Grasmere Fit, Inc. v de Blasio
2020 NY Slip Op 34366(U)
November 17, 2020
Supreme Court, Richmond County
Docket Number: 151523/2020
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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GRASMERE FIT, INC. DBA The MAX CHALLENGE OF GRASMERE, SEAN EGAN LLC. DBA NORTH STAR YOGA, Individually and on Behalf of all Others Similarly Situated, and New York City Council Member MARK GJONAJ, in his capacity as Chairperson of the New York City Council Small Business Committee,

Plaintiffs,

-against-

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, DR. DAVID CHOKSHI, in his Official Capacity of Health Commissioner of the City of New York and THE CITY OF NEW YORK,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 151523/2020
Motion No.: 001 & 002

Recitation, as required by CPLR 2219(a) of the following papers numbered were fully submitted on the day of

	Papers Numbered
Plaintiff's Order to Show Cause, Affirmation and Supporting Papers (MS_001 – NYSCEF DOC. 2 through 13)	1, 2
Defendants' Notice of Cross-Motion Affirmations in Support and in Opposition to Plaintiff's Order to Show Cause and Supporting Papers (MS_002 – NYSCEF DOC. 14 through 28)	3, 4
Plaintiff's Reply Memorandum of Law and in Opposition to Defendants' Cross-Motion (MS_001 – NYSCEF DOC. 29)	5

Upon the foregoing papers, plaintiff's order to show cause [MS_001] for a preliminary injunction and defendants' cross-motion to dismiss this action pursuant to CPLR 3211(a)(2) and 3211(a)(7) [MS_002] are decided as follows:

PROCEDURAL HISTORY

Plaintiffs commenced this civil rights action on September 10, 2020 by e-filing a summons and class action complaint. On September 29, 2020 [19 days later], plaintiff e-filed a proposed Order to Show Cause seeking a preliminary injunction enjoining defendants from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the continued New York City lockdowns and New York City shutdown of Fit studios, yoga studios, pilates studios and other boutique fitness studios (NYSCEF #12). Due to an inability to timely serve the Order to Show Cause, the Court signed an amended Order to Show Cause on October 7, 2020 extending the time for service upon defendants. Defendants were served with the Order to Show Cause and supporting papers on October 8, 2020. Defendants e-filed a cross-motion to dismiss this action. 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 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 when a non-party, Governor Andrew Cuomo ("the Governor"), issued a series of Executive Orders in March 2020.

On March 7, 2020, the Governor signed Executive Order 202 declaring a state of disaster emergency in the State of New York and, subsequently, signed Executive Order 202.3 on March 16, 2020. The latter stated that, "[n]o local government or political subdivision shall issue any local emergency order or declaration of emergency or disaster inconsistent with, conflicting with or superseding the foregoing directives, or any other executive order issued under Section 24 of the Executive Law" (NYSCEF #18). Additionally, Executive Order 202.3 also stated, in relevant part, that "[a]ny gym, fitness centers or classes, and movie theaters shall also cease operation effective at 8 pm on March 16, 2020 until further notice" (Id.).

Then, on March 18, 2020, the Governor signed Executive Order 202.5 (NYSCEF #18) which stated that, "no locality or political subdivision shall issue any local emergency order or executive order with respect to response of COVID-19 without the approval of the State Department of Health." Also, on March 18, 2020, the Governor signed Executive Order 202.6 (NYSCEF #19). This Executive Order reads, *inter alia*, as follows:

> Effective on March 20 at 8 p.m.: All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize…Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. This includes essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services; news media; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public…

The foregoing Executive Orders were still in effect on August 17, 2020 when the Governor announced that gyms and fitness centers were permitted to reopen starting on August 24, 2020. However, the reopening was subject to inspection by local health departments and that any locality may delay reopening until on or after September 2, 2020. This announcement was memorialized in writing at https://www.governor.ny.gov/news/governor-cuomo-announces-gyms-and-fitness-centers-can-reopen-starting-august-24. The announcement stated as follows:

> Local elected officials may choose to delay the reopening of gyms and fitness centers until September 2 to, in part, provide time for required local health department inspections, and may also choose to delay the reopening of indoor fitness classes until a date beyond September 2. In New York City, the Mayor will determine whether gyms and fitness centers should postpone reopening. Outside of New York City, the county's chief executive - county executive, administrator, manager, or chair of the local elected legislative body - will determine whether gym reopening needs to be postponed. Localities can also determine whether gyms postpone resumption of indoor classes. In New York City, the Mayor and, throughout the rest of the state, the county's chief executive may decide to opt-out of indoor group fitness and aquatic classes within their jurisdiction, postponing their resumption until a later date" (NYSCEF #17).

