

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 101 CD 2021

COUNTY OF ALLEGHENY,

Appellee,

v.

THE CRACKED EGG, LLC,

Appellant.

MOTION FOR STAY

PENDING APPEAL PURSUANT TO PA.R.A.P. 1732 (b)

Appeal from the Order of the
Honorable John T. McVay, Jr. of the Court of
Common Pleas of Allegheny County, entered on
February 3, 2021 at GD-20-009809

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MOTION FOR STAY PENDING APPEAL

And now, the Cracked Egg, LLC, by its attorneys, Robert O Lampl, James R. Cooney, Ryan J. Cooney, Sy O. Lampl, Alexander L. Holmquist and Dennis M. Blackwell, files the within Motion for Stay Pending Appeal:

Background:

1. The Appellant is the Cracked Egg, LLC (the Cracked Egg).
2. The Cracked Egg is a small, family-owned restaurant located in the Brentwood area of Pittsburgh.
3. On March 6, 2020, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency in response to the COVID-19 pandemic
4. In connection with the Governor's Proclamation, on July 1, 2020, the Secretary of the Pennsylvania Department of Health issued an Order "requiring universal face coverings."
5. On July 16, 2020, Governor Wolf issued an Order "Directing Targeted Mitigation Measures." Pursuant to the "Targeted Mitigation Measures," (Exhibit "E"), among other things, restaurants were limited to the lesser of:

- A. 25% of fire code stated maximum occupancy for indoor dining; or
 - B. 25 persons including staff.
6. On August 11, 2020, the Allegheny County Health Department (the ACHD) suspended the Cracked Egg's health permit.
 7. The basis for the suspension was the Cracked Egg's failure to comply with the universal face coverings order and the targeted mitigation measures.
 8. The ACHD initiated the within action on September 16, 2020 by filing a Complaint in Equity in the Court of Common Pleas of Allegheny County at GD-20-009809.
 9. On the same date, the ACHD filed an Emergency Motion for a Preliminary Injunction. In its Motion, the ACHD sought to enforce the universal face coverings order and the targeted mitigation measures against the Cracked Egg.
 10. The Cracked Egg filed an Answer and Affirmative Defenses. Among other things, the Cracked Egg asserted that:
 - A. The mitigation measures are not enforceable since neither the Governor nor the ACHD complied with the mandatory rule making procedures.

B. The suspension of the Cracked Egg's permit was issued without prior notice or hearing in violation of the Cracked Egg's rights to due process of law.

C. Scientific opinion is divided regarding the efficacy of face masks to prevent the spread of COVID-19, and several epidemiologists have concluded that face masks are ineffective to stop the spread of COVID-19.

D. Enforcement of the mitigation measures would be contrary to the ruling of the Honorable William S. Stickman, IV in the case of *County of Butler v. Wolf*, 2020 U.S. Dist. LEXIS 167544 (W.D. Pa. 2020).

E. Enforcement of the mitigation measures would violate the Cracked Egg's substantive due process rights.

F. Enforcement of the mitigation measures would violate the Cracked Egg's rights to equal protection under the law.

G. Enforcement of the mitigation measures would violate the separation of powers doctrine.

11. A three-day evidentiary hearing on the ACHD's Emergency Motion for a Preliminary Injunction was held before the

Honorable John T. McVay, Jr. on January 27 through January 29, 2021.

12. On February 3, 2021, Judge McVay issued a Memorandum Opinion and Order granting the ACHD's Emergency Motion for a Preliminary Injunction.

13. On February 4, 2021, the Cracked Egg filed a Notice of Appeal to this Honorable Court.

The within Motion:

14. The Cracked Egg seeks a stay pending appeal pursuant to *Pa.R.A.P. 1732 (b)*.

15. The Cracked Egg sought a stay pending appeal in the trial court. However, by his Order entered on February 17, 2021 (attached hereto as Exhibit "A"), Judge McVay denied the Cracked Egg's Motion for Stay Pending Appeal.

16. In *Pa. Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983), the Supreme Court of Pennsylvania set forth the factors that govern a stay pending appeal. As stated by the Court, a stay will be granted if:

A. The petitioner makes a strong showing that he is likely to prevail on the merits.

B. The petitioner has shown that without the requested relief, he will suffer irreparable injury.

C. The issuance of a stay will not substantially harm other interested parties in the proceedings.

D. The issuance of a stay will not adversely affect the public interest.

See also, *Chartiers v. William H. Martin*, 518 Pa. 181, 542 A.2d 985 (1988).

17. All of these elements are present here.

A. Probability of success on the merits:

18. The Cracked Egg is likely to succeed on the merits of its appeal for the following reasons.

19. Judge McVay's decision is contrary to the holding of the Honorable William S. Stickman, IV in the case of *County of Butler v. Wolf*, 2020 U.S. Dist. LEXIS 167544 (W.D. Pa. 2020). In that case, Judge Stickman held that:

A. The congregate gathering limits imposed by the Covid-19 mitigation orders violate the right of assembly enshrined in the First Amendment.

