SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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BOCELLI RISTORANTE INC. DBA OSTERIA BOCELLI, JKCT 9984, LLC. DBA JOYCE'S TAVERN, and I.R.O.A.R. Inc., Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

-against-

ANDREW M. CUOMO, in his Official Capacity as Governor of the State of New York, ATTORNEY GENERAL OF THE STATE OF NEW YORK, BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, and THE STATE OF NEW YORK,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 151500/2020
Motion No.: 001

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "5" were fully submitted on the 30th day of October 2020.[1]

	Papers Numbered
Plaintiff's Order to Show Cause, Affirmation, Affidavits and Exhibits (NYSCEF 6 through 23)	1, 2
Defendants, ANDREW M. CUOMO, in his Official Capacity as Governor of the State of New York, ATTORNEY GENERAL OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK, Affirmation and Affidavits in Opposition with Exhibits (NYSCEF 29 through 89)	3, 4
Plaintiff's Memorandum in Reply (NYSCEF 106)	5

[1] Defendant, Bill deBlasio in his Official Capacity as Mayor of the City of New York e-filed a cross-motion to dismiss this action (NYSCEF 90 through 102). After the cross-motion was served, plaintiff's attorney discontinued this action as against the Mayor (NYSCEF 104 and 105).

Upon the foregoing papers, plaintiff's Order to Show Cause seeking a preliminary injunction enjoining defendant, Andrew M. Cuomo, in his Official Capacity as Governor of the State of New York, the Attorney General of the State of New York and the State of New York from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with executive orders 202, 202.3, 202.13, 202.14, 202.18, 202.31, 202.34, 202.45, 202.48 and 202.61or any prohibition in Plaintiff and all others similarly situated from operating their restaurants and bars at 50% indoor capacity as long as CDC guidelines are follows is denied as follows:

PROCEDURAL HISTORY

Plaintiffs commenced this civil rights action on September 7, 2020 by e-filing a summons and class action complaint. On September 16, 2020, plaintiff e-filed a proposed Order to Show Cause seeking a preliminary injunction against defendants without supporting papers which was rejected by the Court. On September 21, 2020, plaintiff e-filed an amended class action complaint. Then, plaintiff e-filed a second Order to Show Cause on October 1, 2020, which was signed by this Court and scheduled for oral argument on October 30, 2020. Defendant, Bill deBlasio in his Official Capacity as Mayor of the City of New York e-filed a cross-motion to dismiss this action. Plaintiff's attorney then discontinued this action as against the Mayor. Defendants, ANDREW M. CUOMO, in his Official Capacity as Governor of the State of New York (hereinafter referred to as "the Governor"), ATTORNEY GENERAL OF THE STATE OF NEW YORK, and THE STATE OF NEW YORK (hereinafter collectively referred to as "the State"), e-filed opposition. After oral argument, this Court reserved decision.

FACTUAL BACKGROUND

This action seeks declaratory and injunctive relief on behalf of plaintiffs and others similarly situated for alleged constitutional violations committed by the State, under color of law, of rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and for violations of New York State Executive Law § 29-a and the New York Constitution Article 1, § 7, and Article 1, § 11. This controversy arises out of the COVID-19 pandemic and the ensuing "shut down" of the State of New York.

On March 2, 2020, the New York State Legislature passed a bill amending Section 29-a of the Executive Law which increased the Governor's emergency powers. Following this amendment, the Governor signed Executive Orders 202 (dated March 7, 2020) declaring a state of disaster emergency in the State of New York; and 202.3 (dated March 16, 2020 which ordered "all restaurants or bars to case serving patrons food on premises effective at 8:00 P.M. on March 16, 2020, and until further notice shall only serve food or beverage for off-premises consumption."

In the interest of brevity, Executive Order 202.3 was subsequently extended by multiple Executive Orders from March 29, 2020 through July 6, 2020. This Order to Show Cause seeks to lift the Governor's emergency powers pursuant to Executive Law 29-a (as amended) and to prevent the enforcement of, *inter alia,* Executive Orders 202 and 202.3, or at the very minimum, Executive Order 202.61 signed by Governor Cuomo on September 9, 2020 which permitted restaurants within New York City to open for indoor dining on September 30, 2020 at 25% indoor capacity, while restaurants in the remainder of the State were permitted to open for indoor dining at 50% indoor capacity since June 2020.