Three days later on August 20, 2020, the Governor issued Executive Order 202.57 (NYSCEF #22) in accordance with the August 17, 2020 announcement which stated that, "[t]he directive contained in Executive Order 202.3, as extended, which require any gym, fitness center or classes, to cease operation, is hereby modified only insofar as to allow a gym, fitness center, or class to operate subject to adherence to Department of Health issued guidance; and as provided further, that such operations may begin no earlier than August 24, 2020, or may be postponed by the local chief executive only consistent with Department of Health issued guidance."

Defendant, Mayor Bill de Blasio ("the Mayor") issued New York City Emergency Executive Order 144 on August 31, 2020 (NYSCEF #23). This order, consistent with the foregoing Executive Orders by the Governor, permitted gyms and fitness centers that met the

criteria set forth by the Governor to open on September 2, 2020. Executive Order 144 further stated that, "Indoor group fitness classes, as defined by DOHMH at nyc.gov/health/restart are prohibited (Id. at §2c.) An indoor group fitness class is defined as, "an activity with two or more participants led by either an in-person instructor or a remote or pre-recorded instructor."[1] Such indoor group fitness classes have remained closed at the recommendation of the New York City Department of Health on September 10, 2020 (NYSCEF #25).

Plaintiffs' Allegations

In their summons and complaint, plaintiffs allege that boutique fitness studios -- yoga, pilates, barre, cross fit, spin and rowing -- are open throughout the State of New York, except within the City of New York (NYSCEF #1, ¶5). It is further alleged that this shut down was and continues to be "random and arbitrary" Id. ¶6). As a result, plaintiffs and other boutique fitness studios similarly situated have been forced under threat of criminal penalties to close their businesses (Id. ¶42), thereby depriving them of their liberty and property interests in violation of the Due Process Clause and Equal Protection Clauses of the United States Constitution and State Law (Id. ¶12, 14).

The complaint seeks a designation of this action as a class action; designation of plaintiffs as representative plaintiffs of all boutique fitness studios; a declaratory judgment that the constitutional rights of plaintiffs and members of the putative class have been violated; enjoining defendants from enforcing the shutdowns and issuing any future orders or rules; granting a preliminary injunction enjoining any further enforcement of the shutdowns; and compensation in the amount of $250,000,000.00.

[1] https://www1.nyc.gov/assets/doh/downloads/pdf/covid/businesses/covid-19-reopening-gyms.pdf.

Defendants' Opposition and Cross-Motion to Dismiss

Defendants have cross-moved to dismiss this action pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss this action in its entirety.

From the outset, it is argued that plaintiffs have failed to state a cause of action for damages from defendants from March 16, 2020 through August 24, 2020 as the shutdown of their businesses were at the direction of the Governor [a non-party], not defendants. Additionally, plaintiffs' classification as non-essential businesses was and continues to be the edict of the Governor. Defendants were not free to disregard Executive Order 202.3 and, moreover, plaintiffs have not included the Governor as a party to this action pursuant to CPLR §1010(a). Therefore, assuming the alleged financial harm from March 16, 2020 through August 24, 2020 is true, plaintiffs' complaint fails to state a cause of action for damages against defendants.

Defendants further argue that with respect to the continuing enforcement of Emergency Executive Order 144 on and after August 24, 2020, plaintiffs have also failed to establish a cause of action for damages. Plaintiff, Roseann Camarda, states without support that there is no science to prove that operating a boutique fitness studio in Staten Island is unsafe as opposed to the remainder of the State. Assuming the lack of science to be true, plaintiffs have not articulated facts to support their contention that defendants' basis for Emergency Executive Order 144 is without a reasonable and substantial basis.

In that regard, defendants submit the affirmation of Dr. Jay Varma, the Mayor's Senior Advisor for Public Health. Dr. Varma affirms that defendants' reopening has been more "gradual and fine-tuned" due to the different risk factors the City faces as compared to the remainder of the State of New York. He affirms that

> NYC contends with the highest ongoing risk of 'importing' cases because it is a center for domestic and international travel and welcomes tens of thousands of students arriving each fall for higher education studies in the numerous universities and higher learning institutions located within the five boroughs, and the inherent risk associated with a large population living in a dense environment, including in high-risk residential congregate facilities and multi-generational housing, that make distancing difficult and increase the likelihood that an increase in transmission could quickly lead to a resurgence (NYSCEF #15, ¶19).

