SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2615-21

ROCKLEIGH COUNTRY CLUB, LLC,

Plaintiff-Appellant,

v.

HARTFORD INSURANCE GROUP, a/k/a THE HARTFORD, d/b/a HARTFORD FIRE INSURANCE COMPANY, STRATEGIC INSURANCE PARTNERS, INC., PHILIP D. MURPHY, in his capacity as Governor of the State of New Jersey, and STATE OF NEW JERSEY,

Defendants-Respondents.

Submitted February 1, 2023 – Decided March 3, 2023

Before Judges Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4013-20.

Newman & Denburg, LLC, attorneys for appellant (Gary S. Newman, of counsel and on the briefs; David F. Scheidel, II, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondents Philip D. Murphy and State of New Jersey (Jeremy M. Feigenbaum, Solicitor General, of counsel; Jeffrey S. Posta and Nathaniel Levy, Deputy Attorneys General, on the brief).

PER CURIAM

In this appeal arising from an as-applied challenge to Governor Philip D. Murphy's Executive Order (EO) 107,[1] plaintiff, the owner/operator of an event venue, alleges the order resulted in an uncompensated taking of its property in violation of its right to just compensation under the State and Federal Constitutions. More specifically, plaintiff argues EO 107 effected a regulatory taking that deprived it of all economically beneficial uses of its property. In the alternative, plaintiff argues EO 107 resulted in a per se taking of its property by appropriating its right to exclude for which it seeks just compensation pursuant to the United States Supreme Court's holding in Cedar Point Nursery v. Hassid, 594 U.S. ___, 141 S.Ct. 2063, 2072 (2021).

For the following reasons, we find plaintiff did not suffer a compensable taking of its property, and we therefore dismiss plaintiff's claim.

[1] Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020).

I.

"COVID-19 is a highly contagious, dangerous, and . . . deadly disease . . . ." Biden v. Missouri, 595 U.S. ___, 142 S.Ct. 647, 653 (2022). The SARS-CoV-2 coronavirus, which causes COVID-19, "spreads by person-to-person contact in confined indoor spaces[.]" Nat. Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 595 U.S. ___, 142 S.Ct. 661, 670 (2022) (Breyer, J., dissenting). Beginning in March 2020, the COVID-19 pandemic created a "rare, once-in-a-century . . . health emergency" and thus required "ordering individuals to stay at home to fight the disease's spread . . . ." See New Jersey Republican State Comm. v. Murphy, 243 N.J. 574, 607-08 (2020).

New Jersey "ha[d] been hit particularly hard" by the pandemic at its outset and at the time "rank[ed] second in the nation in COVID-19 deaths . . . ." Id. at 583. More recently, this court observed COVID-19 has "killed more than 900,000[,]" has "hospitalized about 4,000,000[,]" and has infected "[a]t least 75,000,000 Americans . . . ." New Jersey State Policemen's Benevolent Assoc. v. Murphy, 470 N.J. Super. 568, 575 (App. Div. 2022). The Court has aptly described the COVID-19 pandemic as "a true disaster with widespread consequences . . . ." New Jersey Republican State Comm., 243 N.J. at 580-81.

Governor Murphy issued executive orders, including EO 107, "in response to health-related emergencies caused by the spread of the COVID-19 coronavirus." JWC Fitness, LLC v. Murphy, 469 N.J. Super. 414, 419-20 (App. Div. 2021); see also New Jersey State Policemen's Benevolent Assoc., 470 N.J. Super. at 584. EO 107, which became effective March 21, 2020, implemented "social mitigation strategies" requiring "every effort to reduce the rate of community spread of the disease[.]"

Pertinent here, EO 107 imposed restrictions which "limit[ed] person-to-person contact" in the State. The executive order required residents to "remain home" unless engaging in certain well-delineated activities and additionally "cancelled" all "[g]atherings of individuals, such as parties, celebrations, or other social events[.]" The cancellation of social events, including those that were or could have been scheduled at plaintiff's venue, continued from EO 107's March 21, 2020 effective date until the issuance of EO 152, which permitted resumption of in-person gatherings on June 9, 2020. Exec. Order. No. 152 (June 9, 2020), 52 N.J.R. 1301(a) (July 6, 2020).

