	:Superior Court of New Jersey :Law Division, Special Civil Part :Middlesex County
AQUILA MANAGEMENT, INC,	:
Plaintiff,	:
vs.	:Civil Action :Docket No. MID-LT-90-21
LESLIE ROMAN, et al.	:
	: Decision and Order
Defendants	:

June 21, 2021

BEFORE:

Hon. J. Randall Corman, J.S.C.

APPEARANCES:

Sobel, Han & Cannon, LLP
Attorney for the Plaintiff

Jose Abreu, Esq., Central Jersey Legal Services
Attorney for the Defendants

PROCEDURAL HISTORY

This matter comes before the Court after a trial for eviction pursuant to N.J.S.A. 2A:18-61.1*l*(3), specifically, a case in which the Plaintiff has contracted to sell a residential unit to a buyer who wishes to personally occupy, and where the contract for sale calls for the unit to be vacant at the time of closing. The complaint was filed January 8, 2021 and Plaintiff's counsel filed an application for an order to show cause seeking an emergent trial pursuant to the Order of the Supreme Court of July 14, 2020 so that a

warrant of removal can be executed upon in the interest of justice, notwithstanding the eviction moratorium imposed by Executive Order 106, as permitted by P.L.2020, c.1. An initial hearing took place on January 27, 2021, another hearing commenced on February 3, 2021 and a trial followed on March 3, 2021.

BACKGROUND

A. Factual Background

The hearing on January 27, 2021 to schedule an emergent trial concluded with an effort by the Court to settle the case and an adjournment for a week so the parties could further discuss settlement. However, attempts by the parties to resolve the case proved unsuccessful. On February 3, 2021, Plaintiff's counsel argued that his client's right to alienate his property was of such constitutional magnitude that it required an eviction in the interest of justice and the Court agreed to set a trial date. The trial took place on March 3, 2021 and the testimony of the witnesses was undisputed.

The Plaintiff, Aquila Management Inc., is a closely held corporation in the real estate business and Gerald Chiusolo is the principal of the corporation. One of the properties owned by the Plaintiff is located at 31 New Street in Edison Township. This property is a three-bedroom, single family house which has been rented by Defendant since June 2013. The property is subject to the Anti-Eviction Act (N.J.S.A. 2A:18-61.1 et seq.) and the current rent is $2,000 per month. Plaintiff served Defendant with a two month Notice to Quit dated October 26, 2020 terminating the tenancy effective December 31, 2020 on the grounds that the house was under contract for sale to a buyer who intends to personally occupy, and where the contract for sale requires that the house be vacant at time of closing. When the Defendant refused to vacate the present action was filed.

Gerald Chiusolo testified that this property was originally purchased together with seven other properties. The loan that financed the purchase was described as a blanket mortgage in which the bank provided a payoff figure for each individual property. Mr. Chiusolo testified that the property had been marketed on and off for the past three years, but the present contract has been his only offer. He also indicated that he offered to sell to the Defendant before accepting the current offer. Mr. Chiusolo stated that the purchase price of $233,000 was just enough to pay what was owed to the bank for the property, and he expected to take a loss on the sale after paying closing costs and transfer taxes.

The prospective buyer of the property, Francis McDonald, testified that he had been leasing an apartment but had given up his unit in anticipation of buying the subject property and living in it. Since then, his life has been on hold. He has been staying with a friend in Long Valley, sleeping on the couch. He is a licensed realtor who normally lives alone and who works a half mile from the house he wants to buy. He currently commutes an hour to work from Long Valley. He testified that when he signed the contract, he paid a $1,000 deposit and was aware the house was rented. He now has his financing in place and is prepared to move in immediately. Both Mr. Chiusolo and Mr. McDonald testified that they had no relationship prior to the signing of the contract.

The Defendant Leslie Roman testified that she has lived at the property for seven years. She said she has been looking for another place to live since she got the Notice to Quit last October but has not found anything yet. Her only other testimony was that she has no children living in her household and the only other occupant in the house is an adult male.

While there was no direct testimony on the question of outstanding rent, it is clear that at some point the Defendant stopped paying rent. At the initial order to show cause hearing on January 27th, Defendant's counsel conceded that the tenant was behind on rent. CourtSmart recording at 9:17 AM (Jan. 27, 2021). Plaintiff's counsel referred to this when he noted that every month his client must pay carrying costs that include the mortgage and property taxes. CourtSmart recording at 9:25 AM (Jan. 27, 2021). When Mr. Chiusolo testified that he expected to lose money on the sale after closing costs were paid, the evident frustration in his voice indicated that he was selling the property because it was no longer a source of income and had become a constant financial drain.

Because the Plaintiff had raised constitutional issues that required proper analysis and scrutiny, the parties were permitted to submit briefs after the trial had concluded, which will be summarized as follows.

B. Legal Arguments Raised

In the Plaintiff's brief, his counsel raises for the first time his contention that Executive Order 106 is itself unconstitutional, as opposed to simply claiming that the order should be interpreted so as to allow an eviction in the interest of justice in this case. Counsel notes that the Fourteenth Amendment to the Federal Constitution as well as Article 1, paragraph 1 of the New Jersey Constitution both protect 'the right to acquire, own and dispose of real property.' Cherokee Equities v. Garaventa, 382 N.J. Super. 201, 209 (Ch. Div. 2005) (citing Jones v. Haridor Realty Corp., 37 N.J. 384, 391 (1962)). The court in Cherokee Equities also stated that "the right to freely alienate property interests is one of the most basic rights guaranteed by law." Id. at 209. From this, Plaintiff

concludes that Executive Order 106 is unconstitutional if it restrains him from the free alienation of his property.