Plaintiffs' Factual Allegations

It is alleged by plaintiffs that the Governor's rationale for excluding the City of New York from opening at 50% indoor capacity was that, "They're different demographically, they're different by population, they're different by density, they're different by crowding factor" (Amended Complaint ¶6). The amended complaint further alleges in par. 6 that, "Current data suggests otherwise as the New York City percentage of positive covid [sic] test results is equal or lower than Nassau, Suffolk and Westchester. Staten Island is just as suburban as Nassau, Suffolk, and Westchester [counties]."

It is further alleged plaintiffs that the Governor's initial Executive Order, quarantining healthy people, was premised upon the need to "flatten the curve" (Id. at ¶11-12). As a result, plaintiffs and others similarly situated have been denied their "unalienable right to pursue happiness, which includes the freedom to make our own choices about our safety and welfare without unconstitutional inference (Id. at ¶12). Moreover, it is alleged that they have incurred great economic losses and face the possibility of going out of business if they are not permitted to increase their indoor dining capacity to 50%.

The amended complaint alleges four separate counts of constitutional violations, i.e., Procedural Due Process, Substantive Due Process, Equal Protection and Equal Protection Under State Law.

a) Plaintiffs' Counts I through IV

First, the Procedural Due Process Count alleges that the Governor did not provide procedural due process to plaintiffs prior to issuing the Executive Orders and depriving them of their liberty and property interests under the threat of criminal and civil penalties (Id. pp.20-22). Second, it is alleged that the Executive Orders denied plaintiffs of substantive process in that said

orders "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." Third, plaintiffs have been deprived of Equal Protection in that they are being treated differently than others similarly situated in suburban areas outside the City of New York that have been permitted to resume indoor dining at 50% indoor capacity since plaintiffs have the ability to comply with social distancing restrictions regardless of their location. Fourth, plaintiffs are being denied Equal Protection in that their businesses (bars and restaurants) have been deemed "non-essential" while Gyms, Bowling Alleys, Tattoo parlors, tanning salons, health spas, malls, schools, casinos and dentists are allowed to open their doors. This non-essential designation is "unequal, random, arbitrary and unfair" (Id. ¶117).

The foregoing also constitutes a taking under the Fifth and Fourteenth Amendments in that the shutdown amounts to a physical taking of plaintiffs' income and revenue from the use of their properties, entitling them to compensation from the State. Plaintiffs do not have an adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless the State is enjoined from implementing and enforcing the Executive Orders.

b) Plaintiffs' Additional Causes of Action

The complaint also sets forth two additional causes of action seeking a Preliminary Injunction enjoining the enforcement of the Executive Orders, and a Violation of the Takings Clause of the Fifth Amendment for which plaintiffs seek damages in the amount of $500,000,000.00.

c) Plaintiffs' Order to Show Cause

In support of their application for a preliminary injunction, plaintiffs submit the amended class-action complaint, together with the affidavit of Robert Hanley, Jr., the General Manager of Bocelli Ristorante Inc. (hereinafter "Bocelli"). Hanley attests that Bocelli has an indoor seating

capacity of 290 patrons with limited outdoor seating capacity. The recent average temperature was 45 degrees causing an 80% loss of our outdoor capacity (Hanley Affidavit, ¶¶1-5). At the current 25% indoor capacity, Bocelli will be unable to pay the rent, but at 50%, it will be able to pay rent and overhead, as well as "keep afloat" (Id. ¶6). He has further attested that the business is down 70% from the same time last year, causing him to lay off 75% of the staff (Id. ¶¶8-9). It is Bocelli's position that since the restaurant is located in a suburban, middle class neighborhood no different from Long Island, Westchester and other suburban areas within the State, plaintiffs should be permitted to increase their business to 50% indoor capacity (Id. ¶10).

Plaintiff also submitted an expert affidavit attesting that since New York City has reached herd immunity, restricting indoor dining to 25% is not necessary (Wittkowski Affidavit, ¶3). This herd immunity prevents people from being infectious and transmitting COVID-19 to others, although they have become infected with COVID-19 (Id. ¶5). Therefore, there is no science to support limiting dining capacity within New York City to 25%.

Plaintiffs argue overall that there no longer exists any rational basis, scientific or otherwise, for the orders since the virus is under control or, in the alternative, that the Executive Orders are not related to a legitimate government interest. Thus, it is argued that Court intervention is necessary to declare that the continuance of Executive Order 202 is unconstitutional and to terminate the Governor's emergency powers.

