client membership of approximately 500 before the Governor ordered a shutdown (Id. ¶ 8).

Manovill closed Club Fitness on March 23, 2020, when Governor Scott issued his first emergency order (Id. ¶ 10). Club Fitness remained closed until May 1, 2020 (Id.). As the only source of income for Manovill and his wife, Jeanine, the six- week closure resulted in Manovill losing all income from his business (Id. ¶¶ 11-12). During the closure, Manovill received numerous calls and messages from clients requesting the fitness center re-open, as their physical and mental wellness was declining (Id. ¶¶ 13-14). Based on these requests and the need for income to support his family, Manovill reopened Club Fitness on May 1, 2020 (Id. ¶ 14).

On May 11, 2020, Vermont Attorney General T.J. Donovan contacted Manovill and told him to close the fitness center or else a suit would be filed against him (Id. ¶ 15). After Manovill indicated that he would remain open, Donovan requested that Manovill close for a week to provide a reprieve, indicating that he thought there was a possibility that the Governor would allow fitness centers to re-open by May 15th (Id. ¶ 15). As a result of Donovan's representations, Manovill shut down Club Fitness until May 15th (Id.).

On May 15th, Manovill re-opened the facility, despite the lack of any announcement by the Governor whether the shutdown would continue (Id. ¶ 16). At 11:00am on May 15th, Manovill learned that Governor Scott had extended the emergency order (Id. ¶ 17). Sergeant Whitehead and Corporal Plemmons of the Rutland Police Department visited Club Fitness to take notes and ask Manovill questions that day, but neither officer told Manovill to close the fitness center (Id.). Therefore, Manovill remained open until 5:00 p.m., despite the Governor's emergency order; at no point that day were there more than ten people at the fitness center at one time (Id.).

Later that day, Attorney General Donovan, on behalf of the State of Vermont, filed this suit against Manovill and Club Fitness and obtained a temporary restraining order against them

(Id. ¶ 18). On Sunday, May 17, Manovill opened Club Fitness for a few hours, with a few clients attending (Id. ¶ 19). On May 18, Manovill placed fitness equipment outside the facility, after realizing the court order did not prohibit outdoor fitness activities at his facility (Id. ¶ 20). Manovill provided customers with hand sanitizer and cleaning material to clean the equipment (Id.). On May 20, the Attorney General told Manovill to close the outdoor facility, and he threatened to ask the court to hold Manovill in contempt, which he indicated could result in jail time (Id. ¶ 21). Manovill closed Club Fitness and has remained closed ever since (Id. ¶ 22).

At no time has the government offered to compensate Manovill for his losses (Id. ¶ 23). Manovill and Club Fitness suffered a 100% loss of business between March 23, 220, and June 1, 2020, as a result of Governor Scott's emergency orders (Id. ¶ 25). Since June 1st Defendants' loss of business from the shutdown is projected to be at least 75% (Id. ¶ 26). As a result of the loss of business, Manovill is planning to close the fitness center and permanently move out of state (Id. ¶ 27).

Analysis

Defendants Manovill and Fitness Center contend that they are entitled to an award of damages for their losses pursuant to 20 V.S.A. § 11 and 42 U.S.V.A. §§ 1983 and 1985 because the Governor's emergency orders, requiring Defendants to close their business due to the COVID-19 outbreak, constitute an uncompensated governmental taking of their property in violation of Chapter 1, Article 2 of the Vermont Constitution and the Fifth Amendment of the United States Constitution. The State, Governor and Attorney General deny that contention and argue that Defendants' Counterclaim must be dismissed because it fails to allege any taking resulting from the Governor's orders. This court will address the Constitutional claims first, the statutory claims second, and the immunity claim last.

Chapter 1, Article 2 and the Fifth Amendment

Chapter 1, Article 2 of the Vermont Constitution provides:

> That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

The Fifth Amendment to the United States Constitution provides "nor shall private property be taken for public use, without just compensation." It is undisputed that the State has not offered to compensate Defendants for the closing of their fitness center. The question, therefore, is whether Defendants' fitness center business was "taken" for public use by the Governor's executive orders.