Next, Plaintiff asserts that he has suffered a regulatory taking of his property in violation of the Fifth Amendment to the Federal Constitution as well as Article 1, Section 20 of the State Constitution because he has lost all beneficial uses of his property as a result of Executive Order 106. While noting the criteria used by the Appellate Division to determine whether there has been a regulatory taking in Rieder v. State, 221 N.J. Super. 547 (App. Div. 1987), Plaintiff's brief primarily focused on case law involving interim zoning regulations, also known as a moratorium on development. In Schiavone Constr. Co v. Hackensack Meadowlands Dev. Com., 98 N.J. 258, 263 (1985), the case revolved around a development moratorium that was extended from eight months to 31 months, in which the Court noted that "[r]estrictions on land use short of total appropriation, if sufficiently extensive and prolonged, may constitute a taking." The Court in Schiavone cited a case involving an interim zoning ordinance, Deal Gardens, Inc. v. Board of Trustees, 48 N.J. 492, 500 (1967), which noted the dangers "which may result if there is no restriction of the period of time during which a restraint against some land use is permitted to continue. Plainly there must be some terminal point." Plaintiff concludes that because there are no guidelines for an endpoint to the eviction moratorium of Executive Order 106, an unconstitutional taking has occurred.

Plaintiff also argues that Executive Order 106 impairs the obligations of contracts in violation of Article IV, Section VII, paragraph 3 of the State Constitution. The Plaintiff contracted with a buyer who wishes to personally occupy the property, which is a cause for eviction under N.J.S.A. 2A:18-61.1*l* provided that the contract for sale call for

the unit to be vacant at the time of closing. Despite following the statute which would entitle the Plaintiff to a judgment for possession, the Plaintiff is now unable to close title and his contractual rights have been impaired.

In marked contrast, the brief submitted by Defendant's counsel portrays Executive Order 106 as limited government action made necessary by an unprecedented pandemic. The moratorium on residential evictions is thus characterized as "a temporary limitation on one of the multiple remedies available to landlords." Defendant notes that tenants are not relieved of financial liability for rent and landlords are permitted to collect back rent in a civil proceeding for breach of contract and may seek compensation for any other economic loss as a result of the tenant's failure to vacate. Defendant observes that the prevention of homelessness is a legitimate legislative objective, citing Cmty. Realty Mgmt. v. Harris, 155 N.J. 212 (1998), which held that one of the purposes of the Anti-Eviction Act was to address the housing shortage.

Defendant notes the recent opinion of Judge Hillman of the Federal District of New Jersey in Johnson v. Murphy, 1:20-cv-06750-NLH, 2021 U.S. Dist. LEXIS 53191 (D.N.J. Mar. 22, 2021), that involved a challenge to Executive Order 128 of Governor Murphy which allowed residential tenants to apply their security deposits to back rent. While this case did not involve a constitutional challenge to the eviction moratorium of Executive Order 106, Judge Hillman did dismiss claims that Executive Order 128 violated the rights of landlords under the Contracts Clause, the Due Process Clause, the Equal Protection Clauses and the Privileges or Immunities Clause of the Federal Constitution, noting that the United States Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant

relationship in particular," and concluding that because tenants still remained liable for back rent, there was no substantial impairment of the landlords contractual bargain. Id. at 25 and 30-31.

As to the ability of the Plaintiff to sell his property, Defendant argues that Executive Order 106 does not limit or impair that right, it just prevents the eviction of the current tenant and cites Chase Manhattan Bank v. Josephson, 135 N.J. 209 (1994) as an example where the courts have limited the right to dispossess a tenant during transfer of the ownership of the leased premises. Defendant also cites Rieder, *supra*, 221 N.J. Super. at 555 for the proposition that diminished marketability of real estate does not constitute a taking.

Finally, the Defendant argues that the Supreme Court's Order of July 14, 2020 and Directive #20-20 do not permit an eviction trial in the present case. These orders set forth the grounds for which a landlord may seek an emergent eviction trial and Defendant's brief lists these grounds verbatim so as to highlight the fact the list does not include eviction so that the property can be sold to a buyer who wishes to personally occupy pursuant to N.J.S.A. 2A:18-61.1*l*. Though acknowledging that Directive #20-20 states the "list is not meant to be exclusive," Defendant notes that all the other causes of action are for noneconomic reasons and almost all involve some form of tenant misconduct. Since the harm suffered by the Plaintiff if he is unable to sell to his prospective buyer is purely economic, Defendant contends its absence from the list means that emergent trials for this reason are barred.