"In the context of a public health emergency," and "[g]iven the scientifically undisputed risk of spreading this deadly virus," the COVID-19 pandemic demanded the State take "many actions . . . to protect the common

good." Matter of City of Newark, 469 N.J. Super. 366, 385-86 (App. Div. 2021). EO 107 was one such action.[2]

II.

Plaintiff filed a complaint stating it "is an event venue which provides large rooms for purposes of pre-booked social gatherings at [its] premises," including weddings and other events. In part, the complaint alleges EO 107 effected a regulatory taking of its property "without just compensation" by "forcing [it] to suspend its business" of hosting social events and thereby "denying [it] economic use of its property."

A regulatory taking occurs where "the owner of real property has been called upon to sacrifice all economically beneficial uses" of its property. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). An exception to the State's duty to pay just compensation for a

[2] Although plaintiff does not raise claims under the New Jersey Civil Defense and Disaster Control Act, N.J.S.A. App. A:9-30 to -63, we recognize the statute authorizes the Governor "to employ all the available resources of the State Government" and "[t]emporarily employ, take[,] or use the . . . real or personal property[] of any citizen or resident of this State . . . for the purpose of . . . protecting or promoting the public health, safety[,] or welfare[.]" N.J.S.A. App. A:9-34 and -51; see also New Jersey State Policemen's Benevolent Assoc., 470 N.J. Super. at 578 (quoting Worthington v. Fauver, 88 N.J. 183, 193-94 (1982)) (explaining the Disaster Control Act "vests the Governor with broad powers to provide for the health, safety, and welfare of the people of the State during any 'emergency'").

regulatory taking applies where "the court determines that background principles of property and nuisance law [otherwise] preclude [the owner's] intended use of the property." Mansoldo v. State, 187 N.J. 50, 62 (2006). In other words, "restrictions that background principles of the State's law of property and nuisance already place upon land ownership[,]" such as the State's power "to abate nuisances that affect the public generally" or "forestall other grave threats to the lives and property of others[,]" are not compensable. Lucas, 505 U.S. at 1029 n.16.

The exception also applies to per se taking claims. See Cedar Point Nursery, 141 S.Ct. at 2079 (quoting Lucas, 505 U.S. 1028-29) (noting "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'"). A per se taking occurs where a regulation "appropriates a right" inherent in property ownership, such as the right to exclude, id. at 2072, which plaintiff additionally alleges occurred here.

A.

The Law Division transferred plaintiff's complaint to this court pursuant to Rule 1:13-4(a), which permits transfer where, among other things, the transferor court is without subject-matter jurisdiction to adjudicate the cause.

Because Rule 2:2-3(a)(2) gives this court as-of-right appellate jurisdiction "to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer[,]" the Law Division judge, citing our decision in JWC Fitness, determined "[j]urisdiction to decide challenges to executive orders issued by the Governor resides in the Appellate Division."

We have previously decided appeals from EOs pursuant to Rule 2:2-3(a)(2). See, e.g., New Jersey State Policemen's Benevolent Assoc., 470 N.J. Super. at 575-76; JWC Fitness, 469 N.J. Super. at 419; Comm. Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 251 (App. Div. 2010); Perth Amboy Bd. of Educ. v. Christie, 413 N.J. Super. 590, 593 (App. Div. 2010). But in those cases, the plaintiff challenged an EO's facial validity or otherwise raised an as-applied challenge based on a fully developed record fit for appellate review. Compare Comm. Workers of Am., 413 N.J. Super. at 234-35 (challenging the facial validity of an EO on separation-of-powers grounds), with New Jersey State Policemen's Benevolent Assoc., 470 N.J. Super. at 575-78, 585-86 (challenging an EO as-applied to State corrections officers where record on appeal contained certifications recounting details concerning affected staff).