"'Because the federal and Vermont Constitutions use virtually the same test for takings review,' ... the analysis and result ... are the same under both...." Ondovchik Family L.P v. Agency of Transportation, 2010 VT 35, ¶ 14, 187 Vt. 556 (*quoting* Conway v. Sorrell, 894 F.Supp. 794, 801 n. 8 (D. Vt. 1995)). The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). "The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power" by requiring the government to compensation the property owner. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37 (2005). "For a property loss to be compensable as a taking, the government must 'intend[ ] to invade a protected property interest or the asserted invasion [must be] the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'"[3] Lorman v. City of Rutland, 2018 VT 64, ¶ 35, 207 Vt. 598 (*quoting* Ondovchik, 2010 VT 35, ¶ 16).

"There are two types of cases cognizable under the Takings Clause: physical takings and regulatory takings." McCarthy v. Cuomo, 2020 WL 3286530, at *4 (E.D.N.Y. June 18, 2020) (*citing* 1256 Hertel Ave. Associates, LLC v. Calloway, 761 F.3d 252, 263 (2d Cir. 2014)). A physical taking "occur[s] when the government physically takes possession of an interest in property for some public purpose." Buffalo Teachers Fed. v. Tobe, 464 F.3d 362, 374 (2d Cir. 2006) ("The fact of a taking is fairly obvious in physical takings cases: for example, the government might occupy or take over a leasehold interest for its own purposes...or the government might take over a part of a rooftop of an apartment building so that cable access may be brought to residences within.") (internal citations omitted). A regulatory taking is an interference with property rights that "arises from a public program adjusting the benefits and burdens of economic life to promote the public good[.]" Id. (*quoting* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). "The Supreme Court has 'generally eschewed any set

---

[3] This court would be remiss not to mention Jacobson v. Massachusetts, the landmark case decided more than 100 years ago during a smallpox epidemic, which developed the framework governing emergency public health and public safety measures. 197 U.S. 11 (1905). In Jacobson, the Court held that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Jacobson, 197 U.S. at 29. In the context of the COVID-19 pandemic, Jacobson has been called "the controlling Supreme Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures." In re Abbott, 954 F.3d 772, 785 (5th Cir. 2020). "[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members,'" including by '"enact[ing] quarantine laws and health laws of every description." Jacobson, 197 U.S. at 27, 25, 25 S.Ct. 358). *See* South Bay United Pentecostal Church v. Newson, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) ("[States] undoubtedly ha[ve] a compelling interest in combating the spread of COVID-19 and protecting the health of [their] citizens.").

formula' for identifying regulatory takings, instead 'preferring to engage in essentially ad hoc, factual inquiries' to determine in each case whether the challenged property restriction rises to the level of a taking." 1256 Hertel Ave. Assoc., LLC v. Calloway, 761 F.3d 252, 264 (2d 2014) (*quoting* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, (1992)).

There are two types of regulatory takings: categorical and non-categorical. A categorical taking occurs "where regulation denies all economically beneficial or productive use of land." Lucas, 505 U.S. at 1015. A Lucas taking is a "'relatively narrow' and relatively rare taking category[ ] confined to the 'extraordinary circumstance when *no* productive or economically beneficial use of land is permitted[.]'" Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610, 625–26 (9th Cir. 2020) (*quoting* Lingle, 544 U.S. at 538 and Lucas, 505 U.S. at 1017). "Anything less than a 'complete elimination of value,' or a 'total loss' would require the kind of analysis applied in Penn Central" and is considered a non-categorical regulatory taking. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 (2002) (*quoting* Lucas, 505 U.S. at 1019-1020, n. 8). Penn Central has set forth familiar factors paramount to the taking inquiry: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." Penn Central, 438 U.S. at 124. "Also telling, is the 'character of the governmental action,' particularly 'whether it amounts to a physical invasion' or appropriation of property or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'"[4] 1256 Hertel Ave., 761 F.3d at 264 (*quoting* Penn Central, 438 U.S. at 124).

