

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA**

DAVID J. LEAVITT

CASE NO.: 2020-CA-001136-16-K

Plaintiff,

vs.

SEMINOLE COUNTY, a political
subdivision of the State of Florida,

Defendant.

_____ /

**SEMINOLE COUNTY'S MOTION TO DISMISS COMPLAINT FOR
EMERGENCY INJUNCTIVE RELIEF AND DECLARATORY
JUDGMENT FOR FAILURE TO STATE A CAUSE OF ACTION**

Defendant, SEMINOLE COUNTY ("the County"), by and through its undersigned counsel and pursuant to Rule 1.140, Fla. R. Civ. P., moves to dismiss Plaintiff, DAVID J. LEAVITT's, Complaint for Emergency Injunctive Relief and Declaratory Judgment for failure to state a cause of action, and in support thereof, states as follows:

Introduction

1. Count I of Plaintiff's Complaint for Emergency Injunctive Relief and Declaratory Judgment requests the Court to enter a temporary injunction to enjoin Seminole County from enforcing the limited mask/facial covering requirement of the County's Executive Order 2020-017 ("the Order"), entitled Executive Order Regarding COVID-19 Requiring Social Distancing and Adhering to Opening Up America Guidelines. The limited requirement to wear a mask/facial covering, which applies to employees and patrons of businesses which require employees and patrons to be within six (6) feet, is an action the County deems necessary to protect the public health and safety of its residents and visitors. Plaintiff asserts that Seminole County lacks the legal authority to create such a mandate. Additionally, Plaintiff contends that the Order violates the

constitutional right of privacy in Article 1, Section 23 of the Florida Constitution and the due process clause of Article 1, Section 29 of the Florida Constitution.

2. Plaintiff's Complaint for Emergency Injunctive Relief and Declaratory Judgment alleges that he is a resident of Seminole County and a business owner who is "personally and negatively affected by the mandate to wear a mask." Plaintiff's Complaint is unverified and not accompanied by any affidavits of harm or damages.

3. As discussed below, Plaintiff's Complaint should be dismissed for failure to state a cause of action for declaratory judgment as pled because the Executive Order 2020-017 about which he filed suit was rescinded and replaced by Executive Order 2020-020. A dismissal without prejudice to allow amendment of the Complaint to allege a case or controversy with respect to the same limited mask/facial covering requirement that is contained in Executive Order 2020-020 currently in effect would be appropriate. Further, Plaintiff's Complaint should be dismissed for failure to state a cause of action for temporary injunctive relief because it fails to demonstrate a prima facie, clear legal right to the relief requested.

Background

4. Seminole County, like countless communities across the State of Florida, our nation, and the world has been impacted during the unprecedented public health care crisis and worldwide pandemic arising from the Novel Coronavirus Disease 2019 ("COVID-19"), a highly contagious respiratory illness that may result in serious illness or death. On March 1, 2020, Florida Governor Ron DeSantis issued Executive Order 20-51, which directed the Florida Department of Health to declare a Public Health Emergency due to COVID-19. On March 2, 2020, due to the serious health threat to persons within Seminole County arising from COVID-19, Seminole County Chairman Jay Zembower executed Executive Order 2020-001, declaring a Local State of Emergency under the

provisions of Chapter 72, Seminole County Code. On March 11, 2020, the World Health Organization declared the spread of COVID-19 to be a global pandemic. On March 13, 2020, President Trump declared a national emergency concerning COVID-19. The federal, state and local states of emergency are still in effect in an effort to address the ongoing public health threat related to COVID-19.

5. On April 1, 2020, Governor DeSantis issued Executive Orders 20-91 and 20-92 that put in place a state-wide safer at home order, directed the closure of “non-essential services and activities” and limited the movement of persons. On April 16, 2020, the White House released Guidelines for Opening Up America Again, which outlined steps for a three-phased approach to help state and local officials when reopening their economies, getting people back to work and continuing to protect lives. On April 29, 2020, Governor DeSantis issued Executive Order 20-112, effective on May 4, 2020, that rolled back certain restrictions imposed by Executive Orders 20-91 and 20-92.

