FILED

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

2020 MAY 20 AM 9:23
MAUREEN G. KELLY
LAKE CO. CLERK OF COURT

ROCK HOUSE FITNESS, INC., *et al.*	)	**CASE NO. 20CV000631**
	)	
	)	**JUDGE EUGENE A. LUCCI**
Plaintiffs	)	
	)	**ORDER GRANTING PRELIMINARY INJUNCTION**
vs.	)	
	)	
AMY ACTON, DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH, *et al.*	)	
	)	
Defendants	)	

{¶1} The court has considered: (1) the plaintiffs' motion for preliminary injunction, filed May 14, 2020; (2) Defendant Lake County General Health District's (Lake County) motion to exceed page limitation, filed May 17, 2020; (3) Defendant Amy Action, Director of the Ohio Department of Health's (Acton) motion to exceed page limitation, filed May 17, 2020; (4) Defendant Lake County's brief in opposition to the motion for preliminary injunction, filed May 17, 2020; (5) Defendant Acton's brief in opposition to the motion for preliminary injunction, filed May 17, 2020; (6) the affidavit of Mary Kathleen Francis, M.D., filed May 17, 2020; (7) the affidavit of Brian Fowler, filed May 17, 2020; (8) the affidavit of Corey Hamilton, filed May 17, 2020; (9) the affidavit of Terry Allan, filed May 17, 2020; (10) the affidavit of Edward Johnson, filed May 17, 2020; (10) the plaintiffs' reply brief, filed May 18, 2020; (11) the affidavit of Timothy Cassell, filed May 18, 2020; and (11) the affidavit of Michael S. Wilson, filed May 18, 2020.

{¶2} The motions for leave to exceed the page limit are well-taken and are hereby granted.

{¶3} The plaintiffs' amended complaint seeks a declaratory judgment finding that Defendant Acton's *Stay at Home, Amended Stay at Home,* and *Stay Safe Ohio* orders, on their face and as applied, violate Article I, sections 1, 2, 16, 19, and 20, and Article II, Section 1, of the Ohio Constitution and constitute a taking. The plaintiffs also seek costs, actual damages, nominal damages, and expenses.

{¶4} The plaintiffs' allege that "[o]ne of two conclusions is necessarily true: either (i) the General Assembly's delegation of authority to the Ohio Department of Health in Ohio Rev. Code § 3701.13 is too broad or vague; or (ii) the Ohio Department of Health's exercise of the delegated authority is too broad. Under either conclusion, the *Director's Stay at Home Order*, the *Amended Director's Stay at Home Order*, and/or the *Director's Stay Safe Ohio Order*, in criminalizing the operation of gyms, violates the separation of powers guarantees to which Plaintiffs are entitled." Plaintiff's Amended Complaint, ¶98.

{¶5} The plaintiffs seek a preliminary injunction enjoining the defendants from:

> (1) relying solely on the authority in R.C. 3701.13 and R.C. 3701.352 to impose criminal, civil, or equitable penalties on Plaintiffs *so long as they adhere to the safety regulations expressly articulated in Paragraphs 8, 16, 21(a), 21(b), and 21(c) of the Director's Stay Safe Ohio Order;* (2) imposing criminal, civil, or equitable penalties that arise from orders that exceed the limits of the authority granted by R.C.3701.13 on Plaintiffs *so long as they adhere to the safety regulations expressly articulated in Paragraphs 8, 16, 21(a), 21(b), and 21(c) of the Director's Stay Safe Ohio Order;* (3) imposing criminal, civil, or equitable penalties on Plaintiffs *so long as they adhere to the safety regulations expressly articulated in Paragraphs 8, 16, 21(a), 21(b), and 21(c) of the Director's Stay Safe Ohio Order;* and/or (4) enjoin the enforcement of Paragraph 13(g) of the *Director's Stay Safe Ohio Order.*

{¶6} An injunction is an extraordinary remedy, equitable in nature, that should only be granted where no adequate remedy is available at law and where it is necessary to prevent a future wrong that the law cannot. *Arndt v. P & M Ltd.*, 11th Dist. Portage No. 2007-P-0038, 2008-Ohio-2316, ¶63. The primary goal of a preliminary injunction is to maintain the status quo pending final determination of the matter. *Id.* at ¶64.