In McCarthy, the owner of a New York restaurant, bar and gentleman's club, claimed that the executive orders issued by Governor Cuomo which resulted in the restaurant closing was, among other things, a violation of the Fifth Amendment takings clause.[5] The court determined that because "[n]o government officials have taken physical possession of any property belonging to McCarthy or the Blush Club," there was no physical taking. Id. at *5.

Moving on to a regulatory taking analysis, the McCarthy court concluded that

> [t]he COVID-19 Executive Orders plainly do not deny McCarthy all economically beneficial use of his property. He could, for example, offer food and drinks from the Blush Club for take-out or delivery...[i]f McCarthy has lost all income from his club, that is a result of a voluntary choice not to pursue alternative business models that would allow the business to remain open while complying with the regulation. McCarthy's voluntary choice to close his business

---

[4] In Buffalo Teachers Fed'n, the court considered whether a wage freeze was a taking. In so considering, the Court noted that the "wage freeze is temporary and operates only during a control period," and the "wage freeze is a negative restriction rather than an affirmative exploitation by the state. Nothing is affirmatively taken by the government...The freeze is in this respect like a temporary cap on how much plaintiffs may charge for their services," and finally, that the "temporary suspension of plaintiffs' wage increase arises from a public program that undoubtedly burdens the plaintiffs in order to promote the common good." 464 F.3d at 375. Based on these factors, the court was not persuaded that the plaintiffs had established a taking had occurred.

[5] In Defendants' Memorandum in Opposition to Motion to Dismiss, Defendants claim there are "a dearth" of court decisions on the issue as to whether temporarily shutting down legitimate, innocent businesses because of a perceived emergency threat of contagion constitutes a "taking" under the Fifth Amendment or similar state constitutions. While Defendants only cited to one case, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020), there have been at least five other courts that have addressed the issue and determined such shut-downs did not constitute a taking. *See* McCarthy v. Cuomo, 2020 WL 3286530 (E.D.N.Y. June 18, 2020); PCG-SP Venture I LLC v. Newsom, 2020 WL 4344631 (C.D. Cal. June 23, 2020); TJM 64, Inc. v. Harris, 2020 WL 4352756 (W.D. Tenn. July 29, 2020); Auracle Homes, LLC v. Lamont, 2020 WL 4558682 (D.Conn. Aug. 7, 2020); Lebanon Valley Auto Racing Corp. v. Cuomo, 2020 WL 4596921 (N.D.N.Y. Aug. 11, 2020). Defendants appear not to recognize the reality of COVID-19, the state of emergencies that have been announced throughout the country, and the attempts by courts at all levels to address situations similar to the present case.

> also makes him unlikely to succeed in an ad hoc factual analysis of the alleged regulatory taking. He cannot demonstrate any causal connection between the COVID-19 Executive Orders and his financial losses because his choice to close the club entirely was not mandated by the regulation. Moreover, all of his allegations of economic impact are vague and conclusory…Thus, the Fifth Amendment Takings Clause claim is unlikely to succeed on the merits.

McCarthy, at *5.

In addition to McCarthy, several courts across the country have addressed whether executive orders closing or restricting business during the COVID-19 pandemic constitute a taking. In line with McCarthy, no court has found that such closings or restrictions have resulted in a deprivation of all economically beneficial use of such property, constituting a taking under Lucas. *See* PCG-SP Venture I LLC v. Newsom, 2020 WL 4344631 (C.D. Cal. June 23, 2020); TJM 64, Inc. v. Harris, 2020 WL 4352756 (W.D. Tenn. July 29, 2020); Auracle Homes, LLC v. Lamont, 2020 WL 4558682 (D.Conn. Aug. 7, 2020). Rather, these courts focused their analysis on the Penn Central factors: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017).