6. On April 30, 2020, due to the imminent health hazard and increased risk of infection posed by COVID-19 to the residents of Seminole County and to healthcare workers, first responders, and emergency medical service workers caring for patients with COVID-19, Executive Order 2020-017 was issued pursuant to the authority granted by Section 72.6(b)(1), Seminole County Code, by Alan Harris, Chief Administrator of the Seminole County Office of Emergency Management, to protect the health and safety of the citizens, residents and visitors of Seminole County, to assist the healthcare delivery system in its ability to serve person infected by COVID-19, and to preserve the public’s access to essential services and maintain the operation of critical infrastructure. The Order which became effective on May 4, 2020 states, in pertinent part, in Section 1, as follows:

Section 1. Minimum Standards for Businesses and Places of Assembly. All places of assembly and businesses in Seminole County may open, or remain open, under the following conditions, unless precluded by any order issued by the Governor for the State of Florida:

a) All persons, employees, patrons and participants must practice social distancing by staying at least six (6) feet apart.

b) Businesses which require employees and patrons to be within six (6) feet, both employee and patron must wear a face mask/covering; unless the customer wearing the mask would impede the service, in which case the service provider would need to wear a face mask/covering.

* * *

Legal Standards

Pursuant to Rule 1.140(b), Fla. R. Civ. P., a complaint must be dismissed if it “[f]ails to state a cause of action.” “Whether a complaint is sufficient to state a cause of action is an issue of law.” *Doe v. Baptist Primary Care, Inc.*, 177 So. 3d 669, 674 (Fla. 1st DCA 2015) (quoting *Locker v. United Pharm. Grp., Inc.*, 46 So. 3d 1126, 1128 (Fla. 1st DCA 2010)). While courts must “accept as true all well-pled allegations” and draw all reasonable inferences in favor of the pleader,” courts “need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party.” *W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citing *Response Oncology, Inc. v. Metra Health Ins. Co.*, 978 F. Supp. 1052, 1058 (S. D. Fla. 1997)).

Dismissal of a complaint is also warranted if it fails to allege “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.” Fla. R. Civ. P. 1.110(b). This rule of pleading “forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted

expense to the litigants and unnecessary judicial effort.” *Horowitz v. Laske*, 855 So. 2d 169, 172-73 (Fla. 5th DCA 2003).

Argument

A. Plaintiff’s Complaint Fails to State a Cause of Action for Injunctive Relief.

Count I of Plaintiff’s Complaint seeks the Court to enjoin Seminole County from enforcing Executive Order 2020-017. A temporary injunction is an extraordinary remedy that should be granted sparingly. *State, Dept. of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 472 (Fla. 1st DCA 2018), *reh’g denied* (Feb. 21, 2018) (citing *Sch. Bd. Of Hernando Cty. v. Rhea*, 213 So. 3d 1032, 1040 (Fla. 1st DCA 2017)).

Plaintiff’s first contention that Seminole County should be enjoined from enforcing Executive Order 2020-017 because it lacks the legal authority to create a mandate for citizens to wear masks is wholly without merit. Pursuant to Section 72.6(b)(D), Seminole County Code, the County’s Director of Emergency Management has the power and authority to, by Executive Order, “[p]rohibit or regulate the participation in or carrying on of any business activity and prohibit or regulate the keeping open of places of business, places of entertainment, and any other place of assembly.” Section 72.6(b)(J), Seminole County Code, further grants the Director of Emergency Management the power and authority to, by Executive Order:

J. Impose any other restriction reasonably necessary for the protection of the health, safety and welfare of the people or property of Seminole County, Florida resulting from any Governor Declared State of Emergency or any declared Local State of Emergency under this Chapter, provided the restriction is not covered by an exception to the specific restrictions set forth above and provided the restriction is not prohibited by federal or state law.”

Executive Order 2020-017 was lawfully issued pursuant to that grant of authority.

To obtain a temporary injunction, the Plaintiff must establish (1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest. *Bayfront HMA Med. Ctr., LLC*, 236 So. 3d at 472.

1. Substantial Likelihood of Success on the Merits

“A substantial likelihood of success on the merits is shown if good reasons for anticipating that result are demonstrated.” *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 753 (Fla. 1st DCA 1994), *approved sub nom. Naegele Outdoor Advert. Co., Inc. v. City of Jacksonville*, 659 So. 2d 1046 (Fla. 1995), *as modified on reh’g* (Aug. 24, 1995). “It is not enough that a merely colorable claim is advanced.” *Id.* The petition or other pleading must demonstrate a prima facie, clear legal right to the relief requested. *Colonial Bank, N.A. v. Taylor Morrison Srvs., Inc.*, 10 So. 3d 653, 656 (Fla. 5th DCA 2009). The establishment of a clear legal right to the relief requested is an essential requirement prior to the issuance of a temporary injunction. *Mid-Florida At Eustis, Inc. v. Griffin*, 521 So. 2d 357, 357-358 (Fla. 5th DCA 1988).