{¶7} In ruling on a motion for a preliminary injunction, the court must consider whether the movants can establish by clear and convincing evidence that a balancing of the following factors favors granting the relief requested:

(1) whether the movants have shown a strong or substantial likelihood or probability of success on the merits;

(2) whether the movants have shown irreparable injury, including whether the movant has an adequate remedy at law, and whether the injunction would prevent the claimed irreparable harm;

(3) whether the preliminary injunction could harm the defendants, third parties, and the general public, along with a balancing of the potential injuries;

(4) whether the public interest would be served by issuing the preliminary injunction.

(5) whether the preliminary injunctive relief sought is for the purpose of maintaining the status quo pending a trial on the merits.

Arndt v. P & M Ltd., 11th Dist. Portage No. 2007-P-0038, 2008-Ohio-2316, ¶64.

LIKELIHOOD OF SUCCESS ON THE MERITS

{¶8} At issue in this matter are orders issued by Defendant Amy Acton, MD, MPH, Director of Health of the state department of health responding to the COVID-19 pandemic.

{¶9} On March 22, 2020, Defendant Amy Acton issued her Director's Stay at Home Order, ordering that "non-essential businesses and operations must cease" and "effective at 11:59 pm on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order." Gyms were determined to be non-essential by the defendant.

{¶10} On April 2, 2020, Defendant Acton issued an Amended Director's Stay at Home Order, without enabling legislation or administrative rulemaking. (Amended Complaint Par 59 and 60.) This order clarified that a violation will be punished as a misdemeanor of the second degree, which can carry imprisonment of up to 90 days or a fine of up to $750, or both.

{¶11} On April 30, 2020, Defendant Acton issued her Director's Stay Safe Ohio Order, pursuant to the authority she claimed or assumed was granted to her in R.C. 3701.13, again, without enabling legislation or administrative rulemaking. In that order, Defendant Acton continued the closure of the plaintiffs' gymnasium businesses until May 29, 2020, unless the order is rescinded or modified.

{¶12} The plaintiffs argue that that these statutes are impermissibly vague. The plaintiffs also argue that the director's order exceeds her authority by legislating and directing

public policy, rather than administering public policy established by the General Assembly. Although the plaintiffs' motion does not state so explicitly, the plaintiffs' vagueness and delegation of authority arguments appear to involve, or at least rely on, case law involving: (1) allegations of improper delegation of legislative authority in violation of the separation of powers; (1) allegations of improper delegation of legislative authority in violation of due process considerations; (3) allegations that the statutes and Defendant Acton's orders are void for vagueness; and (4) allegations that Defendant Acton's orders exceed the authority granted to her by R.C. 3701.13.

{¶13} The orders at issue in this case were issued pursuant to Defendant Acton's authority under R.C. 3701.13.

{¶14} R.C. 3701.13 provides that:

> The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of *quarantine and isolation*, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either has been established. (Emphasis added.)

{¶15} "'Isolation' means the separation of an infected individual from others during the period of disease communicability in such a way that prevents, as far as possible, the direct or indirect conveyance of an infectious agent to those who are susceptible to infection or who may spread the agent to others." Ohio Adm.Code 3701-3-01(R).

{¶16} "'Quarantine' means the restriction of the movements or activities of a well individual or animal who has been exposed to a communicable disease during the period of communicability of that disease and in such a manner that transmission of the disease may have occurred. The duration of the quarantine ordered shall be equivalent to the usual incubation period of the disease to which the susceptible person or animal was exposed." Ohio Adm.Code 3701-3-01(W).

{¶17} "Period of communicability" means the interval during which an infected individual or animal is shedding the specific microorganism of a communicable disease in such a manner that those who are susceptible could acquire the infection. Ohio Adm.Code 3701-3-01(U).

{¶18} R.C. 3701.13 further permits the department of health to make special or standing orders or rules for preventing the spread of contagious or infectious disease.

{¶19} R.C. 3701.352 prohibits the violation of any rule or order issued by the director or department of health that is issued pursuant to Chapter 3701 to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.

{¶20} "'Pandemic' means an epidemic disease that is occurring throughout a very wide area, usually several countries or continents, and usually affecting a large proportion of the population." Ohio Adm.Code 3701-3-01(S).