Dr. Varma attributes the higher risk of transmission during indoor group fitness classes to the fact that participants are not tied to equipment in a fixed location to ensure social distancing. This increases the risk that the participants will come in close contact with other participants for extended periods of time while exercising vigorously. The contact would be for a prolonged period of time as opposed to individuals on equipment. This prolonged contact, coupled with the increased respiratory droplet production, broader dispersion during exercise and greater volume of inhalation/exhalation renders indoor group fitness classes a high risk activity for the transmission of COVID-19 (Id., ¶27).

With respect to plaintiffs' substantive and procedural due process claims, defendants argue that plaintiffs cannot establish the deprivation of a protected liberty or property interest. It is posited that the complaint makes unsupported allegations that plaintiffs were deprived of a right to intrastate travel, a right to engage in commerce, a right to work, a right to contract, and significant revenue through the operation of their businesses. In this regard, defendants argue that plaintiffs have not been restricted from opening their boutique fitness centers or gyms, but rather, have been restricted in the manner in which they may operate. Defendants may conduct outdoor and online fitness classes and although plaintiffs' claim they have been deprived of lost revenue/profit or the right to operate their business, neither are protected under the Fourteenth Amendment. Moreover, plaintiffs are not entitled to procedural due process in the form of a

hearing because summary administrative actions are justified to protect the health and safety of the public.

Likewise, plaintiffs' equal protection claims fail since, *inter alia,* plaintiffs have failed to establish that defendants undertook a governmental action that draws a distinction between similarly situated individuals. Here, all gyms within the City of New York, large or small, are prohibited from conducting indoor fitness classes at the direction of the Mayor. Again, any distinction between essential and non-essential businesses was at the direction of a non-party to this action.

Next, it is argued that the physical taking claims fail to state a cause of action since plaintiffs have not had their private property appropriated or invaded without compensation. Defendants have only regulated the use of the property without reducing the economic value of plaintiffs' property to zero. Plaintiffs are free to operate their business online or outdoors or sell the property if they so choose. Therefore, absent proof that plaintiffs will never realize a financial return on their property or that the value has been severely reduced, the physical taking claims are without merit.

Finally, Mark Gjonaj in his capacity as the Chairperson of the New York City Council Small Business Committee, lacks standing to challenge Emergency Executive Order 144 since he is neither an owner of a boutique fitness studio, nor has the authority to retain private counsel to commence litigation on his behalf as a city official.

Plaintiff's Reply

Plaintiffs neither submitted admissible evidence in opposition to Dr. Varma's affidavit, nor served opposition to defendants' cross-motion. Plaintiffs reiterated the arguments set forth in

their initial moving papers in reply and further support of their request for a preliminary injunction, without reference to the cross-motion or a prayer for relief denying same.

Based upon the foregoing, plaintiffs' order to show cause is denied and defendants' cross-motion to dismiss is granted without opposition in its entirety.

DISCUSSION

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]). A motion served pursuant to CPLR 3211 "allows plaintiff to submit affidavits, but it does not oblige him to do so on penalty of dismissal, as is the case under CPLR 3212 when defendant has made an evidentiary showing that refutes the pleaded cause of action. If plaintiff chooses to stand on his pleading alone, confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action, he is at liberty to do so and, unless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint" (Rovello v. Orofino Realty Co., Inc., 40 NY2d 633, 635 [1976]). However, a plaintiff may utilize an affidavit "to preserve an inartfully pleaded, but potentially meritorious claim" (Id.).

Here, plaintiffs have failed to state a cause of action for damages from defendants with respect to Executive Orders 202, 202.3, 202.5 and 202.6 as the shutdown of their businesses was at the direction of the Governor [a non-party], not defendants. These facts are not in dispute and, as plead in the complaint, do not constitute a cause of action against defendants (Rovello v.

Orofino Realty Co., Inc., 40 NY2d 633). Additionally, plaintiffs have also failed to state a cause of action for any such loss of revenue or business by reason of plaintiffs' classification as non-essential businesses which, was and continues to be, an edict by the Governor and thus non-compensable by defendants (Id.). Defendants were not free to disregard the Executive Orders and, further, plaintiffs have not included the Governor as a party to this action pursuant to CPLR §1010(a). Therefore, assuming as true that plaintiffs suffered alleged financial harm from March 16, 2020 through August 24, 2020 as well as being classified as "non-essential businesses" plaintiffs' complaint also fails to state a cause of action for damages against defendants (Id.).

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. and *see Bocelli v. Cuomo,* 151500/2020, Aliotta, J. [11/2020 unpublished]).