Based upon the foregoing, it is argued that plaintiffs have a substantial likelihood of success on the merits and should be granted a preliminary injunction preventing the enforcement of Executive Order 202.61 limiting indoor dining to 25% indoor capacity.

Defendants' Opposition

In opposition, the State sets forth that the COVID-19 pandemic has caused more than 16,000 deaths in New York City. This number would have been greater but for the Executive Orders mandating temporary restrictions on businesses and social gatherings. The Executive Orders alleged in the amended complaint flattened the curve for new infections and fatalities.

The primary goals of the initial Executive Orders in March and April 2020 (based upon the available science, data and studies) were to flatten the curve, slow the spread of COVID-19, and prevent the healthcare system from becoming overwhelmed (Id. ¶30). To achieve these goals, the State restricted all on-premises consumption of food and beverages in bars and restaurants but not off-premises consumption (Id. ¶¶31-33, EO 202.3). Thereafter, the Empire State Development Corporation in accordance with Executive Order 202.6 deemed restaurants "essential retail," but only for take-out and delivery (Id. ¶34).

Now that the State is reopening, there is a focus on mitigating the risks posed by certain activities that are inherently dangerous because of the potential to spread the infection. One such inherently dangerous activity is indoor dining. The population density within the City of New York presents a particular risk for spreading or transmitting the infection.

It is argued that COVID-19 remains a deadly respiratory disease which is highly transmissible via indoor air exchange through direct, indirect or close contact with an infected person. The virus transmits through saliva and respiratory secretions or droplets that are expelled when an infected person coughs, sneezes, talks or sings (Affidavit of Debra S. Blog, M.D., M.P.H. (¶¶6,8 & 13). This risk for infection is especially significant when an infected person is in an enclosed space in excess of 30 minutes (Id. ¶¶13 & 18). Therefore, a critical

component of the State's plan to control the spread of the virus is to control the size of gatherings coupled with face masks and social distancing (Id. ¶¶15-17; 76-77).

These restrictions are particularly important for "non-essential businesses" or activities such as indoor dining at bars and restaurants because of the inability to easily enforce social distancing and face coverings (Id. ¶¶78-81). A patron will need to remove a face covering to eat or drink and will not be able to socially distance from other patrons and staff during their presence in the restaurant (Id. ¶81). The State's edicts that indoor dining is inherently dangerous are based upon the Center for Disease Control's (hereinafter "the CDC") scientific analyses and reports indicating that states where indoor dining resumed too early, transmission rates of COVID-19 increased, including infections arising from restaurants reportedly in compliance with the public health guidelines (Id. ¶¶ 80-82; 86-88).

On June 26, 2020, the Governor issued Executive Order 202.45 which permitted indoor dining and gathering not to exceed 50% of the maximum indoor capacity. This Executive Order did not include New York City. As of July 7, 2020, the Upstate Regions, Westchester, and Long Island were permitted indoor dining at 50% indoor capacity (Id. ¶50). It is conceded that New York City remains at 25% indoor capacity as of the return date of the Order to Show Cause. As of October 22, 2020, Queens County has the second highest number of COVID-19 deaths in the country, and Kings County has the third highest (Id. ¶70). It is alleged that this is attributable to the extremely densely-populated nature of New York City (Id. ¶86). New York City contains approximately 27,000 individuals per square mile, while Long Island has approximately 2,360 per square mile, and the remainder of the State has an average of 421 (Joseph C. Finelli[2] Affidavit, ¶22). There are approximately 11,386 restaurants within New York City that are

[2] Mr. Finelli is the Director of Enforcement for the New York State Liquor Authority.

licensed by the New York State Liquor Authority (39 per square mile), as compared with Long Island (3 per square mile) and the remainder of the State (.22 per square mile). It is further alleged that New York City has seen a higher number of violations of the COVID-19 Executive Orders (Id. ¶¶6-11, 23-26; and Blog ¶¶86-88). Accordingly, it is the State's position that non-essential bars and restaurants cannot be allowed to return to their indoor business above 25% at the expense of public health and the risk-assessments by defendants should not be disturbed.

a) Inability to Prove Likelihood of Success on the Merits – Counts I through IV

Based upon the foregoing, defendants argue that the plaintiffs' application for a preliminary injunction should be denied since plaintiff cannot demonstrate a likelihood of success on the merits.

First, the State has a real and substantial basis for restricting indoor dining and, therefore, the restriction does not constitute a plain and palpable invasion of rights.