{¶21} Criminal penalties attend a violation of the director's orders:

> ... (C) Whoever violates section 3701.352 ... of the Revised Code is guilty of a misdemeanor of the second degree. R.C. 3701.99.

{¶22} The department of health informed the public and stated on its official website the incubation period for the virus:

> The incubation period (of the coronavirus that causes COVID-19) can be up to 14 days so people who are incubating the illness also aren't showing symptoms. See, https://coronavirus.ohio.gov/wps/portal/gov/covid-19/families-and-individuals/how-can-you-respond/COVID-19-and-Community-Spread (last accessed 5/19/2020).

{¶23} The director was granted ultimate authority in matters of quarantine and isolation. The department of health defined those terms. "Isolation" is the separation of an ***infected individual*** from others ***during the period of disease communicability*** in such a way that prevents, as far as possible, the direct or indirect conveyance of an infectious agent to those who are susceptible to infection or who may spread the agent to others.

{¶24} "Quarantine" is the restriction of the movements or activities of a ***well individual who has been exposed*** to a communicable disease ***during the period of communicability*** of that disease and in such a manner that transmission of the disease may have occurred.

{¶25} The ***duration of the quarantine ordered shall be equivalent to the usual incubation period*** of the disease to which the susceptible person was exposed. Ohio Adm.Code 3701-3-01(W). The incubation period can be up to 14 days, according to the department of health.

{¶26} The director has quarantined the entire people of the state of Ohio, for much more than 14 days. The director has no statutory authority to close all businesses, including the plaintiffs' gyms, which she deems non-essential for a period of two months. She has acted in an impermissibly arbitrary, unreasonable, and oppressive manner and without any procedural safeguards.

{¶27} The movants have shown a strong or substantial likelihood or probability of success on the merits.

IRREPARABLE HARM

{¶28} "An irreparable injury is an injury that cannot be redressed via monetary damages or an adequate remedy at law." *LCD Videography, L.L.C. v. Finomore*, 11th Dist. Lake No. 2009-L-147, 2010-Ohio-6571, ¶ 55. The party alleging irreparable injury must do more than make conclusory allegations of irreparable harm, and must offer independent evidence. *Id.* at ¶59.

{¶29} The plaintiffs will suffer imminent prosecution, sanctions, equitable, and economic harm by the continued closure of their businesses or any attempt to open the businesses in the absence of an injunction.

{¶30} The rights of the plaintiffs are fundamental. "The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself...." Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 632 (1853), emphasis sic. "Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 36-38.

{¶31} Fundamental liberties to own and use property and earn a living are at stake and are violated by the defendants' actions.

{¶32} The defendant has criminalized lawful businesses, imposing strict liability for violations, including severe criminal, civil, and equitable penalties. Some of the plaintiffs' businesses will not survive the lockdown of two or more months.

{¶33} For these reasons, the court finds that the plaintiffs have established that they will suffer irreparable harm if an injunction is not granted.

OTHER REMEDIES AND BALANCING OF HARMS

{¶34} The plaintiffs have no adequate remedy at law, as there is no means to obtain compensation, no monetary damages that can make them whole, and there is no administrative appeal process within the department of health regulation for this taking. An injunction is reasonably calculated to prevent the claimed irreparable harm.

{¶35} An injunction cannot harm the defendants, for the defendants should not have the ability to enact and enforce the director's sweeping *ultra vires* orders.

{¶36} Third parties are affected by a grant or refusal to grant an injunction. Customers of the plaintiffs would be harmed by not being able to utilize facilities for which they paid initiation fees and dues, and to which they have a property interest. And, if the customers paid no membership dues during the time of the lockdown, then the plaintiffs suffered the loss of income. These facilities are members-only institutions; the general public cannot simply walk into a gym and start using the equipment and facilities. Of course, customers who are concerned about this coronavirus have the option to stay away from the gym facilities if they so choose. The property owners/landlords of the gyms also suffer from a lack of payment of rent by the gyms; if the gym owns the property, then the gym owner suffers economic detriment by his property laying fallow.

