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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CARL JACKSON,

Plaintiff,

vs.

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

Defendant.
_____/

CASE NO: 48-2020-CA-006427-O

Division 40

ORDER DENYING MOTION FOR TEMPORARY INJUNCTION

THIS CAUSE came before the court for evidentiary hearing on August 27, 2020, on the Plaintiff's Emergency Motion for Temporary Injunction[1], and the court, having heard the argument of counsel, reviewed the pleadings and briefing in this cause, and being otherwise duly advised in the premises, finds that the motion must be denied for the reasons that follow.

Plaintiff seeks to enjoin Orange County from enforcing Emergency Order 20-25 as an unconstitutional deprivation of his rights as guaranteed by Article I, Sections 2, 3, 9, and 23 of the Florida Constitution.[2]

[1] The County argues that the motion itself is legally insufficient. The court agrees; however, the court will address the motion on its merits.

[2] While the motion made passing reference to Article I, Sections 2, 3, and 9, the motion argued only a violation of Article I, Section 23.

A preliminary injunction is an extraordinary remedy which should be granted sparingly and only if the party seeking the injunction establishes the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of the public interest. *Yardley v. Albu*, 826 So.2d 467, 470 (Fla. 5th DCA 2002); *Dragomirecky v. Town of Ponce Inlet*, 882 So.2d 495 (Fla. 5th DCA 2004); *Environmental Services v. Carter*, 9 So.3d 1258, 1261 (Fla 5th DCA 2009); *Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So.3d 466 (Fla. 1st DCA 2018); *Hiles v. Auto Bahn Fed'n, Inc.*, 498 So.2d 997, 998 (Fla. 4th DCA 1986). The burden to establish these factors is upon the plaintiff as movant. *Zupnik v. All Fla. Paper, Inc.*, 997 So.2d 1234, 1238 (Fla. 3d DCA 2008); *St. Johns Inv. Mgmt. Co. v. Albaneze*, 22 So.3d 728 (Fla. 1st DCA 2009). The failure to show any one of the relevant factors mandates denial of a preliminary injunction motion. *Genchi v. Lower Fla. Keys Hosp. Dist.*, 45 So.3d 915, 919 (Fla. 3d DCA 2010).

At the evidentiary hearing, the court heard testimony of Dr. Andrew Bostom, plaintiff's expert, and Danny Banks, Director of Public Safety for Orange County and received documentary evidence. The court had the opportunity to evaluate the credibility of the witnesses and to review the documentary evidence. The plaintiff, as movant seeking a temporary injunction, has failed to meet his evidentiary burden.

Findings of Fact

Plaintiff seeks to enjoin the County from taking the action it deems necessary to protect the public health, safety and welfare of its constituents during this unprecedented public health crisis, the COVID-19 worldwide pandemic. The County acted pursuant to its authority under Sec. 252.38, Fla. Stat. and Chapter 2, Article IX, Orange County Code, empowering Orange County Mayor Jerry L. Demings to declare a State of Local Emergency and to take action necessary and consistent with the authority granted by state law and Executive Order of the Governor.

COVID-19 is a respiratory illness caused by a virus that spreads rapidly from person to person and may result in serious illness or death. On March 1, 2020, Governor DeSantis declared a Public Health Emergency because of COVID-19. Eight days later, Governor DeSantis issued Executive Order 20-52 declaring a general State of Emergency because of COVID-19. On March 11, 2020, the World Health Organization declared the spread of COVID-19 to be a global pandemic. Two days later, President Trump declared a national emergency concerning COVID-19. On March 13, 2020, Mayor Demings declared a State of Local Emergency in all of Orange County due to COVID-19. The federal, state and local states of emergency are still in effect in an effort to address the ongoing public health crisis of COVID-19.

On April 1, 2020, Governor DeSantis issued Executive Order 20-91 putting in place a statewide safer at home order, directing the closure of non-essential services and activities, and limiting the movement of people. On April 29, 2020, Governor DeSantis entered Executive Order 20-112 (Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery), which opened a number of non-essential services and activities effective May 4, and explained that local governments were permitted under the orders (Executive Orders 20-91 and 20-112) to institute more stringent restrictions than those contained in such orders. On May 1, 2020, Mayor Demings issued Emergency Executive Order 2020-12, reopening Orange County and requiring social distancing and face coverings, which set forth minimum standards for businesses and places of assembly to follow unless precluded by the Governor. On June 3, 2020, Governor DeSantis issued Executive Order 20-139 related to phase 2 of the recovery.

