SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3186-20

JUDITH M. PERSICHILLI, R.N., B.S.N., M.A., in her official capacity as Commissioner of the New Jersey Department of Health,

Plaintiff-Respondent,

v.

ATILIS GYM OF BELLMAWR,

Defendant-Appellant.

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Submitted February 28, 2023 – Decided March 15, 2023

Before Judges Sumners, Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Mercer County, Docket No. C-000048-20.

The Law Office of John McCann, attorneys for appellant (John McCann and Giancarlo Ghione, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney

General, of counsel; Stephen Slocum, Deputy Attorney General, on the brief).

PER CURIAM

Defendant Atilis Gym of Bellmawr (Atilis) appeals from a Chancery Division judgment enforcing orders issued by the Commissioner of the Department of Health (DOH) directing Atilis to comply with the Executive Orders (EO) issued by Governor Philip D. Murphy as part of the State government's response to the COVID-19 pandemic, first by closing its gym to the public, then by permitting operation subject to restrictions on activities and capacity with cleaning and social distancing measures in place. In multiple proceedings, the court found that Atilis contumaciously disobeyed a series of DOH orders and related court orders and imposed monetary sanctions under Rule 1:10-3 for violating the orders.

On appeal, Atilis argues the court erred by denying its motion to stay the enforcement proceedings until the disposition of criminal charges pending in municipal court against its owners. It asserts the owners were rendered unable to provide a defense in the civil action without potentially incriminating themselves, in violation of their Fifth Amendment rights.

Atilis also argues the court erred by enforcing the August 28, 2020 DOH order directing it to comply with requirements imposed on gyms, averring the

court disregarded Atilis' recharacterization of itself as a political campaign center not subject to those requirements. Atilis further asserts that the sanctions imposed by the court were improperly punitive. Atilis also raises several challenges to the validity of the EOs and DOH orders, and the constitutionality of the statutes upon which these executive actions were based, namely the Emergency Health Powers Act (EHPA), N.J.S.A. 26:13-1 to -36, and the Disaster Control Act (DCA), N.J.S.A. App. A:9-33 to -63.

We conclude that Atilis' collateral attacks on the DOH orders are not properly brought in this appeal, and, finding no substantive merit in Atilis' arguments, affirm each of the orders that it challenges, including the monetary sanctions imposed and attorney's fees awarded.

I.

A.

To provide context, we first recount the underlying EOs. On March 9, 2020, Governor Murphy issued EO 103 in response to the outbreak of COVID-19. Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020). The EO stated that COVID-19 "is a contagious, and at times fatal, respiratory disease caused by the SARS-CoV-2 virus" and explained the disease "can spread from person to person via respiratory droplets." Ibid. In January 2020, the World

Health Organization declared the COVID-19 outbreak to be "a public health emergency of international concern," which would "potentially require a coordinated international response." Ibid. That same month, the United States Department of Health and Human Services Secretary declared a national public health emergency in response to the outbreak. Ibid. In March 2020, the Centers for Disease Control and Prevention (CDC) reported COVID-19 cases were increasing rapidly in the United States. Ibid.

The Governor declared a "Public Health Emergency" under the EHPA and a "State of Emergency" under the DCA. Ibid. EO 103 authorized and directed certain agencies and officials to take actions to protect "the health, safety and welfare" of citizens from the outbreak, and declared it was "the duty of every person or entity in this State . . . to cooperate fully with the . . . the Commissioner of DOH in all matters concerning this state of emergency." Ibid.

On March 16, 2020, the Governor issued EO 104, which established statewide "social mitigation strategies for combatting COVID-19." Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020). The CDC advised that COVID-19 "spreads most frequently through person-to-person contact when individuals are within six feet or less of one another" and recommended "social distancing" to "prevent community spread of the virus." Ibid. Relevant

here, EO 104 stated that "gyms" and "fitness centers," among other types of recreational venues, are "locations where large numbers of individuals gather in close proximity" and "come into contact with common surfaces." Ibid. It further stated that "suspending operations at these businesses is part of the State's mitigation strategy to combat COVID-19 and reduce the rate of community spread." Ibid. EO 104 ordered the closure of "[g]yms and fitness centers and classes" to the public effective March 16, 2020, and to remain closed "for as long as [the] order remain[ed] in effect." Ibid.

On March 21, 2020, the Governor issued EO 107, which classified types of businesses as "essential" and "non-essential" and ordered the closure of the latter. Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020). Gyms and fitness centers, along with other "recreational and entertainment businesses," were classified "non-essential." Ibid.

B.