On the issue of whether it is "in the interest of justice" to allow an eviction to proceed in this case, as permitted by Executive Order 106, both parties asked the Court to

employ the standard set forth in Wellington Belleville, L.L.C. v. Belleville Twp., 20 N.J. Tax 331 (Tax 2002). In Wellington, the Tax Court ruled that the determination as to whether it is "in the interests of justice" to relax the tax payment requirement necessary to file a tax appeal must be treated as a limited exception to statutory policy, a holding that was later adopted by the Appellate Division in Dover-Chester Assocs. v. Randolph Twp., 419 NJ Super 184, 194 (App. Div. 2011). The Wellington Court specified that exceptions "in the interest of justice" may only be granted in circumstances that are "(1) beyond the control of the property owner, not self-imposed, (2) unattributed to poor judgment, a bad investment or a failed business venture, and (3) reasonably unforeseeable." Wellington Belleville, L.L.C., 20 N.J. Tax at 336.

Plaintiff argues that the Wellington factors are to be considered from the standpoint of how the pandemic has affected his client's business. Both the COVID-19 pandemic and the eviction moratorium imposed in its wake were beyond the Plaintiff's control. When the Plaintiff entered into this lease, he assumed a fair return for the use of the property, and the possibility that the courts would be unavailable to evict the tenant if she stopped paying rent was completely unforeseeable and cannot be attributed to poor business judgment. The Plaintiff will be making no money from this sale, and in fact, is continuing to lose money each day the property is not sold, and now seeks to be relieved of this financial burden in the interest of justice by selling to a buyer who wishes to personally occupy the premises.

In applying the Wellington factors to the Plaintiff's case, Defendant focuses on the contract of sale with the prospective buyer, noting that the decision to enter into a contract of sale that required the premises to be vacant at closing in the midst of a

pandemic related eviction moratorium was self-imposed. Defendant argues this was a poor business decision because Plaintiff's witness testified that he was aware of the moratorium when he signed the contract. As to the third factor, Defendant observes that because the landlord knew of the moratorium, it was foreseeable the tenant would be unable to vacate at the time of closing.

C. COVID-19 Eviction Moratorium History

Now that the eviction moratorium imposed in connection with the COVID-19 pandemic has been in effect for over a year, it would be instructive to review the governmental acts which have limited the prosecution of eviction complaints. The groundwork for the moratorium was laid by Executive Order 103, issued on March 9, 2020, in which Governor Murphy responded to the diagnosis of first COVID cases in New Jersey. In issuing the executive order, the Governor declared a State of Emergency pursuant to the Disaster Control Act (N.J.S.A. App. A:9-33 et seq.) and a Public Health Emergency pursuant to the Emergency Health Powers Act (N.J.S.A. 26:13-1 et seq.) and invoked all the emergency powers authorized under those statutes.

Ten days later, amid increasing COVID cases in New Jersey, the Legislature passed A. 3859 (2020), which was signed into law that day as P.L. 2020, c.1 (codified as N.J.S.A. 2A:18-59.3). This new statute authorized the Governor to issue an executive order declaring that any lessee, tenant, or homeowner shall not be removed from a residential property as the result of an eviction or foreclosure proceeding whenever the Governor has declared a State of Emergency under N.J.S.A. App. A:9-33 or a Public Health Emergency under N.J.S.A. 26:13-1. Such an executive order would remain in effect for no longer than two months following the end of the Public Health Emergency

or State of Emergency. While eviction and foreclosure proceedings could be initiated or continued during the effective period of the executive order issued pursuant to the new law, enforcement of all judgments for possession, warrants of removal, and writs of possession are stayed, "unless the court determines on its own motion or motion of the parties that enforcement is necessary in the interest of justice." That same day, Governor Murphy invoked these new powers and issued Executive Order 106 and imposed a moratorium on residential evictions and foreclosures.

The Public Health Emergency had to be extended by executive order every 30 days to remain in effect pursuant to N.J.S.A. 26:13-3(b). These extensions occurred in 2020 on April 7 (Executive Order 119), May 6 (Executive Order 138), June 4 (Executive Order 151), July 2 (Executive Order 162), August 1 (Executive Order 171), August 27 (Executive Order 180), September 25 (Executive Order 186), October 24 (Executive Order 191), November 22 (Executive Order 200) and December 21 (Executive Order 210); and in 2021 on January 19 (Executive Order 215), February 17 (Executive Order 222), March 17 (Executive Order 231), and April 15 (Executive Order 235) and on May 14 (Executive Order 140). In contrast, the State of Emergency declared pursuant to the Disaster Control Act does not need to be periodically renewed and remains in effect until ended by the Governor. So, while the monthly extensions of the Public Health State of Emergency may have given the impression that the eviction moratorium was also being extended, the moratorium has remained in effect for an indeterminate period under the regular State of Emergency pursuant to the Disaster Control Act.

With regard to commercial tenancies, on April 13, 2020, the Legislature passed S. 2363 (2020), which would authorize the Governor to permit emergency rent suspension

of no more than three months for small business tenants that are economically distressed due to the COVID pandemic. However, on May 28, 2020, Governor Murphy issued an absolute veto of the bill. In his veto message, the Governor stated that "[T]he bill disregards the financial position of the impacted parties, shifting the financial burden in all cases from tenants onto property owners, who may not be relieved of their own obligations to pay mortgage payments and property taxes." To date, there has been no attempt within the Legislature to override the Governor's veto.

