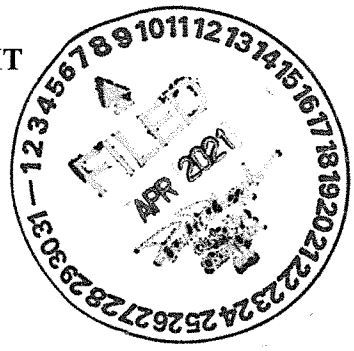
IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS



IN RE: COVID-19 LITIGATION

Case No: 2020-MR-589

Honorable Raylene D. Grischow

MEMORANDUM AND ORDER ON DEFENDANTS MOTION TO DISMISS COUNT V OF FOX FIRE'S AMENDED COMPLAINT

This matter comes on for hearing on the Governor and the Illinois Department of Public Health's ("IDPH") (collectively "defendants") Motion to Dismiss Count V of Fox Fire LLC's Amended Complaint with prejudice pursuant to 735 ILCS 5/2-615 for failure to state a claim upon which relief can be granted. All parties appear through counsel via Zoom.

Arguments were heard on March 30, 2021 and the Court took the matter under advisement. The parties agree Counts I through IV (unchanged from the original complaint) must be dismissed pursuant to *Fox Fire Tavern, LLC v. Pritzker*, 2020 IL App (2d) 200623, 161 N.E.3d 1190, 1200, 443 Ill. Dec. 538, 548 (2nd Dist. 2020), which holds the Illinois Emergency Management Agency Act, 20 ILCS 3305 "allow[s] the Governor to issue successive disaster proclamations stemming from an ongoing disaster." *Id.* Based on the plaintiff's amended complaint, the parties' written motions and memorandums and the parties' oral arguments, in addition to the applicable legal authority, the Court finds and orders as follows:

735 ILCS 5/2-615

"The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). In reviewing the sufficiency of a complaint, a court must "accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "Moreover, Illinois is a fact-pleading jurisdiction." *Beahringer*, 204 Ill. 2d at 369. As such, a

plaintiff "must allege facts that set forth the essential elements of the cause of action" and may not rely on "conclusions of law [or] conclusory allegations not supported by specific facts." *Visvardis v. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007). However, "the plaintiff is not required to set out evidence." *Chandler v. Illinois Cent. R.R.*, 207 Ill. 2d 331, 348 (2003). Instead, the plaintiff need only allege the ultimate facts to be proved, "not the evidentiary facts tending to prove such ultimate facts." *Id.* Therefore, "[t]o survive a [section 2-615] motion to dismiss, a complaint must present a legally recognized claim as its basis for recovery, and it must plead sufficient facts which, if proved, would demonstrate a right to relief." *Derby Meadows Util. Co. v. Inter-Cont'l Real Estate*, 202 Ill. App. 3d 345, 358 (1st Dist. 1990). Further, a court should dismiss a cause of action on the pleadings "only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery." *Chanel v. Topinka*, 212 Ill. 2d 311, 318 (2004). It is within this framework that the Court analyzes defendants' motion to dismiss Count V of the amended complaint.

ANLAYSIS

Defendants move to dismiss Count V of the amended complaint with prejudice asserting it does not state a cause of action. Defendants claim the Emergency Management Act provides the Governor discretion to exercise his powers under the Act and that the courts cannot inquire further into the propriety of the reasoning, so long as the reasoning and decision are not, themselves, illegal. On the other hand, Fox Fire contends that the Second District Appellate Court Opinion from November of 2020 outlines that a viable cause of action for reasonableness exists. Fox Fire also claims that courts may interfere with regulations that prove to be arbitrary, capricious or unreasonable.

This Court recognizes that the U.S. Constitution and the Illinois state constitution created three separate branches of government. The separation of powers clause of the Illinois Constitution provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const.1970, art. II, § 1. In both theory and practice, the purpose of

the provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands. *People v. Hammond*, 2011 IL 110044, ¶ 51, 959 N.E.2d 29, 44 (*citing People v. Walker*, 119 Ill.2d 465, 473, 116 Ill.Dec. 675, 519 N.E.2d 890 (1988)). The separation of powers clause does not seek to achieve a complete divorce among the three branches of government. *In re S.G.*, 175 Ill.2d 471, 486–87, 222 Ill.Dec. 386, 677 N.E.2d 920, 927 (1997).