Atilis, a gym located in Bellmawr, re-opened on May 18, 2020. From the date it re-opened, Atilis violated the EOs. Bellmawr police officers issued summonses to Atilis' co-owners, Ian Smith and Frank Trumbetti, for violating the EOs. Finding that Atilis was not complying with EO 107, on May 20, 2020, the Commissioner issued an "Emergency Closure Order" to Atilis, that ordered

it to "remain closed until further notice" with "[n]o members of the public" permitted inside. The Commissioner explained that gyms were "particularly high-risk settings for the spread of COVID-19," because: (1) exercise increases respiratory activity, which can "increase the amount of respiratory droplets or aerosols in a confined setting"; (2) gyms "foster prolonged and close person-to-person contact"; and (3) gyms "necessitate the communal use of equipment and other items" upon which the SARS-CoV-2 virus could live. The order stated it was a "Final Agency Decision" appealable to the Appellate Division and warned that failure to comply could result in "criminal sanctions and/or civil penalties."

Atilis did not appeal from the Emergency Closure Order but remained open in violation of the closure order. On May 22, 2020, the Commissioner filed a verified complaint pursuant to Rule 4:67-6 and an order to show cause (OTSC) seeking temporary restraints and enforcement of the May 20 DOH order. A certification by a Bellmawr police lieutenant and the summonses issued to Smith and Trumbetti were attached in support of the Commissioner's allegations that the gym had opened in violation of her closure order.

The court heard the OTSC on May 22, 2020. The Commissioner argued Atilis' reopening of the gym despite receiving the closure order two days earlier was not in dispute because the owners had discussed their intentions and actions

publicly on social media and with the news media. She asserted that temporary restraints were necessary to ensure Atilis' compliance with her order pending a full enforcement proceeding. The Commissioner expressed concern that if Atilis was permitted to act as it pleased, it would "open[] the door for any other businesses . . . to make whatever social distancing rules they think are appropriate," thereby endangering the public by allowing COVID-19 to spread at a greater rate. In response, Atilis argued it was not afforded due process before it was ordered to close, the gym was not "unsanitary" or "unsafe," the "essential" versus "non-essential" classification of businesses in the EOs violated equal protection, and the measures implemented through the EOs were unnecessary because "there [was] a 99.6 percent recovery rate for COVID-19" and "[p]eople [were] not dying as everyone would lead us to believe."

In an oral decision, the court first explained it would not consider any collateral attack on the validity of the EOs or the May 20, 2020 DHO closure order, noting that such challenges must be brought in a direct appeal to the Appellate Division. Next, the court found Atilis did not dispute it violated the DOH order and that it gave "no indication that compliance would be forthcoming." The court found noncompliance would cause irreparable harm and that temporary restraints were needed and in the public interest.

The court set a schedule affording Atilis the opportunity to oppose the complaint, but Atilis did not submit any opposing papers. On June 8, 2020, the court granted the Commissioner's application for an order directing Atilis to comply with the May 20 closure order and authorizing the State to secure Atilis' premises. A June 15 amended order, entered with the parties' consent, allowed Atilis to open its premises limited to operating its vitamin/nutrition and clothing/apparel stores located therein.

We denied Atilis' motion for leave to file an emergent appeal from the May 20, 2020 closure order. Atilis did not otherwise appeal the closure order.

On June 26, 2020, the Governor issued EO 157, which acknowledged the decrease in new COVID-19 cases in New Jersey but stated "the ongoing risks presented by" the virus meant that many of the State's protective measures needed to remain in place, "both to reduce additional new infections and to save lives." Exec. Order No. 157 (June 26, 2020), 52 N.J.R. 1455(a) (Aug. 3, 2020). EO 157 further stated that indoor gyms and fitness centers posed a significantly higher risk of COVID-19 transmission because "sustained physical activity result[s] in heavy breathing and exhalations" and "exercise equipment is shared by many different people over the course of the day." Ibid. As a result, gyms could open their indoor premises "to offer individualized indoor instruction by

appointment only where an instructor is offering training to an individual, and the individual's immediate family members, household members, caretakers, or romantic partners." Ibid. If the gym offered multiple simultaneous instruction sessions, the sessions were required to take place in separate rooms or be separated by a floor-to-ceiling barrier. Ibid. All individuals present at the indoor premises of any business were required to wear masks. Ibid. On July 1, 2020, the Commissioner issued a "Modified Order" to Atilis, updating the May 20 order to comport with EO 157.

On July 17, 2020, the Commissioner moved before the trial court to enforce litigant's rights under Rule 1:10-3, alleging Atilis was not complying with the court's June 8 and June 15 orders. In her supporting certification, the Commissioner averred that the Camden County Department of Health and Human Services, accompanied by Bellmawr Police, inspected Atilis' premises on July 15, and observed approximately forty individuals using gym equipment at the same time. The inspectors' report also stated masks and gloves had not been provided to staff, Atilis placed signs blocking view into the gym, and that Trumbetti had advised that 348 people had "come through" the premises that day and he was "not closing" the gym. The certification also stated Atilis had posted "numerous video clips and other pieces of media on its social media

platforms" including Facebook, showing that the gym was "open for wide scale public use . . . without social distancing or the use of masks" and with patrons "sharing communal equipment and high-touch surfaces and engaging in heavy respiration."