On a parallel track to these legislative and executive branch actions, the State Supreme Court has issued a series of orders pursuant to its administrative authority over the court system that further restricted eviction proceedings. Recognizing that crowded calendar calls could potentially spread the COVID-19 virus, a Notice to the Bar was issued by Chief Justice Rabner on March 14, 2020, announcing the suspension of landlord/tenant calendars for two weeks from March 16, 2020 until March 27, 2020. This notice was issued five days after the declaration of a State of Emergency by the Governor. The following day, March 15, 2020, the Chief Justice issued another Notice implementing other actions intended to slow the spread of the virus. All in-person court proceedings at the trial level throughout the State were postponed except for various emergent matters. No new jury trials were to be scheduled and motions and certain other matters were to be conducted by phone where possible.

Eight days after the Governor imposed an eviction moratorium, as authorized by the Legislature, the State Supreme Court issued an Omnibus Order that essentially shut down most court operations until April 26, 2020 and tolled discovery deadlines while the Judiciary transitioned to video and phone proceedings. Landlord/tenant calendars were

suspended until that date, as were all jury trials, special civil and small claims calendars, municipal court sessions and grand jury sessions, and the Office of Foreclosure was barred from reviewing motions or judgments received after March 1st until further notice. The only suspended proceedings that were scheduled to resume were civil arbitrations and matrimonial ESP (early settlement panel) sessions, which would both resume on April 27, 2020 and involuntary civil commitments, which could only be adjourned for an additional fourteen days for adults and seven days for minors.

The suspension of landlord/tenant calendar had the effect of preventing any eviction trials even though the language of Executive Order 106 specifically stated that eviction "proceedings may be initiated or continued during the time this Order is in effect," and only stayed "enforcement of all judgments for possession, warrants of removal and writs of possession." Executive Order 106, Section 2 (2020). Because the suspension of landlord/tenant calendars applied to both residential and commercial tenancies, a *de facto* moratorium on commercial evictions was created by the administrative action of the Supreme Court, even though the moratorium instituted by Executive Order 106 only pertained to residential tenancies. The obvious rationale for this course of action at this point in time was to slow the spread of the COVID-19 virus by eliminating crowded landlord/tenant calendar calls.

Subsequent orders of the Supreme Court gradually permitted other court proceedings to resume as the court system upgraded its technology to allow for virtual trials and hearings. Municipal court resumed on a remote basis in all matters on May 11, 2020. The Fourth Omnibus Order issued on June 11, 2020 permitted ongoing jury trials to resume with the consent of all parties, provided that appropriate health precautions

were taken. In addition, while special civil or small claims calendars remained suspended, virtual trials were allowed to proceed in these cases with consent of the parties.

Significant progress was seen in the Seventh Omnibus Order, issued July 24, 2020, which allowed new jury selections and new jury trials to begin on September 21, 2020, with selection to be conducted primarily virtual and trials in-person with social distancing. September 21st was also the date on which virtual grand juries could be selected in all counties and trials in special civil and small claims cases could proceed remotely without consent of the parties. In addition, the Order also permitted quasi-criminal trials to proceed remotely only with consent of parties and to proceed in-person in the absence of consent. Municipal courts were also permitted to proceed in-person for complex matters such as DWI trials and cases involving a consequence of magnitude. The Eighth Omnibus Order, issued September 17, 2020, indicated further confidence in the growing technological ability of the Judiciary by instituting a mandate that all counties were to have virtual grand juries by December 1, 2020, and the Ninth Omnibus Order, issued October 8, 2020 authorized in-person grand juries to meet subject to social distancing.

A second wave of the COVID-19 virus struck New Jersey in the Fall of 2020 and delayed further progress. Pursuant to the Order of the Supreme Court issued November 16, 2020, new jury trials were suspended as were in-person grand juries. The one in-person jury trial in progress was permitted to continue, as were the two ongoing jury selections that were in the virtual phase, although they were not permitted to continue into the in-person phase. Increased technological capabilities enabled the Supreme Court

to resume jury trials a virtual basis, as set forth in the order of January 7, 2021. This Order permitted virtual jury trials to be held with the consent of parties, beginning February 1, 2021, and without consent as of April 5, 2021. Improving COVID-19 trends (e.g., declines in new cases, hospitalizations and deaths) made possible by increased vaccinations, made it possible for the Supreme Court to issue and Order dated May 11, 2021 that authorized the resumption of in-person jury trials as of June 15, 2021, with priority given to criminal jury trials involving detained defendants.

While this steady march of progress has continued with most court proceedings, it is apparent that landlord/tenant cases have been treated differently. On July 14, 2020, over a month after special civil and small claims trials were permitted to resume, the Supreme Court issued an Order that allowed eviction trials to take place only in emergent circumstances. Landlords seeking to have a trial go forward would be required to apply for an Order to Show Cause setting forth the basis of the emergency and the Court would be required to "review the complaint and determine whether an emergency exists (e.g., violence against other tenants; criminal activity; extreme damage to residence; death of tenant resulting in vacancy of the rental unit), and based on that determination may schedule a landlord/tenant trial." The Order further specified that the "basis of the landlord/tenant action cannot be nonpayment of rent, except in the case of the death of the tenant." Order of the Supreme Court, dated July 14, 2020, paragraph 5.