Second, plaintiffs have failed to state plausible procedural and substantive due process claims. Procedurally, plaintiffs have neither a constitutionally recognized general right to do business nor are they entitled to procedural due process in the form of notice and an opportunity to be heard with respect to Executive Orders which are legislative in nature. Substantively, the Executive Orders do not shock the conscience, constitute a gross abuse of governmental authority or interfere with plaintiffs' alleged property rights or fundamental rights, including the right to work, contract or engage in commerce.

Third, the Equal Protection claims must also fail as Staten Island is part of the City of New York and subject to the same restrictions as the remaining four Counties. Plaintiffs are not similarly situated because they are within the same State as Westchester or Long Island. Nor are

plaintiffs treated unequally based upon distinctions drawn by the State based upon geographical location.

b) Inability to Prove Likelihood of Success on the Merits – Preliminary Injunction and Violation of the Takings Clause of the Fifth Amendment

Defendants argue that plaintiffs have failed to demonstrate a likelihood of success on the merits because they have failed to provide factual support or documentary evidence for their assertions that they will suffer irreparable harm in the form of insolvency if they are not permitted to resume operations at 50% indoor dining capacity. Their affidavits are speculative and conclusory at best. Without documentary evidence of impending insolvency, it cannot be determined at this juncture that the damage cannot be rectified by financial compensation. Therefore, the preliminary injunction must be denied because allegations of economic loss alone do not constitute irreparable harm and are insufficient. Finally, although plaintiffs are not seeking a preliminary injunction with respect to their claim for injunctive relief vis-à-vis the Takings Clause of the Fifth Amendment, this cause of action must be brought in the New York State Court of Claims. Therefore, plaintiffs have no likelihood of success on the merits with respect to this final cause of action.

Plaintiff's Reply

In reply, plaintiff reiterates their position as set forth in their moving papers without submitting documentary or admissible evidence to rebut the affidavits of Debra S. Blog, M.D., M.P.H. and Joseph Finelli.

DISCUSSION

The Court finds that plaintiffs have failed to meet their burden for a preliminary injunction.

The authority of the state to enact quarantine laws and public health laws is derived from its police power, a power specifically retained under the Constitution of the United States when joining the Union (Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 [1905]). This power must legislatively establish reasonable regulations that will protect the public health and safety (Id).

To implement the police power, "the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state" (Id.). However, any such law or local rule enacted may neither contravene the Constitution, nor infringe any right granted or secured by it (Id.). The liberties and rights secured by the Constitution do not bestow an absolute right to each person to be wholly free from restraint to act according to one's own will to the detriment of the common good (Jacobson v. Commonwealth of Massachusetts, 197 U.S. 26-27). One such liberty secured by the 14th Amendment, in part, is "the right of a person to live and work where he will; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests" (Id. at p.29 [internal citations omitted]).

Jacobson remains the law to this day more than 115 years after it was decided (Columbus Ale House, Inc. v. Cuomo, __ F.3d __, 2020 WL 6118822, p.3 [2d. Cir. 2020]). Here, the regulation of this pandemic by the Governor and State local authorities, as authorized by the Legislature when it amended Executive Law 29-a and implemented through the Executive Orders, "is fraught with medical and scientific uncertainty" (Columbus Ale House, Inc. v. Cuomo, at p.4). While the initial focus of the Executive Orders was to flatten the curve and minimize the pandemic's impact on the healthcare system, the current focus is to prevent a

resurgence while the virus is still a threat to the public health and safety. Under the facts presented, the Governor's latitude to act must be "especially broad" and not second-guessed by the judiciary "which lacks the background, competence, and expertise to assess public health" (South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1613, 1613-1614 [Mem] [2020]).

The threat of the infection and resurgence of this deadly virus arises when patrons from different households and environments enter restaurants and then depart to move around the densely populated City, potentially coming into contact with 27,000 individuals within every square mile (*See,* Id.). Therefore, Executive Order 202.61 limiting indoor dining to 25% has a real and substantial relation to public health and safety within the City of New York. There may be significant disagreement about the wisdom and efficacy of the Governor's protective measures, but it is neither "the role of the courts to second-guess the Governor's approach," nor to take " a piecemeal approach and scrutinize individual aspects of a rule designed to protect public health or otherwise create an exception for particular individuals impacted by it" (Id. [internal citations omitted]; and see Jacobson v. Commonwealth of Massachusetts, supra.).