In the instant case, Plaintiff’s Complaint fails to demonstrate a prima facie, clear legal right to the relief requested. There is no recognized constitutional right *not* to wear a mask/facial covering in public locations or to expose other citizens of the County to a contagious and potentially deadly virus during an ongoing declared public health emergency. “Before the right to privacy attaches, there must be a legitimate expectation of privacy.” *Nucci v. Target*, 162 So. 3d 146, 153 (Fla. 4th DCA 2015). As stated by the Florida Supreme Court, Article I, Section 23 of the Florida Constitution “was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual.” *Stall v. State*, 570 So. 2d 257, 262 (Fla. 1990) (citing *Florida Board of Bar Examiners re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983)).

The Eleventh Circuit Court of Appeals, in a case challenging the constitutionality of Florida's motorcycle law, stated "[t]here is little that could be termed private in the decision to wear safety equipment [in public]." *Picou v. Gillum*, 874 F. 2d 1519, 1521 (11th Cir. 1989). The Court noted that:

There is no broad legal or constitutional "right to be let alone" by government. In the complex society in which we live, the action and nonaction of citizens are subject to countless local, state, and federal laws and regulations. Bare invocation of a right to be let alone is an appealing rhetorical device, but it seldom advances legal inquiry, as the "right" – to the extent it exists– has no meaning outside its application to specific activities. The Constitution does protect citizens from government interference in many areas –speech, religion, the security of the home. But the unconstrained right asserted by appellant has no discernable bounds, and bears little resemblance to the important but limited privacy rights recognized by our highest Court. As the Court has stated, "the protection of a person's *general* right to privacy -- his right to be let alone by other people -- is like the protection of his property and his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-51, 88 S. Ct. 507, 510-11, 19 L. Ed.2d 576 (citations omitted).

Noting that a motorcyclist without a helmet is more likely to suffer serious head injury than a rider wearing one and that costs of this injury may be borne by the public through police and ambulance services provided by state and local governments and the injured cyclist may be hospitalized at public expense, the Court determined Florida's helmet requirement to be "a rational exercise of its police powers", and stated that "Legislatures and not courts have the primary responsibility for balancing conflicting interests in safety and individual autonomy." *Picou v. Gillum*, 874 F. 2d 1519, 1521-1522 (11th Cir. 1989).

Similarly, in *Pac. Legal Found. v. Dep't of Transp.*, 593 F. 2d 1338, 1347 n. 72 (D. C. Cir. 1979), the contention that the passive restraint rule violates an individual's right to privacy has been rejected:

Passive restraints protect not only the owner or driver of the car, but also any passengers, and thus involve more than an individual concern. Also, by their very nature, passive restraints involve no intrusion on an intimate area of activity, as

in cases concerning the family or procreation decisions where courts have defended privacy interests.

Moreover, “there are circumstances in which a public health emergency, for instance, a fire, the spread of infectious or contagious diseases or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government’s police power.” *Davis v. City of S. Bay*, 433 So. 2d 1364, 1366 (Fla. 4th DCA 1983).

The critical role and responsibility that local governments have in protecting the health, safety and welfare of their citizens is recognized by Section 252.38, Florida Statutes (2019): “Safeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state.” The County’s temporary mandate to wear masks/facial coverings in the limited circumstance of a business which requires its employees and patrons to not be six (6) feet or more apart, was imposed pursuant to that responsibility and authority in order to slow the spread of the highly contagious COVID-19 virus among County citizens and to preserve the public’s access to essential healthcare services if they become infected. It is not the role of the Court to second guess the County’s decision to require the wearing of facial coverings as set forth in the Executive Order.

Plaintiff’s Complaint fails to allege and establish a recognized right to a reasonable expectation of privacy in a public location, particularly as it pertains to facial coverings. The facial covering requirement does not violate either of the constitutional rights asserted by the Plaintiff. Therefore, strict scrutiny does not apply. The County’s Executive Order only requires use of a mask/facial covering under the limited circumstance where an employee is coming into contact with the public in a business where social distancing measures of staying at least six (6) feet apart are not possible. The requirement to wear a facial covering during the limited circumstance set forth in the Executive Order is a minimal inconvenience and its benefit to the public in potentially reducing the

spread of COVID-19 outweighs any inconvenience. Pursuant to Section 252.38(3)(a)(5), Florida Statutes, the County's declaration of a Local State of Emergency is subject to review every seven (7) days and may be extended by Executive Order, as necessary, in seven (7) day increments, the facial covering requirement is not permanent.

Lack of an Adequate Remedy at Law

Plaintiff's Complaint fails to assert any actual damage that that could not be remedied by law were the facial covering requirement to be found unconstitutional. There is no recognized constitutional right to privacy applicable to Plaintiff's claim that his rights under the Florida Constitution are being violated by the Executive Order. Although the County's Executive Order does not mandate that a business owner whose business requires employees and patrons to be within six (6) feet purchase masks for themselves or their employees, any such cost paid by a business that makes a business decision to do so is capable of being remedied by monetary compensation. Because Plaintiff's Complaint fails to establish a lack of a legal remedy, Plaintiff's Complaint should be dismissed.