Further implementation of the Order to Show Cause procedure in eviction cases was set forth in Directive #20-20 issued on July 28, 2020 by Judge Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts. The Directive indicated that:

> "the following grounds for the removal of tenants that may constitute emergent circumstances justifying an LT trial: Disorderly tenant (N.J.S.A. 2A:18-53(c) or 2A:18-61.1(b)); Willful or gross negligent damage to premises (N.J.S.A. 2A:18-53(c) or 2A:18-61.1(c)); Abating housing or health code violations (landlord seeks to permanently board up or demolish premises because cited by authorities/inspectors for substantial health and safety of tenants) (N.J.S.A. 2A:18-61.1(g)); Occupancy as consideration of employment (N.J.S.A. 2A:18-61.1(m)); Offenses under comprehensive drug act (N.J.S.A. 2A:18-61.1(n)); Assaults or threats against landlord or certain other persons ((N.J.S.A. 2A:18-61.1(o)); Eviction for civil violations (tenant found by preponderance of evidence that theft of property, assault, terroristic threats against landlord or member of their family, employee of landlord's, etc.) (N.J.S.A. 2A:18-61.1(p)); Eviction for theft (N.J.S.A. 2A:18-61.1(q)); and Human trafficking (N.J.S.A. 2A:18-61.1(r))."

The Directive further noted that "[t]he above list is not meant to be exclusive. The court will take into consideration the circumstances of each case in determining whether a trial is warranted." In addition, the Directive also provided sample Order to Show Cause forms that landlords seeking an emergent trial may use.

While the Order of July 14, 2020 and Directive #20-20 appeared to be focused on residential tenancies, the Supreme Court's Order of February 5, 2021 clarified the circumstances where a landlord may seek an emergent eviction trial in a commercial tenancy. This Order provided that:

> (1) The July 14, 2020 Order that provides that landlords/plaintiffs may in emergent circumstances apply for an Order to Show Cause for eviction applies to both residential matters and commercial matters; (2) in determining whether to issue the Order to Show Cause, the court in both residential matters and commercial matters will review the complaint and determine whether an emergency exists (e.g., violence against other tenants; criminal activity; extreme damage to residence; death of tenant or permanent closure of the business resulting in vacancy of the property); (3) in residential matters, the basis of that landlord/tenant action cannot be nonpayment of rent, except in the case of the death of the tenant; (4) in commercial matters, the basis of that landlord/tenant action cannot be nonpayment of rent, except where the tenant has vacated the property; the tenant's business is not operating and will not resume operations; or the

> commercial landlord is facing foreclosure or a tax lien; and (5) the court, based on its determination as to whether an emergency exists, may schedule a landlord/tenant trial. As permitted by Executive Order 106, following any such trial an eviction may proceed in the "interest of justice."

Essentially, the Order of February 5, 2021 specified that the provisions of the July 14, 2020 Order applied to both residential and commercial eviction cases and also created three instances applicable to commercial tenancies where a landlord could seek an emergent trial for nonpayment of rent: (1) where the tenant has vacated the property; (2) where the tenant's business is not operating and will not resume operations; and (3) where the landlord is facing foreclosure or a tax lien. This Order also had the effect of codifying the *de facto* commercial eviction moratorium that had existed since landlord/tenant calendars were suspended in March of 2020.

Since the conclusion of testimony and submission of briefs, the legal landscape has been altered in response to improving vaccination rates and declining COVID related hospitalizations. First, the *de facto* moratorium on commercial evictions came to an end on June 2, 2021, when the Supreme Court issued an Order authorizing the resumption of commercial landlord/tenant trials, with such trials to be conducted in a remote format unless a party has a demonstrated inability to participate in a remote proceeding. The Order kept in place the suspension of residential eviction trials except as permitted by the Orders of July 14, 2020 and February 5, 2021.

Two days later, the Governor approved the enactment of P.L. 2021, c.103 which had passed both Houses of the Legislature the previous day. This new statute ended the Public Health Emergency declared pursuant to N.J.S.A. 26:13-1 et seq., but allowed the Governor to retain powers concerning vaccinations, COVID-19 testing, health resource

allocation and coordination and implementation of recommendations from the Center for Disease Control, while phasing out administrative regulations issued during the emergency and ending immunity for health care professionals and facilities related to COVID-19. The law revoked all the executive orders issued in connection with the Public Health Emergency, with the exception of fourteen executive orders that will now expire on January 1, 2022 unless revoked on an earlier date by the Governor. One of the orders so extended to the end of this year was Executive Order 106. Significantly, the law left in place the State of Emergency declared by Executive Order 103 pursuant to the Disaster Control Act.

ANALYSIS

It is against this legal background that the Plaintiff seeks to evict the Defendant in the present matter. Plaintiff primarily argues that the legal environment established in connection with Executive Order 106 is unconstitutional to the extent that it prevents a landlord from evicting his tenant to sell his property. Defendant takes the position that neither Executive Order 106, nor the various administrative orders of the Judiciary prevent the Plaintiff from selling his property, they just prevent an eviction until after the State of Emergency has concluded. Thus, because the Supreme Court's Order of July 14, 2020 and Directive #20-20 do not explicitly permit an eviction trial pursuant to N.J.S.A. 2A:18-61.1*l*(3), Defendant requests that entry of judgment be denied.