Facial challenges generally involve issues that "are purely legal" for which "no fact-finding hearings are necessary." Comm. Workers of Am., 413 N.J. Super. at 252. In contrast, as-applied challenges present mixed questions of law and fact that are typically inappropriate to decide in the absence of either stipulated facts, the lack of any dispute over the facts, or a court's findings of fact based on a fully developed record. To proceed differently "would be incompatible with the function of a[n] [appellate] court." Montclair Twp. v. Hughey, 222 N.J. Super. 441, 446-47 (1987).

In this as-applied challenge to EO 107, plaintiff claims the order resulted in a compensable taking because it deprived plaintiff of all economically beneficial uses of its property. In our view, the record on appeal does not permit a definitive finding EO 107 effected a total deprivation of all economically viable uses of plaintiff's property during EO 107's effective period of March 21, 2020 to June 9, 2020, and, for that reason, we are unable to determine if plaintiff actually suffered a taking in the first instance. Cf. JWC Fitness, 469 N.J. Super. 420.

Therefore, resolution of plaintiff's as-applied challenge to EO 107 would generally require development of an evidentiary record to determine if, as plaintiff alleges, EO 107 totally deprived it of all economically viable uses of

its property.[3] Although "the ordinary course" would be a remand to the Law Division for factfinding on plaintiff's claim, we need not remand here because the record includes undisputed facts allowing disposition of plaintiff's claim as a matter of law, even if it is assumed EO 107 temporarily deprived plaintiff of all economically beneficial uses of its property. See State v. Harris, 181 N.J. 391, 418-19 (2004) (quoting State v. Sugar, 108 N.J. 151, 159 (1987)) (deciding dispositive legal issue on appeal even though "the ordinary course of action would be 'to remand . . . to the trial court'" where the issue "involves matters of fact," but "the ultimate determination" of the claim presented "is one of law . . . .").

B.

Plaintiff's challenge to EO 107 fails as a matter of law because the exception to a State's duty to pay just compensation for a regulatory or per se

[3] We observe that, even assuming EO 107 resulted in a taking, plaintiff's claim presents additional fact issues requiring an evidentiary hearing. For example, plaintiff seeks "compensatory and consequential damages" in its complaint. The amount, if any, of damages due first requires a determination by a factfinder based on an evidentiary record developed at a hearing. Village of South Orange v. Alden Corp., 71 N.J. 362, 368 (1976) ("In making a determination as to value" in a takings case, "all considerations . . . should be laid before the trier of fact."); Jackowitz v. Lang, 408 N.J. Super. 495, 503 (App. Div. 2009) (quoting Johnson v. Scaccetti, 192 N.J. 256, 279 (2007), abrogated on other grounds, Cuevas v. Wentworth Grp., 226 N.J. 480, 506 (2016)) (noting "'a civil plaintiff has a constitutional right to have a jury decide the merits and worth of her case.'").

taking applies here. Cedar Point Nursery, 141 S.Ct. at 2079; Lucas, 505 U.S. at 1029; Mansoldo, 187 N.J. at 62. A plaintiff bears the burden of "demonstrat[ing] deprivation of all or substantially all economically beneficial uses of property to sustain a claim for a temporary taking." Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 301 (2001). If a plaintiff makes a prima facie showing it suffered a temporary taking, "the State is required to pay just compensation unless the court determines that background principles of property and nuisance law preclude [the plaintiff's] intended use of the property." Mansoldo, 187 N.J. at 62 (citing Lucas, 505 U.S. at 1029). Stated differently, the State is relieved of its duty to pay just compensation damages for a regulatory or per se taking if the regulation at issue "merely asserts a 'pre-existing limitation upon the landowner's title.'" Cedar Point Nursery, 141 S.Ct. at 2079 (quoting Lucas, 505 U.S. at 1028-29).