Likelihood of Irreparable Harm

Plaintiff's Complaint fails to demonstrate a reasonable probability that a real injury will occur unless the Court grants his request for a temporary injunction. "Mere general allegations of irreparable harm are not sufficient." *Stoner v. S. Peninsula Zoning Comm'n*, 75 So. 2d 831, 832 (Fla. 1954). Plaintiff asserts that the limited mask requirement infringes upon his right to privacy over bodily and facial autonomy. Because the wearing of a face covering under the limited circumstances required by the County's Executive Order during the ongoing COVID-19 pandemic will not alter the Plaintiff's physical person or result in permanent disfigurement, Plaintiff has not established in his pleading the requisite element of irreparable injury.

Whether Injunctive Relief Would Serve the Public Interest

Plaintiff's Complaint fails to establish the fourth requisite criteria for temporary injunctive relief - that a temporary injunction would serve the public interest. To the contrary, in weighing the Plaintiff's claim that he has a constitutional right to be free from a requirement to wear a mask/facial covering when in close contact with others during the COVID-19 pandemic against the public interest to slow and reduce the further spread of the virus in the midst of this ongoing public health emergency, it is clear that an injunction in this situation would disserve the public interest. According to the CDC, COVID-19 primarily is spread through interactions either "between people who are in close contact with one another" or "[t]rough respiratory droplets produced when an infected person coughs, sneezes or talks." See CDC, How COVID-19 Spreads (last updated May 22, 2020), <https://www.cdc.gov/corona-virus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>. The virus can be spread by persons who have no symptoms and do not know that they are infected. There currently is no known cure, effective treatment or vaccine for COVID-19. To date, there have been 505 confirmed cases and 12 deaths from COVID-19 in Seminole County, 58,764 confirmed cases and 2,566 deaths in the State of Florida and 1,876,246 confirmed cases and 108,041 deaths in the United States from the virus. Seminole County's need to take measures to slow and reduce the spread of COVID-19 during this global pandemic outweighs the Plaintiff's personal interest in not wearing a mask/facial covering in the limited circumstances required by the County's Executive Order, and an injunction would disserve the public interest.

Conclusion

For the reasons stated, Plaintiff's Complaint should be dismissed for failure to state a cause of action for declaratory judgment or injunctive relief. The limited mask/facial covering requirement in the County's Executive Order was imposed for the common good to slow and reduce the spread

of COVID-19 and to preserve citizens' access to the healthcare system if they do become infected and the Executive Order was a lawful exercise of emergency power and authority. Plaintiff's complaint fails to show that he has a substantial likelihood of success, fails to show irreparable harm, fails to show that there is not an adequate remedy at law, and fails to show that the public interest would be served by a temporary injunction.

“There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.” *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). As the United States Supreme Court explained in its May 29, 2020 opinion in *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California*, a case in which the Court denied the Church's application for injunctive relief seeking to enjoin an Executive Order of the Governor of California that placed temporary restrictions on public gatherings during the COVID-19 health emergency:

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally '[e]ntrusts the safety and health of the people' to the politically accountable officials of the State 'to guard and protect'. *Jacobson v. Massachusetts*, 197 U.S. 11, 38(1905). When those officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' *Marshall v. United States*, 414 U.S. 417, 427 (1974).

South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California, 590 U.S. _____ (2020).

WHEREFORE, Defendant, SEMINOLE COUNTY, respectfully requests that this Honorable Court enter an Order dismissing the Complaint for Emergency Injunctive Relief and Declaratory Judgment as filed by Plaintiff, DAVID J. LEAVITT, and granting such other and further relief as the Court deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2020, a true and correct copy of the foregoing has been filed with the Clerk of the Court by using the Florida Courts E-Filing Portal, which served a copy of the foregoing by email to the following: Anthony F. Sabatini, Esquire, Sabatini Law Firm, P.A., 1172 S. Grand Highway, Suite #2, Clermont, FL 34711 at Anthony@SabatiniLegal.com; Lynn P. Porter-Carlton, Esquire, Deputy County Attorney, Seminole County Attorney's Office, 1101 East 1st Street, Sanford, FL 32771 at lporter-carlton@seminolecountyfl.gov; and A. Bryant Applegate, Esquire, County Attorney, Seminole County Attorney's Office, 1101 East 1st Street, Sanford, FL 32771 at bapplegate@seminolecountyfl.gov.

/s/Lynn P. Porter-Carlton

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