In examining the Plaintiff's constitutional claims, the Court must note that the Plaintiff failed to comply with R. 4:28-4, which requires that a party questioning the constitutionality "of a statute, rule, regulation, executive order or franchise of this State… shall give notice of the pendency of the action to the Attorney General," who shall have

60 days in which to file a motion to intervene. In addition, the Court fully recognizes that the "drastic remedy" of invalidating a statute on constitutional grounds "is not the only—and not even the preferred—approach." N.J. State Chamber of Commerce v. N.J. Election Law Enf't Commerce, 82 N.J. 57, 81 (1980). A court must assume that the Legislature intended to act in a constitutional manner, so if a statute is "reasonably susceptible" to an interpretation that will render it constitutional, the statute must be construed "to conform to the Constitution, thus removing any doubt as to its validity." State v. Burkert, 231 N.J. 257, 276-77 (2017). It is axiomatic that executive orders and other administrative regulations must also be construed in such manner. *See* Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 580-581 (1992). To properly analyze the Plaintiff's constitutional claims, we must determine whether the Defendant's interpretation of the law as applied to the facts of this case is consistent with the Constitution.

Such an analysis leads to the inescapable conclusion that if the Plaintiff is unable to consummate this sale because he is unable to evict the Defendant, his business prospects for the immediate future are grim. The present tenant stopped paying rent prior to January of this year. Assuming rent was paid last December, at $2,000 a month, the current amount of unpaid rent is $12,000. Even if the Defendant's financial condition improves, she has no incentive to resume making rent payments because of the present eviction moratorium.

While the Plaintiff has no income from rent, he must still make his mortgage payments and pay property taxes. The Plaintiff continues to have commercial liability with respect to the property, so if he wants to protect his investment, he must continue to

pay insurance premiums. If the Plaintiff fails to maintain the property so as to create habitability issues for the tenant, he is subject to an order to show cause for a constructive eviction. *See* Marini v. Ireland, 56 N.J. 130 (170); and Reste Realty Corp. v. Cooper, 53 N.J. 444 (1969).

The Plaintiff could file an action against the Defendant for breach of contract and seek a judgment for money damages. However, there is a significant backlog of all civil trials due to the limitations on Court functions because of the COVID-19 state of emergency and there is no indication of when the Plaintiff would finally be able to proceed to trial in such an action. Even if the Plaintiff is able to obtain a judgment for the full amount of back rent, it is questionable whether such a judgment is collectible from a tenant who was financially unable to pay rent. It is unlikely that the Plaintiff will collect any money in the near future, and it is entirely possible that any such judgment will fall into the abyss wherein numerous other uncollectible judgments languish because the debtors are insolvent.

The Plaintiff could also file an inverse condemnation action against the State of New Jersey, alleging that his property has been taken without just compensation in violation of the Fifth Amendment of the United States Constitution and Paragraph 20 of the Rights and Privileges Article of the New Jersey Constitution. He may argue that the practical effect of Executive Order 106 has been to conscript New Jersey landlords into providing emergency housing to indigent tenants during the COVID-19 State of Emergency and for two months thereafter.

Such an argument would flow from Green v. Biddle, 21 U.S. 1 (1823), where the Marshall Court struck down Kentucky statutes that exempted the occupants of land from

payment of rents and profits to landowners because "a right to land essentially implies a right to profits accruing from it, since without the latter, the former can be of no value." Id. at 76. Thus, the inability to evict a tenant denies to the landlord the right to exclude others from his property, which the US Supreme Court has ruled to be "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Thus, government effects a physical taking "where it *requires* the landowner to submit to the physical occupation of his land." Yee v. City of Escondido, 503 US 519, 527 (1992).

However, an inverse condemnation action, even if successful, would not provide any short term relief to the Plaintiff. The discovery period for such an action is 450 days. *See* R. 4:24-1(a); *N.J. R. Appendices App. XII-B1*. This means that a minimum of another five quarters of property tax payments and another fifteen months of mortgage payments must be made before a trial can possibly take place, and the Plaintiff must hope that the current COVID-19 related backlog in civil cases will not delay him further.

The administrative procedure for providing compensation for privately owned property taken by State government in a State of Emergency holds even less promise for the Plaintiff. N.J.S.A. App. A:9-51 provides that when the Governor declares a State of Emergency, emergency compensation boards are to be appointed in each county and are authorized to hold hearings on claims brought by persons seeking compensation taken by the State. However, a review of the various executive orders issued by the Governor since the onset of the pandemic indicates that no such boards have been appointed, therefore, the Plaintiff has no practical administrative remedy.

At first blush, it would seem that the recent enactment of P.L. 2021, c. 120, which provides that Executive Order 106 shall remain in effect until January 1, 2022 has negated Plaintiff's complaints about the uncertain length of moratorium. However, a careful reading of the statute indicates otherwise. Section 4 of the act provides that "[T]he state of emergency declared in Executive Order No. 103 of 2020, as extended, pursuant to P.L.1942, c.251 (N.J.S.A. App. A:9-33 et seq.) shall remain in effect until terminated by the Governor." Thus, the Governor's discretion to indefinitely continue the State of Emergency declared pursuant to the Disaster Control Act has been given explicit legislative sanction. Furthermore, Section 1(a) of P.L. 2020, c.1 allows the Governor to impose an eviction moratorium whenever either a Public Health Emergency or a State of Emergency has been declared. Therefore, if the Governor has allowed the State of Emergency to remain in effect through January 1, 2022, he could replace the expiring Executive Order 106 with a new executive order that would continue the moratorium until two months after the end of a State of Emergency that has no terminal point. Thus, if economic conditions or a mutant COVID strain compel the Governor to continue the moratorium beyond next January, what may now appear to landlords as a distant light at the end of the tunnel could turn out to be a train speeding in the opposite direction.