With the significant reopening of its economic, cultural and civic life, bringing more people into contact with each other, Orange County experienced an increase in the daily positivity rates for COVID-19 as high as eleven percent (11%). *See* Order 2020-25. Orange County health care providers have also experienced an increase in emergency room visits and hospitalizations related to COVID-19. *See* Order 2020-25. As a result, and in order to continue to protect the public health and safety of its

citizens, residents and visitors, Mayor Demings issued Emergency Executive Order 2020-25 on June 24, 2020, which is the Order at issue.

Plaintiff's Claims

Plaintiff's emergency motion is brief and seeks to enjoin Orange County from enforcing Emergency Order 20-25 as an unconstitutional deprivation of his rights as guaranteed by Article I, Sections 2 (basic rights), 3 (religious freedom), 9 (due process), and 23 (privacy) of the Florida Constitution. Plaintiff's motion does not set forth whether he is claiming an as-applied or facial constitutional challenge to the Order. No testimony was elicited to support an as-applied constitutional challenge; therefore, the court finds that the challenge is to facial constitutionality of the Order. At the hearing, plaintiff relied solely upon a violation of his right to privacy and did not address the other claimed violations.

Plaintiff argued that masks are a medical device and forced use of a medical device violates his Florida right to privacy. The court rejects the premise that a face mask is a medical device such that the mandatory wearing of one in public spaces invades the right to privacy. Forced medical procedures can certainly impinge upon constitutional rights. See *Public Health Trust of Dade County v. Wons*, 541 So.2d 96 (Fla. 1989)(forced blood transfusion violated constitutional right to privacy and religion); *Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980)(extraordinary, life-extending measures forced upon competent adult suffering terminal illness violated

constitutional right to privacy); *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990)(competent individual has the constitutional right to refuse medical treatment); see also, *In re Matter of Dubreuil*, 629 So.2d 819 (Fla. 1993). The facts before the court bear no reasonable correlation to the long line of cases addressing the constitutional implications of forced blood transfusions and other forced medical procedures.

The plaintiff further argues that no reliable scientific evidence, supported by years of clinical research, exists that masks slow or prevent the spread of COVID-19. Years of clinical trials about the spread of COVID-19 would be impossible because the virus has recently emerged.

Analysis

Substantial likelihood of success on the merits: In order to show that a movant has a substantial likelihood of success on the merits of the claim, the movant must show a "clear legal right to the relief sought." *Jouvence Ctr. for Advanced Health, LLC v. Jouvence Rejuvenation Ctrs., LLC*, 14 So.3d 1097, 1099 (Fla. 4th DCA 2009). See also *Colonial Bank, N.A.*, supra. "It is not enough that a merely colorable claim is advanced." *Naegle Outdoor Advert. Co.*, supra. ("A substantial likelihood of success on the merits is shown if good reasons for anticipating that result is demonstrated.") The establishment of a clear legal right to the relief sought

is an essential requirement prior to the issuance of a temporary injunction. *Mid-Florida at Eustis, Inc. v. Griffin*, 521 So.2d 357, 358 (Fla. 5th DCA 1988).

In order to succeed on a facial challenge, the challenger must establish that no set of circumstances exists in which the statute can be constitutionally valid. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So.3d 894, 897 (Fla. 2018). If any state of facts, known or to be assumed, justify the law or regulation, the court's power of inquiry ends. *State v. Cotton*, 198 So.3d 737, 742 (Fla. 2d DCA 2016), citing *State v. Bales*, 343 So.2d 9, 11 (Fla. 1977), citing *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938). Finally, legislative enactments arrive at this court "clothed with a presumption of constitutionality" and "must be construed whenever possible to effect a constitutional outcome." *Brinkmann v. Francois*, 184 So.3d 504, 507-08 (Fla. 2016). The presumption of constitutionality is only overcome by a showing of invalidity "beyond a reasonable doubt", meaning that the presumption applies unless the enactment is "clearly erroneous, arbitrary, or wholly unwarranted." *State v. Hodges*, 506 So.2d 437, 439 (Fla. 1st DCA 1987), citing *State v. State Bd. of Educ. of Fla.*, 467 So.2d 294 (Fla. 1985).

Plaintiff is unable to show he has a recognized constitutional right not to wear a facial covering in public locations or to expose other persons to a contagious and potentially lethal virus during a declared pandemic. Art. I, Sec. 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)). See also, *Picou v. Guillum*, 874 F. 2d 1519, 1521-22 (11th Cir. 1989) (Florida's motorcycle helmet laws); *Pac. Legal Fund v. Dep't of Transp.,* 593 F. 2d 1338, 1347 n. 72 (D.C. Cir. 1979) (seatbelt passive restraints). The Order does not target a fundamental right or target a suspect class but applies to all citizens, residents and visitors equally, and, therefore, it is reviewed on the rational basis test.