The aforementioned separation of powers exist, even in a pandemic. The Illinois legislature enacted a law empowering the governor to respond to a public health emergency within a period of time as prescribed by the legislature. This emergency power expires after 30 days unless a new emergency exists. To date, COVID court cases have been resolved throughout this state by applying the plain language of the statute. However, the governor cannot rely on emergency powers indefinitely. The U.S. Constitution recognized the importance of dispersing governmental power in order to protect individual liberty and avoid tyranny. Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty. The Federalist No. 48 (J. Madison)[1]. So, when a case or controversy comes within the judicial competence, the Constitution does not authorize judges to look the other way; courts must call foul when the constitutional lines are crossed. Indeed, the framers afforded courts independence from the political branches in large part to encourage exactly this kind of "fortitude ... to do [our] duty as faithful guardians of the Constitution." *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019).

Counsel for defendants argue that any disagreement over how the governor is handling the pandemic, for more than a year now, should be handled in the next election and not by this Court. However, it is this Court that must ensure the governor does not circumvent the constitutional confines of his authority. This fundamental principle underlying the foundation of our government prevails even

[1] Madison argues that the legislative, executive and judicial branches must not be totally divided. The branches of government can be connected while remaining separate and distinct. This paper is titled "These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other."

in an emergency because "[e]xtraordinary conditions do not create or enlarge constitutional power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 55. S.Ct. 837 (1935). While this Court cannot consider the governor's discretion of particular measures to address a pandemic, this Court can ensure that such measures comport with the constitution and whether any measures have been disregarded by any branches of the government. This Court can inquire as to whether the means utilized in the execution of a power granted are forbidden by the constitution. *Bigelow Group, Inc. v. Rickert*, 377 Ill.App.3d 165, 174 (2nd Dist. 2007).

The Appellate Court's opinion addressed the narrow issue of whether or not the Temporary Restraining Order was properly issued. The Appellate Court found Fox Fire had not established a likelihood of success on the merits and reversed the trial court's granting of the TRO. After remand, Fox Fire amended their complaint to add Count V claiming EO61, the IDPH resurgence mitigation measures of October 20, 2020, and their progeny are arbitrary and unreasonable. The Second District specifically pointed out that they were remanding the case for further proceedings and for judicial economy. The Court informed the parties that "in order to deem the Governor's orders unreasonable, there has to be a comparison of the disease's impact on the restaurant industry *vis-à-vis* its impact on the general public." *Fox Fire Tavern, LLC v. Pritzker*, 2020 IL App (2d) 200623, ¶50, 161 N.E.3d 1190, 1200, 443 Ill. Dec. 538, 548 (2nd Dist. 2020).

The amended complaint contains allegations to this effect. Fox Fire alleges that restricting indoor dining at Fox Fire and other Kane County restaurants is both arbitrary and unreasonable and that they have a right to insist defendants issue orders and regulations which are neither arbitrary nor unreasonable. Our Supreme Court has stated that administrative actions taken under statutory authority will not be set aside unless it has been clearly arbitrary, unreasonable or capricious. *County of Will v. Pollution Control Board*, 2019 IL 122798, ¶ 43, 135 N.E.3d 49, *61; See also, Illinois Coal Operators Ass'n v. Pollution Control Board*, 59 Ill. 2d 305, 310, 319 N.E.2d 782 (1974) ("administrative action taken under statutory authority will not be set aside unless it has been clearly arbitrary, unreasonable

or capricious"). Since this has been pled, it is within the province of this Court to determine if the defendants' implementation of the business shutdowns and/or restrictions were arbitrary and unreasonable. Fox Fire bears a heavy burden to establish that defendants' actions were clearly arbitrary and capricious. Nonetheless, Count V of the amended complaint contains enough information to reasonably inform the defendants of the nature of they claims they are called upon to defend.

The Court orders as follows:

1. The Motion to Dismiss Count V is denied;

2. Defendants have 14 days to file an answer to Count V of the amended complaint, on or before April 21, 2021; and

3. This matter is set for a status conference by Zoom on **April 28, 2021 at 9:30 a.m.** to establish a scheduling order and date for a preliminary injunction hearing. The Court will send a Zoom invite with remote hearing instructions that must be followed.

IT IS ORDERED.

DATE: April 7, 2021

By: Raylene D. Grischow
Raylene D. Grischow, *Circuit Court Judge*