Nevertheless, Defendant argues that there is nothing that prohibits the Plaintiff from selling his property, he just may not evict the Defendant to do so. Defendant notes that there are people who buy houses to rent to others and there are people who buy houses as an investment. But where would the Plaintiff find a buyer if no eviction is possible?

Obviously, it is doubtful that a buyer who wants to be a landlord will purchase a property where rent cannot be collected. But hypothetically, the Plaintiff could sell to the present buyer without the requirement that the property be vacant at the time of closing, and the new owner could then seek an eviction so that he may personally occupy the premises. However, just like the present eviction complaint, that potential cause of action is also not one of those specifically enumerated in the Supreme Court's Order of July 14, 2020 or Directive #20-20 as grounds for an emergent eviction trial. Without clear legal grounds for an eviction, a buyer who closes title and then meets with an adverse court decision will find himself saddled with mortgage and property tax payments and without a place to live.

The only other type of prospective buyer for rental property occupied by a tenant who does not pay rent and cannot be evicted would be a speculator who is willing to gamble that he can sell the property at a profit when the moratorium is over. However, any such speculator would naturally demand a deep discount in the purchase price as compensation for the uncertain length of the moratorium. Since the Plaintiff is selling the property for a price just sufficient to pay off the mortgage, a sale to a speculator at an even lower price would require the Plaintiff to borrow money to pay the balance of the mortgage.

In response, Defendant's counsel cites Rieder, *supra*, for the proposition that diminished marketability does not constitute a taking. But Rieder is distinguishable because it involved a property owner who objected to the filing of a highway alignment map in anticipation of a possible condemnation "without any actual physical appropriation or interference." Id. at 555. Unlike the Plaintiff in the present matter, the

plaintiff in Rieder at least had possession of his property and was "free to reasonably develop his land." Id. at 557.

Similarly, Defendant's reliance on Chase Manhattan Bank, *supra*, for the proposition that the right of the landlord to displace a tenant during transfer of ownership may be limited by the courts is also misplaced. That case involved a bank foreclosing on an owner who had defaulted on a mortgage where the bank sought to obtain an order for possession in Chancery against the tenants of the prior owner without filing an eviction complaint against the tenants. Id. at 215-217. The State Supreme Court held that the tenancy ran with the land, and the bank, as the new owner, had become the landlord, and therefore had to comply with the requirements of the Anti-Eviction Act to remove the tenants. Id. at 226. In contrast, the Plaintiff in the present case has complied with the Anti-Eviction Act to the letter and simply seeks possession as the law would normally permit.

The Plaintiff's lack of possession is further highlighted by the development moratorium cases cited by his counsel. In Schiavone Constr. Co, *supra*, the New Jersey Supreme Court ruled that the extension of a development moratorium could constitute a taking if "sufficiently extensive and prolonged." Id. at 263. Similarly, in Deal Gardens, Inc., *supra*, the Supreme Court warned of the dangers of restraints on development that had no "terminal point." Id. at 500. Like the plaintiff in Rieder, the plaintiffs in Schiavone Constr. Co and Deal Gardens, Inc. at least had possession of their property, unlike the present Plaintiff, who must also contend with an eviction moratorium with no genuine terminal point, even after enactment of P.L. 2021, c.120.

If the Plaintiff is left without the ability to regain possession through eviction, is unable to sell the property except at a ruinous loss and must pay property taxes and mortgage payments with no income to offset these expenses for the foreseeable future, it is difficult to deny he has suffered a taking. The Plaintiff will face the "total deprivation of beneficial use" which "is, from the landowner's point of view, the equivalent of a physical appropriation." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992). Such an outcome would constitute a taking of the Plaintiff's property without just compensation in violation of the Fifth Amendment of the United States Constitution.

This scenario also creates an issue with the State Constitution. Plaintiff's counsel invokes the first sentence of the Rights and Privileges Article, which states:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."
>
> [Article I, paragraph 1.]

This language first appeared in the New Jersey Constitution of 1844 and was subsequently incorporated into the Constitution of 1947. It is an obvious amalgam of the natural rights of life, liberty and property posited in 1690 by John Locke's *Second Treatise on Government* and the unalienable rights of "life, liberty and the pursuit of happiness" set forth in the Declaration of Independence. Moreover, this provision has long been interpreted by New Jersey courts to protect private property rights.

In Brennan v. United Hatters of North America, 73 N.J.L. 729 (E. & A. 1906), future US Supreme Court Justice Mahlon Pitney wrote, "[I]t seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will

make a disturbance of the latter right any less actionable than a disturbance of the former." As noted by the Plaintiff's brief, Article I, paragraph 1 was also invoked in Cherokee Equities, *supra*, to protect the right of a property owner to freely alienate his property. This provision was also applied in a landlord/tenant context in Property Owners Asso. v. North Bergen, 74 N.J. 327 (1977) where the State Supreme Court ruled that a rent control ordinance that prohibits a landlord from recouping funds to which he is rightfully entitled is confiscatory and unconstitutional. Id. at 336.