One such limitation inheres in exercises of the State's police power when the State acts to "abat[e] the danger posed" by an imminent threat to public safety. Nat'l Amusements Inc. v. Borough of Palmyra, 716 F.3d 57, 63 (3d Cir. 2013). In Nat'l Amusements, the court held the State did not owe just compensation when it temporarily closed an open-air flea market for five months to abate unexploded artillery left behind at the site — a former United States

Army proving ground. Id. at 60, 63. The court recognized "[t]he government must pay just compensation for . . . takings 'except to the extent that background principles of nuisance and property law independently restrict the owner's intended use of the property.'" Id. at 63 (quoting Lucas, 505 U.S. at 1032). Thus, a State's exercise of its police power to abate an imminent public danger which temporarily suspends operations of affected businesses is not compensable. Id.; see also JWC Fitness, 469 N.J. Super. at 435-36 (concluding "the facts do not support the existence of a compensable regulatory taking" in part because "it is undisputed that [EO 107's] limitations constituted valid exercises of the State's police powers in the context of a public health emergency[] to mitigate the spread of COVID-19.").

This "limitation of private property rights in land" reflects a property owner's "'implied liability'" for exercises of the State's police power that are "reasonably necessary to meet a public exigency . . . ." Mansfield and Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 151-52 (Sup. Ct. 1938) (quoting Commonwealth v. Alger, 61 Mass. 53, 84 (1851)). Thus, a pre-existing limitation on a property owner's right to use and enjoy its property is "the subordination of individual . . . property rights to the collective interest" when a public exigency, such as an imminent public danger, demands the State

exercise its police power to abate the threat to public safety. See id. at 151; see also State ex rel. State Bd. of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 519 (E. & A. 1935) ("the right of property . . . must yield to the common good and general welfare . . . whenever necessary for the preservation of the public health, morals, comfort, order, and safety.").

Therefore, even if plaintiff could establish it suffered a total deprivation of all economically beneficial uses of its property during EO 107's effective period, cf. Pheasant Bridge Corp., 169 N.J. at 301; JWC Fitness, 469 N.J. Super. at 435, the State has no duty to compensate plaintiff for the taking because EO 107 constitutes an exercise of the State's police power that was reasonably necessary to abate an imminent public danger and preserve public safety. Nat'l Amusements, 716 F.3d at 63; see also JWC Fitness, 469 N.J. Super. at 435-36 (recognizing "the State's broad power to restrict the uses individuals may make of their property in order to protect the health, safety, and welfare of the public"). That is, COVID-19 created a "public exigency" for which EO 107 was "reasonably necessary to meet . . . ." Mansfield and Swett, Inc., 120 N.J.L. at 152.

The Court has recognized 2020 as "the most critical period of the COVID-19 pandemic[.]" State v. Bell, 250 N.J. 519, 531 n.3 (2022). Accordingly, "it

is difficult to imagine an act closer to the heartland of a state's traditional police power than abating the danger posed by" COVID-19 at the outset of the pandemic. Nat'l Amusements, 716 F.3d at 63. As such, EO 107 "may be deemed to be in the public interest" because it "promote[d] the good of the community at large" by mitigating the spread of an indisputably deadly, pervasive virus. Mansfield and Swett, Inc., 120 N.J.L. at 152. EO 107's measures were therefore "demanded by the general welfare" and accordingly "embraced within th[e] [police] power." Id. at 153. The order reflects the well-established, pre-existing limitation of implied liability for exercises of the State's police power extant in plaintiff's title and would have otherwise precluded plaintiff's intended use of its property as an event venue during EO 107's effective period. Cf. Cedar Point Nursery, 141 S.Ct. at 2079; Lucas, 505 U.S. at 1029 n.16; Mansoldo, 187 N.J. at 62.

Governor Murphy's emergency action embodied in EO 107, which resulted in the temporary closure of plaintiff's venue, "constituted an exercise of [the State's] police power that did not require just compensation." Nat'l Amusements, 716 F.3d at 63; JWC Fitness, 469 N.J. Super. at 435-36. The State need not compensate for plaintiff's alleged taking because the exception

relieving a State of its duty to compensate for regulatory or per se takings applies in this case.[4] Id.

III.

Because the State has no duty to compensate under the circumstances presented, we dismiss plaintiff's complaint and appeal with prejudice.

[4] As noted, the exception relieving a State of its duty to compensate for regulatory takings applies equally to plaintiff's per se taking claim. See Cedar Point Nursery, 141 S. Ct. at 2079 (quoting Lucas, 505 U.S. 1028-29) (noting "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the landowner's title.'").