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 Mayor, as authorized and empowered by the Governor through Emergency Executive Orders, and more specifically Order 144, "is fraught with medical and scientific uncertainty" (Columbus Ale House, Inc. v. Cuomo, at p.4). Therefore, while the initial focus of the Mayor's Emergency Executive Orders was to flatten the curve and minimize the pandemic's impact on the healthcare system, the current focus of Order 144 is to prevent a resurgence while the virus is still a threat to the public health and safety. Under the facts presented, the Mayor'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]). It is not the role of the courts to second-guess the Mayor's executive decision or 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.).[2] The limitations of Emergency Executive Order 144 cannot be said to be unconstitutional vis-à-vis emergency interlocutory relief since the Mayor is actively shaping a response to the changing facts and circumstances surrounding the COVID-19 virus in the City (*see generally* South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1614). Therefore, the Mayor was within his delegated authority to issue Emergency Executive Order 144 since the Governor specifically delegated to

[2] The court may also not second guess the Governor's decision to delegate this authority to local officials and cannot rule on the reasonable and substantial basis to do so as the Governor is not a party this action.

him and other local executives, the decision making authority with respect to indoor fitness centers.

Based upon the foregoing, plaintiffs have failed to state a cause of action and, therefore, are unable to demonstrate a likelihood of success on the merits since defendants have a real and substantial basis for restricting indoor fitness classes, which 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.). Assuming the allegations of the complaint to be true, plaintiffs have neither 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]), nor the right to procedural due process with respect to defendants' 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 not demonstrated in the complaint 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). The alleged loss of revenue or business is not a direct government appropriation or physical invasion of plaintiffs' private property or a regulatory taking (*see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 [1982] and Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 [2005]).

Plaintiff's Equal Protection argument also fails to state a cause of action in that boutique fitness studios are not within a constitutionally protected class or subjected to selective enforcement since all gyms regardless of size, including boutique fitness studios, are prohibited from conducting indoor fitness classes due to the very unique nature of such activity, i.e., the

increased respiration and prolonged period of close contact (Progressive Credit Union v. City of New York, 889 F.3d 40, 49 [2d Cir. 2018] and Cine SK7 v Town of Henrietta, 507 F.3d 778, 790 [2d Cir. 2007]). Therefore, plaintiffs are not being treated differently than other gyms similarly situated within the City of New York and are not subject to selective enforcement. Moreover, the remaining counties within the State are outside the Mayor's jurisdiction and not subject to Emergency Executive Order 144.

In reply to the Order to Show Cause, plaintiffs' have failed to submit admissible evidence to rebut Dr. Varma's sworn affidavit detailing the City's reasonable and substantial rationale for the restriction on indoor fitness classes within the densely populated City of New York (Jacobson v. Commonwealth of Massachusetts, supra. and South Bay United Pentecostal Church v. Newsom, supra.). Plaintiff did not address Dr. Varma's explanation that the dense population, coupled with the fact that the City is the center for domestic and international travel for visitors and temporary residents, sets it apart from the remainder of the State with respect to the risk of infection. Plaintiff's affidavit that "there is no science" regarding the operation of a boutique fitness studio is without evidentiary foundation. The unsworn reply memorandum of law is also not supported by admissible evidence and is insufficient to rebut the opposition or survive the motion to dismiss (*see* Zawatski v. Cheektowaga-Maryvale Union Free School Dist., 261 AD2d 860 [4th Dept. 1999], lv. denied 94 NY2d 754 [1999]).[3] Although plaintiffs may stand on their pleadings, the pleadings do not contain factual allegations that establish an arbitrary or capricious basis for Emergency Executive Order 144.

[3] The complaint in this action is not verified by an individual with personal knowledge of the facts recited therein. The affidavit submitted in support of the Order to Show Cause does not attest that, 1) the affiant read the complaint and the facts contained therein are true, and 2) incorporates by reference the facts in the complaint.

Based upon the foregoing, plaintiffs have failed to state a cause of action and, therefore, cannot demonstrate a likelihood of success on the merits for a preliminary injunction (Jacobson v. Commonwealth of Massachusetts, supra). The balance of harms weighs against plaintiffs in light of the alleged irreparable harm incurred by plaintiffs versus the potential irreparable harm to the general public in connection with defendants' Emergency Executive Orders affecting public safety (*see generally*, Columbus Ale House, Inc. v. Cuomo, p. 5]). It is up to defendants, not the Courts, to balance the competing interests. The Court has considered plaintiff's remaining arguments and finds them to be without merit. Therefore, plaintiffs' order to show cause is denied in its entirety.

Defendants' cross-motion to dismiss this action is granted in its entirety without opposition and for the reasons state herein. Plaintiffs did not serve separate opposition to the cross-motion or incorporate opposition thereto in their reply papers.

Accordingly, it is hereby

ORDERED, that plaintiffs' order to show cause is denied in its entirety; and it is further

ORDERED, that defendants' cross-motion to dismiss this action is granted in its entirety without opposition; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 11/17/2020

ENTER:

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