These principles conflict with Defendant's view that the Plaintiff is required to continue ownership of a house that costs him money each month in taxes and debt service and must maintain that house as a rental property where no rent is collected for a time period that has no terminal point. To interpret Executive Order 106 and the Supreme Court's Order of July 1, 2020 to compel such a result would transmogrify the concept of property ownership from an unalienable right into an intolerable burden and would thus be odious to the New Jersey Constitution.

However, neither Executive Order 106 nor the Supreme Court's Order of July 14, 202 or Directive #20-20 need to be construed to reach such a result. The plain language of Executive Order 106 specifically permits a court to authorize an eviction notwithstanding the moratorium "in the interest of justice." Preventing a violation of the Takings Clauses of the Federal and State Constitutions would clearly qualify for such an exception. Similarly, the language of Directive #20-20 states that the list of grounds for an emergent trial "is not meant to be exclusive" and must be interpreted in like manner. In construing administrative directives of the judiciary, the Court must be mindful of Chief Justice Vanderbilt's admonition that the Supreme Court's rule-making power "is

confined to practice, procedure and administration" and that substantive law is not to be made "wholesale through the exercise of the rule-making power." Winberry v. Salisbury, 5 N.J. 240 (1950) at 248, 255. Any trial court must be reluctant to conclude that the State Supreme Court would use its administrative powers, not only to make substantive law, but to incur liability to the State by inverse condemnation.

Therefore, the Court must conclude that an eviction trial sought under N.J.S.A. 2A:18-61.1*l*(3) may proceed as an emergent matter under the Supreme Court's Order of July 14, 2020 as implemented by Directive #20-20 and that a warrant of removal may be executed in the interest of justice, notwithstanding the eviction moratorium as permitted by Executive Order 106. However, the "interest of justice" standard, by its nature, requires a weighing of equities in determining the timeframe for the execution of the warrant. This process involves an evaluation of the relative hardships of the parties.

The hardship to the Plaintiff is clearly economic. Each month that goes by he must pay the monthly bills for a property that no longer produces income. The hardship to the prospective buyer is both monetary and lifestyle related. His life is on hold while he waits to close on the property and commutes an extra hour to work and sleeps on the couch at his friend's house.

The Defendant obviously faces the harm of eviction, and though she testified that she had come close to finding a new place to live, she currently has no place to go. However, there was no testimony of any particular health issues that might be aggravated, nor does the Defendant live with any children whose education might be disrupted by a forced relocation. There was no testimony from the Defendant or from the individual she lives as to whether or not they were unemployed. It may well be that they

are now employed, but their employment was interrupted during the COVID-19 lockdowns causing them to fall behind on rent, but without testimony there is no way to know for sure. It appears that the Defendant has been looking for a new apartment, but without success. This could be the result of an improperly functioning rental market caused by the moratorium. A logical consequence of a ban on evictions for nonpayment of rent is that a rational landlord will not be inclined to rent to a prospective tenant with less than perfect credit, because the landlord would risk being unable to evict a new tenant who stopped paying rent right after moving in.

Obviously, the Defendant would prefer to stay where she is until the moratorium comes to an end. Ironically, this may be the least desirable outcome for the Defendant. A report issued by a Judiciary committee studying landlord/tenant procedures spoke ominously of how "tenants and landlords face the triple threat of the COVID-19 pandemic, a severe economic downturn that has disproportionately affected certain segments of society, and the unknown long-term consequences of an extended moratorium on residential evictions" and noted that the Judiciary must manage the growing number of aging, pending cases – plus an expected 194,000 additional cases in the coming year." MAINTAINING OUR COMMUNITIES: REPORT OF THE JUDICIARY SPECIAL COMMITTEE ON LANDLORD TENANT 1-2 (April 21, 2021). It is therefore reasonable to assume that when the moratorium ends, there will be a tsunami of evictions that will create a housing crisis of epic proportions.

The governmental and charitable agencies that typically work to relocate tenants facing eviction will likely be overwhelmed at the end of the moratorium and the needs of many will go unmet. Therefore, the Defendant is more likely to receive help in

relocation at the present time, as opposed to when the moratorium ends. Toward that end, entry of a judgment for possession that will lead to execution of a warrant at a time certain will trigger a level of urgency with the social service agencies to provide help in relocation assistance at a time when these agencies are best able to provide help.

Accordingly, a judgment for possession is entered against the Defendant and the Defendant is to be provided with the Court's resource sheet listing governmental and charitable agencies that may be able to provide assistance in relocation. For the reasons set forth above, issuance of the warrant of removal is stayed for twenty-one (21) days to provide the Defendant ample time to seek relocation assistance and/or file an appeal. Any further stays must be sought from the Appellate Division.

CONCLUSION

For the reasons stated above, the relief sought by Plaintiff is granted, a judgment for possession is entered against the Defendant, and the warrant of removal is stayed twenty-one (21) days.

Hon. J. Randall Corman, JSC