B. The stay-at-home and business closure components of Defendants' orders violate the Due Process Clause of the Fourteenth Amendment.

C. The business closure components of Defendants' orders violate the Equal Protection Clause of the Fourteenth Amendment.

D. The Governor's emergency powers under *35 Pa.C.S.A § 7301(c)* could not be extended on an indefinite basis, and that such extensions violate the separation of powers doctrine. As stated by the Court:

There is no question that our founders abhorred the concept of one-person rule. They decried government by fiat. Absent a robust system of checks and balances, the guarantees of liberty set forth in the Constitution are just ink on parchment. There is no question that a global pandemic poses serious challenges for governments and for all Americans. But the response to a pandemic (or any emergency) cannot be permitted to undermine our system of constitutional liberties or the system of checks and balances protecting those liberties.

The Cracked Egg believes that these holdings are directly relevant to the issues raised in the present case.

20. The suspension of the Cracked Egg's health permit without notice or a hearing violated the Cracked Egg's rights to procedural due process. Notice and the opportunity to be heard are

the touchstones of due process. See, *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed. 2d 62 (1965):

A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

See also, *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971).

21. The Court erred in holding that the case of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L.Ed. 643 (1905) sets forth the proper level of review. To the contrary, the *Jacobson* case has been severely criticized by many courts and is no longer valid. See, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (dissenting opinion by Justice Alito); *Delaney v. Baker*, 2021 U.S. Dist. LEXIS 1567 (D. Mass. 2021).

22. The Court erred in holding that its decision was required by the Opinion of the Supreme Court of Pennsylvania in *Friends of Danny Devito v. Wolf*, 220 Pa. LEXIS 1987, 227 A.3d 872 (2020). In *Devito*, the Court relied upon the fact that the deprivation of rights

was a temporary, stop gap measure. *Devito* was decided on April 13, 2020, less than one month after the emergency declaration. It is now almost a year since the declaration, and the government has had ample time to engage in the regulatory process.

23. The Court erred in holding that the County's actions were mandated by the Local Health Administration Act, 16 P.S. 12001. Section 12011 of the Local Health Administration Law, 16 P.S. 12011 (c), requires that rules and regulations under the Act must be approved by the county commissioners and published before they become effective. See, *Tid Bit Alley, Inc. v. Erie County*, 103 Pa.Commw. 46, 520 A.2d 70 (1987). The ACHD failed to follow this mandatory rule making procedure.

24. The Court erred in holding that the Governor had the power to supersede and suspend the mandatory rule making procedures (under the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys' Act) on an indefinite basis. The law is clear that Commonwealth agencies, including the Pennsylvania Board of Health, may enact rules or regulations **only if** they comply with mandatory rule making procedures. The law is clear that:

The Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act establish **a mandatory, formal rulemaking procedure that is, with rare exceptions, required for the promulgation of all regulations.** See, *Germantown Cab Co. v. Philadelphia Parking Auth.*, 993 A.2d 933, 937 (Pa. Cmwlth. 2010), *aff'd*, 614 Pa. 133, 36 A.3d 105 (2012). Under the Commonwealth Documents Law, an agency must give notice to the public of its proposed rulemaking and an opportunity for the public to comment. Section 201 of the Commonwealth Documents Law, 45 P.S. § 1201; *Borough of Bedford v. Dept. of Env'tl. Prot.*, 972 A.2d 53 (Pa. Cmwlth. 2009). Under the Regulatory Review Act, the agency must also submit its proposed regulation to IRRC for public comment, recommendation from IRRC, and, ultimately, IRRC's approval or denial of a final-form regulation. Section 5 of the Regulatory Review Act, *as amended*, 71 P.S. § 745.5. The Commonwealth Attorneys Act requires the agency to submit all proposed regulations to the Attorney General and Governor's Office of General Counsel for review of the form and legality. 71 P.S. §§ 732-204(b), -301(10).

Naylor v. Commonwealth, 2012 Pa. Commw. LEXIS 285, 54 A.3d 429, 433-434 (2012) (emphasis added). See also, *Northwestern Youth Services v. Dep't of Public Welfare*, 620 Pa. 140, 66 A.3d 301 (2013).

An agency's failure to comply with the Commonwealth Documents Law and other mandatory rule making procedures causes the rule or regulation to be unenforceable as a matter of law. See, *Germantown Cab Co. v. Philadelphia Parking Authority*, 614 Pa. 133, 36 A.3d 105 (2012). See also, *Transp. Servs. v. Underground*

Storage Tank Indemnification Bd., 2013 Pa. Commw. LEXIS 122, 67 A.3d 142 (2013).

25. Judge McVay's holding that the Governor has the power to supersede and suspend the mandatory rule making procedures on an indefinite basis permits the Governor and other executive officers to rule by executive fiat. Moreover, such holding authorizes violations of the separation of powers doctrine.