"The rational basis test asks (1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government's objective and the means it has chosen to achieve it." *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009). "If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the [law] so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

The plaintiff does not question the County's authority to regulate this area. The plaintiff argues that the County cannot show a rational relationship between its objective and the means it has chosen to achieve it because the scientific community has had insufficient time to conduct adequate studies on the effectiveness of face coverings in limiting the spread of COVID-19 and has not completed the years of

clinical study typical of scientific research. Plaintiff's position would lead to an absurd result. It would prevent any government from addressing new health threats with mandatory regulations until years of clinical study support the decision. Of course, the public health threat would likely be over and the public health adversely impacted. The government's legitimate emergency powers would be hampered to the point of uselessness.

It is clear the County's objective for issuing the Order is to protect the health, safety and welfare of its citizens, residents and visitors against the highly contagious and infectious COVID-19 virus. The documentary evidence admitted at the hearing establishes a rational relationship between the government's objective (to reduce the spread of COVID-19) and the means it has chosen to achieve that objective (masks mandated in public).

If the court were to accept the premise that the Emergency Order impinges on a fundamental constitutional right as argued by the plaintiff, the Order must survive strict scrutiny. The County would bear the burden of proving that the Order serves a compelling state interest and does so through the least restrictive means. *Gainesville Woman Care, LLC v. State*, 210 So.3d 1243, 1263–64 (Fla. 2017). The plaintiff concedes that the County has a compelling state interest but argues that the County has not used the least restrictive means to further the compelling interest. The mandates of the Order do not establish a curfew, dictate citizens' conduct in

their homes, require that all citizens get tested, shelter in place or otherwise restrict their free movement. The Order is the least restrictive means available to accomplish the County's compelling state interest.

Because no argument or evidence was presented by the plaintiff to support the premise that the Order violates his basic rights, religious freedom or right to due process, the court will not address the implications of the Order on these rights.

Public Interest: Injunctive relief may be denied where the injury to the public outweighs any individual right to relief. *Knox v. Dist. Sch. Bd. of Brevard*, 821 So.2d 311, 314 (Fla. 5th DCA 2002); see also *Dragomirecky v. Town of Ponce Inlet*, 882 So.2d 495, 497 (Fla. 5th DCA 2004)("Where the potential injury to the public outweighs an individual's right to relief, the injunction will be denied.").

The County is vested with the authority and obligation to protect the health, safety and welfare of its population. Sec. 252.38, Fla. Stat. In 1905, the U.S. Supreme Court addressed a challenge to a state's police power to enact a compulsory vaccination law during a smallpox epidemic. The plaintiff in *Jacobson v. Commonwealth of Massachusetts* claimed that he had a Fourteenth Amendment right "to care for his own body and health in such a way as to him seems best." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26, (1905). The Supreme Court disagreed:

> The liberty secured by the Constitution of the United States...does not import an absolute right in each person to be, at all times, and in all

> circumstances, wholly freed from restraint...[I]n every well-ordered society, charged with the duty of conserving the safety of its members the rights of the individuals in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand....
>
> Id. at 29.

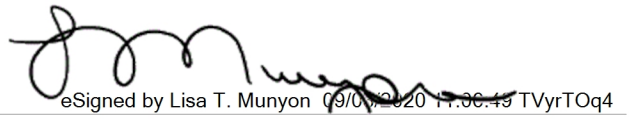
As the *Jacobson* court found, matters involving public health and safety should not be turned over "to the final decision of a court or jury to determine which of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain." Id. at 30. Generally, government is given proper deference and wide latitude in responding to an emergency as long as the "[executive's] actions were taken in good faith and . . . there is some factual basis for the decision that the restrictions . . . imposed were necessary to maintain order." *Smith v. Avino*, 91 F. 3d 105, 109 (11th Cir. 1996). "It is within the police power of the State to enact laws to prevent the spread of infectious or contagious diseases." *State Dept. of Agric. & Consumer Services Div. of Animal Indus. V. Denmark*, 366 So.2d 469, 470 (Fla. 4th DCA 1979). See also *Davis v. City of S. Bay*, 433 So.2d 1364, 1366 (Fla. 4th DCA 1983)("there are circumstances in which a public 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.").

Such exigent circumstances have been visited upon our State and our County. The testimony and evidence presented establish that the requested injunction would not serve the public interest.

Because the plaintiff failed to meet its burden on these essential factors, the balance of the factors need not be addressed. Based upon the foregoing, it is therefore

ORDERED AND ADJUDGED that the Plaintiff's Emergency Motion for Temporary Injunction should be and the same is hereby DENIED.

DONE and ORDERED in Chambers in Orlando, Orange County, Florida, on this 3rd day of September, 2020.



Lisa T. Munyon
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of September, 2020, a true and correct copy of the foregoing was forwarded by electronic mail through the statewide ePortal to:

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