Accordingly, the State was within its right to pass quarantine laws for the protection of the public's life and health within its limits to prevent suffering from a contagious disease (Jacobson v. Commonwealth of Massachusetts, 197 U.S. 28). It "seems quite improbable" that the State's limitations are unconstitutional, especially in the context of emergency interlocutory relief "while the local officials are actively shaping their response to changing facts on the ground" (South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1614).

Based upon the foregoing, plaintiffs are unable to demonstrate a likelihood of success on the merits since the State has a real and substantial basis for restricting indoor dining and, therefore, the restriction does not constitute a plain and palpable invasion of rights (*See* Jacobson

v. Commonwealth of Massachusetts, supra. and South Bay United Pentecostal Church v. Newsom, supra.). Plaintiffs do not have either a constitutionally recognized general right to do business without conditions (Columbus Ale House v. Cuomo, at p.4, *citing* New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 107 [1978]) or the right to procedural due process with respect to the State's decision making authority (*See* New York Pet Welfare Assn., Inc. v. City of New York, 143 F.Supp 3d 50, 71 [EDNY 2015], *affirmed* 850 F.3d 79 [2d Cir. 2017], *cert. denied*, 138 S.Ct. 131 [2017]). Plaintiffs have also failed to demonstrate that they were deprived of substantive due process with respect to a fundamental constitutional right implicit in the concept of liberty by government action that is arbitrary or "conscience-shocking" (Id. p.69). It is also noted that in light of the sparse evidence submitted by plaintiffs, the Court cannot assess plaintiffs' claims of impending insolvency.

In reply, plaintiffs' have failed to submit further evidence to rebut defendants' sworn evidence regarding the State's rationale for the 25% indoor capacity rule. This lack of evidence is fatal to plaintiffs' Equal Protection argument. The County of Richmond does not exist within a bubble to the exclusion of the remainder of the City. After a patron visits a dining establishment in the Upstate Regions, Westchester, Nassau or Suffolk Counties, their potential to spread this deadly virus to mass amounts of people per square mile is markedly lower. The focus of this rule is the increased risk factor *after* a patron is in a restaurant or bar in a densely populated city, not only while *present* in the restaurant or bar. Plaintiffs expert's affidavit does not address the former. Thus, plaintiffs are not similarly situated to restaurant and bar owners in Westchester or Long Island based upon the demographics of the populations being similar, i.e., middle class suburbia. The 25% rule applies to Staten Island based upon its population density,

myriad connections to and geographical location within the City of New York.[3] All five counties have been treated equally. Plaintiffs are also not similarly situated to gyms, bowling alleys, tattoo parlors, tanning salons, health spas, malls, schools, casinos, and healthcare professionals such as dentists based on the very nature of a dining experience.

Again, plaintiffs have failed to provide factual support or documentary evidence for their assertions that they will suffer irreparable harm in the form of insolvency if they are not permitted to resume operations at 50% indoor capacity. Their affidavits are speculative and conclusory and absent the appropriate proof, plaintiffs cannot demonstrate a likelihood of success on the merits since economic loss alone does not constitute irreparable harm. "Although the loss of plaintiff's business is likely an irreparable harm, enjoining the actions of state elected officials in matters that affect public safety also constitutes an irreparable harm. The balance of these harms weighs against plaintiff[s] because, while plaintiff[s] bear the very real risk of losing [their] business[es], the Governor's interest in combatting COVID-19 is at least equally significant" (*Columbus Ale House, Inc. v. Cuomo,* p. 5 [internal quotations omitted]). The public interest also weighs against plaintiffs' injunction in light of New York City leading the nation in COVID-19 deaths and "the State's elected officials must be allowed to exercise their judgment to protect the public health as restrictions on activities are slowly lifted" (Id.). It is up to them, not the Courts, to balance the competing interests.

Lastly, plaintiffs' money claims against the State under the Fifth Amendment must be brought in the New York State Court of Claims (Artibee v. Home Place Corp., 28 NY3d 739, 746 [2017]; People v. Correa, 15 NY3d 213, 227-228 [2010]; and New York State Constitution, Art. VI, §9). To that end, the Court lacks subject matter jurisdiction to ultimately render a

[3] The herd immunity argument does not address the potential of those who are infectious to spread COVID-19 within a densely populated city.

binding determination on the merits. Thus, plaintiffs have also failed establish a likelihood of success as to the two final causes of action.

Accordingly, it is hereby

ORDERED, that plaintiffs' Order to Show Cause is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: November 6, 2020 ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.