26. The Court erred in holding that the operation of the Cracked Egg constituted a "nuisance" which could be abated by the ACHD. Even if the ACHD has the power to "abate nuisances" without enacting rules and regulations, there is no evidence whatsoever to support the contention that the Cracked Egg is a nuisance, and in fact, the evidence is to the contrary. The County's own epidemiologist, Dr. Lu Ann Brink, admitted that no Covid-19 cases have been tracked back to the Cracked Egg.

27. The Court's finding that Dr. Bogen's Covid-19 measures "had the full support of the County Executive, Rich Fitzgerald," is contrary to the record. Rather, Dr. Bogen testified that she did not seek anyone's approval and that the orders were issued *solely under her own authority*. In any event, support of the County Executive,

even if it was present, would not suffice. Rather, Article 1.4-405 of the County's Home Rule Charter makes it clear that rules, regulations and ordinances may be enacted *only by the County Council*.

28. The Court erred in holding that the Cracked Egg was required to submit a "covid mitigation plan." Amanda Mator, the ACHD's Environmental Health Administrator, testified that a Covid-19 mitigation plan was not defined, and when asked what the parameters of such a plan would be, stated that "she did not know." The Cracked Egg has been unable to locate any rules, regulations or other authority which compel the submission of a Covid-19 "mitigation plan."

B. The Cracked Egg will suffer irreparable harm absent a stay:

29. The Cracked Egg will be irreparably harmed absent a stay.

30. Kimberly Waigand, the owner of the Cracked Egg, testified that it will be forced to go out of business if it is limited to 25% of its capacity as required by the targeted mitigation measures.¹

¹ Significantly, Judge McVay found that Ms. Waigand's testimony on this issue was credible.

31. This evidence was clearly sufficient to establish irreparable harm. See, *Greenmoor, Inc. v. Burchick Construction Company*, 2006 Pa. Super. 252, 908 A.2d 310 (2006):

It is correct, as Greenmoor asserts, that a preliminary injunction may be granted where the defendant's actions threaten monetary loss so great as to threaten the existence of the plaintiff's business.

Similarly, in *Three County Services, Inc. v. Philadelphia Inquirer*, 337 Pa. Super. 241, 486 A.2d 997, 1001 (Pa. Super. 1985), the Court held that irreparable harm can be shown where the acts in question could cause the closure of a business. As stated by the Court:

Only when there is proof that the threatened monetary loss is so great as to threaten the existence of the business is a preliminary injunction properly granted. See *id.* (preliminary injunction vacated where evidence insufficient to show that plaintiff was on verge of bankruptcy); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) (preliminary injunction affirmed where defendant threatened to terminate plaintiff's dealership and thereby end plaintiff's business; award of lost profits will not compensate for loss of right to continue a business).

See also, *Mozenter v. Trigiani*, 2003 Phila. Ct. Com. Pl. LEXIS 59 (Phila. 2003):

Moreover, even when monetary damages are fully calculable, a preliminary injunction may be granted "when there is proof that the threatened monetary loss is so great as to threaten the existence of the business."

These same principles clearly apply here.

C. There will be no irreparable harm to the County:

32. The ACHD will not be harmed by a stay pending appeal.

33. The ACHD's chief epidemiologist, Dr. Lu Ann Brink, admitted that no Covid-19 cases have been tracked back to the Cracked Egg.

34. Moreover, the ACHD has submitted no evidence that it will be harmed by a stay pending appeal.

D. The public interest favors a stay:

35. As set forth above, this appeal involves important constitutional issues regarding due process, equal protection, separation of powers and the rights of business owners to be free from unwarranted governmental interference.

36. Accordingly, the public interest favors a stay pending appeal. See, *County of Butler v. Wolf*, 2020 U.S. Dist. LEXIS 167544 (W.D. Pa. 2020):

The public has an interest in constitutional governance and, more specifically, not being subject to unconstitutional governmental action. See *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) ("[P]ublic interest weighs strongly against a stay of the injunction. The district court issued the injunction to protect Doe's constitutional and civil rights, a purpose that is always in the public interest.").

See also, *Jordan v. Lee*, 2020 U.S. Dist. LEXIS 144232 (M.D. Tenn. 2020):

It is well-established that "the public interest is served by preventing the violation of constitutional rights."

Daunt v. Benson, 956 F. 3d 396 (6th Cir. 2020):

Whether the grant of a preliminary injunction furthers the public interest in such a case is largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest.

CONCLUSION

For all of the foregoing reasons, the Appellant respectfully requests this Honorable Court to grant a stay pending appeal.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non- confidential information and documents.

Submitted by: James R. Cooney

Signature: /s/ James R. Cooney

Name: James R. Cooney

Attorney No. : 32706

CERTIFICATE OF SERVICE

I, James R. Cooney, hereby certify that on the 19th day of February, 2021, a true and correct copy of the within **Motion for Stay Pending Appeal** was served upon Counsel for the Plaintiff by Email as follows:

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