In PCG-SP Venture I LLC v. Newsom, 2020 WL 4344631 (C.D. Cal. June 23, 2020), a California company that operates a hotel brought suit against the California Governor, alleging that it had "been forced to close its [h]otel, cease operations, and terminate a majority of its employees as a result of the" Governor's Orders. Id. at *3. Plaintiff argued that the Orders constituted a "complete and total regulatory and physical taking" of plaintiff's property, presumably in reference to Lucas. Id. at * 9. The court determined, however, that plaintiff retained "some productive or economically beneficial use of its property… Plaintiff is free, for example, to sell food or beverages on the premises and engage in commercial construction or development of the Hotel." Id. at *10. The court also concluded that "[t]o the extent Plaintiff could provide evidence of lost profits or interference with investment-backed expectations, the character of the government action at issue would likely outweigh either factor." Id. "Penn Central explained that regulations, statutes, and ordinances that merely 'adjust[ ] the benefits and burdens of economic life to promote the common good' rather than enact a "physical invasion" of property rarely constitute a taking.'" Id. (*quoting* Penn Central, 438 U.S. at 124). Ultimately, the Court found that, "to the extent the Orders temporarily deprive Plaintiff of the use and benefit of its Hotel, the Takings Clause is indifferent. The State is entitled to prioritize the health of the public over the property rights of the individual." PCG-SP, 2020 WL 4344631, at *10.

The plaintiff owners of several limited service restaurants in TJM 64, Inc. v. Harris, 2020 WL 4352756 (W.D. Tenn. July 29, 2020) asserted that the applicable executive order qualified as "as a categorical taking under Lucas…and, alternatively, qualifies as a regulatory taking under the framework established by Penn Central." Id. at *2. The court first rejected the Lucas taking, stating that "[w[hile it may not accord with Plaintiffs' pre-pandemic financial plans to operate their businesses in ways the Order allows, it does not follow that the Closure Order has necessarily stripped Plaintiffs' businesses of *all* their value." Id. at *6. Looking to the Penn Central factors, the court found that although the "first and second Penn Central factors support Plaintiffs, the third factor does not and outweighs the other two factors." Id. "On balance, the Court [found] that Defendants' need to effectively and quickly respond to the COVID-19 pandemic by promulgating the July 8, 2020 Closure Order outweighs any other considerations warranting a finding that the Order amounts to a taking." Id. at *7. *See also* Friends of Danny DeVito v. Wolf, 227 A.3d 872, 895-96 (Pa. 2020) (concluding that petitioners, a Pennsylvania candidate committee, did not establish a regulatory taking as the executive order resulted "in only a temporary loss of the use of the Petitioners' business premises, and the Governor's reason for imposing said restrictions on the use of their property, namely to protect the lives and health of millions of Pennsylvania citizens, undoubtedly constitutes a classic example of the use of the police power to protect the lives, health, morals, comfort, and general welfare of the people") (internal quotations omitted).

A Connecticut district court also recently addressed the takings issue under the Penn Central factors, as related to the state's Executive Orders which sought to "temporarily limit the ability of residential landlords to initiate eviction proceedings against tenants and allow tenants to apply security deposit funds to past due rents, provided the security deposit amount exceeds the value of one month's rent." Auracle Homes, LLC v. Lamont, 2020 WL 4558682, at *13 (D.Conn. Aug. 7, 2020). As to the first factor of economic impact, the court stated that the "Executive Orders constitute a regulatory taking only if they 'effectively prevented [Plaintiffs] from making any economic use of [their] property.'" Id. at *14 (*quoting* Sherman v. Town of Chester, 752 F.3d 554, 565 (2d Cir. 2014)). Ultimately, the court decided that the plaintiffs had not "quantified the precise economic impact" that the executive orders had on their property. Auracle, 2020 WL 4558682, at *15. As to the second factor, investment-backed expectations, "the purpose [of this Penn Central factor] is to limit recovery to owners who could demonstrate that they bought their property in reliance on a state of affairs that