{¶37} The general public would be harmed if an injunction was not granted. There would be a diminishment of public morale, and a feeling that one unelected individual could exercise such unfettered power to force everyone to obey impermissibly oppressive, vague, arbitrary, and unreasonable rules that the director devised and revised, and modified and reversed, whenever and as she pleases, without any legislative guidance. The public would be left with feelings that their government is not accountable to them. Prolonged lockdowns have deleterious effects upon the public psyche. Humans are naturally social beings; socialization strengthens immunities against disease and benefits psychological health.

{¶38} There are many benefits of belonging to a gym, of which the court can take judicial notice: people join gyms to acquire, improve and maintain health, including their immune systems; gyms provide social infrastructure and support; and safety in handling weights and equipment. The top killers of Americans are heart disease, obesity, and depression. Opening up gyms, with precautions and protections in place that are generally

recognized, benefits the public greatly. The primary benefits of physical activity are weight management, bone and muscle health, relief from physical pains, protection against unhealthy conditions, triggering production of anti-oxidants for younger and healthier skin (a natural barrier to infection), a boost in mental health, a boost in energy levels, improvements in mood, and more quality sleep. Physical activity is indispensable when a person is striving for optimal physical and mental health. Gyms permit people to reap these benefits by regimenting them in a safe environment with proper equipment and properly trained peers, instructors, and mentors. There are safety and equipment issues in trying to duplicate a gym in one's home, assuming the person has the space, wherewithal, and ability to do so.

{¶39} The court has balanced the potential injuries, and finds that the harm to the defendants, third parties, and the public is greatly outweighed by the harm to the plaintiffs, their customers, third parties, and the public if a preliminary injunction was not granted.

{¶40} The preliminary injunctive relief sought is for the purpose of maintaining the status quo pending a trial on the merits, and should be granted.

ORDER

{¶41} Accordingly, Defendant Amy Acton, in her official capacity as the Director of the Ohio Department of Health, and the Lake County General Health District, together with their officers, agents, servants, employees, attorneys, and those persons or entities acting at their direction or behest, or in active concert or participation with them, and who receive actual notice of this order, whether by personal service or otherwise, including, without limitation, law enforcement officers, prosecuting attorneys, and the attorney general, are hereby ENJOINED from imposing or enforcing penalties solely for non-compliance with the director's order against the following businesses listed in Paragraph 13(g) of the order: "gymnasiums," "health clubs," "fitness centers," "gyms," and "workout facilities," so long as they operate in compliance with all applicable safety regulations, whether those in the state's order, the state's supplemental guidelines governing businesses like those of the plaintiffs in this case, or the Lake County General Health District.

{¶42} In light of the fundamental constitutional rights involved, the statutory violations, and the continual infringement of such rights, the court exercises its discretion to require no bond be posted or, alternatively, the bond is set at zero dollars ($0.00) pursuant to

Ohio R.Civ.P. 65(C). See *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 831 (Ham. Cty. C.P. 2018) ("[i]n light of the analysis and assessment on the issuance vel non of a preliminary injunction, together with the overall equities of the case, including the fact that the injunction seeks to protect fundamental constitutional rights," court expressly waived posting of bond or set the bond at $0).

{¶43} IT IS SO ORDERED.

EUGENE A. LUCCI, JUDGE

Copies:

PLAINTIFFS' COUNSEL:
Maurice A. Thompson, Esq. (78548), at mthompson@ohioconstitution.org
Christopher P. Finney, Esq. (38998), at chris@finneylawfirm.com
Curt C. Hartman, Esq. (64242), at chartman@fuse.net

DEFENDANT DIRECTOR AMY ACTON'S COUNSEL:
Henry G. Appel, Esq. (68479), at henry.appel@ohioattorneygeneral.gov
Ann Yackshaw, Esq. (90623), at ann.yackshaw@ohioattorneygeneral.gov
Renata Y. Staff, Esq. (86922), at renata.staff@ohioattorneygeneral.gov

DEFENDANT LAKE COUNTY GENERAL HEALTH DISTRICT'S COUNSEL:
David J. Hackman, Esq. (47350), at david.hackman@lakecountyohio.gov
Michael L. De Leone, Esq. (73324), at michael.deleone@lakecountyohio.gov
David M. Smith, Esq. (79400), at dsmith@mrrlaw.com

CLERK
Clerk of Courts (for filing), at CV.Clerk@LakeCountyOhio.gov