Atilis opposed the application, contending the EOs and DOH orders limiting the gym's operation were "unjust" because other businesses had been permitted to open, European research had found that people "allowed to return to their gyms" did not contract COVID-19, and Atilis was not afforded the opportunity to "question [its] classification [as] 'non-essential'" or demonstrate that the gym was not dangerous or a health hazard. Atilis claimed the State had taken its property without just compensation. It further argued Atilis could not be in contempt of the trial court's orders since it had not been ordered it to comply with EO 157 or the July 1 DOH order.[1]

At the July 20, 2020 hearing, the Commissioner asserted Atilis had reopened in a manner "far exceeding the limits imposed by" EO 157 and the July 1 DOH order, and that Smith had publicly announced on Facebook and

[1] The opposition also certified that Atilis filed a complaint for declaratory and injunctive relief against the Governor, the Commissioner, and other officials in federal court challenging the EOs and DOH orders, but on June 19, 2020, the district court "sent [the] case back to state court."

Instagram that it had reopened as of July 4. The Commissioner also stated that since July 17, the gym's owners had removed its doors and put out signs declaring the premises to be "an anti-Murphy autonomous zone." She argued that sanctions under Rule 1:10-3 were necessary to compel compliance with the July 1 DOH order and the court orders already in place.

In an oral decision, the court again informed the parties it would not consider collateral attacks on the DOH orders and the EOs, including EO 157. The court denied the motion, finding the July 1 DOH order had "materially affected and altered" Atilis' rights such that the May 20 closure order and the court's prior orders regarding it could no longer be enforced under that Rule 1:10-3. Pursuant to Rule 4:67-6, the court ordered Atilis to comply with the July 1 DOH order. The court stated it would "not accept" Atilis "ma[king] a mockery of" the July 1 order.

The very next day, Trumbetti told newspaper reporters that Atilis was "not going to comply with their non-laws," referring to the EOs and DOH orders. Also on July 21, Smith appeared on "Tucker Carlson Tonight" and stated he and Trumbetti removed the gym's doors and intended to stay open to the public.

On July 22, 2020, DOH personnel and Bellmawr police attempted to inspect Atilis but were denied entry to the gym. They reported Atilis had

reopened its interior premises to the public without limitation to individualized training as required, was not employing social distancing measures, and was not requiring patrons to wear masks. The report indicated over 100 individuals were observed entering the gym that day. When questioned, Trumbetti and Smith told investigators all the individuals present in the gym were "romantic partners."

On July 23, 2020, the Commissioner filed a second motion under Rule 1:10-3, alleging Atilis was violating July 1 DOH order and the court's July 20 order. At a hearing the next day, the Commissioner pointed to Atilis' actions as evidence of its violations and again argued that sanctions were necessary to compel compliance with the orders. Atilis countered that investigators should have obtained a warrant to enter the gym but conceded that "some people did come in to work out." Atilis' counsel asked that the proceedings be stayed because of "pending criminal proceedings" against the owners "in municipal court." The court advised that a formal motion must be filed to raise that argument.

In a July 24 oral decision, the court found that Atilis had violated its July 20 order, noting that Atilis had neither denied its non-compliance nor promised future compliance. The court rejected Atilis' claims that "gym patrons" were

there for reasons other than to "work out." The court granted the motion, stating that monetary sanctions would be imposed in a sum "to be determined." It also permitted the Commissioner to submit a certification in support of an attorney's fee award. Counsel submitted a certification setting forth legal services totaling $4,888.

On July 30, 2020, Smith spoke at a protest at the State House, declaring his intent to break down the physical barriers DOH had erected at Atilis. He also posted on Facebook that he and Trumbetti would be "reopening Atilis" on August 1 to "push[] back against these oppressive lockdown measures." On August 1, 2020, Smith and Trumbetti removed the barriers and reopened the gym as promised. Camden County detectives reported observing several individuals entering Atilis without wearing masks.

Meanwhile, Atilis had been soliciting and collecting donations through a GoFundMe account. From May 18, 2020, to August 4, 2020, Atilis collected over $152,000 through this fundraising.

On August 6, 2020, the Commissioner filed a motion to compel compliance with the court's July 24 order and for an award of attorney's fees. A supporting certification alleged further violations of the court's order, including that Trumbetti and Smith "personally kicked down" the State's barricade. The

application asserted Atilis collected approximately $267.96 in daily membership fees and $152,298 in GoFundMe donations, demonstrating Atilis' ability to pay monetary sanctions. The Commissioner requested a $15,497.76 sanction for each day of non-compliance. The motion also requested $10,481 in attorney fees that included the services related to the July 23 application and all other court proceedings arising from Atilis' non-compliance between July 24 and August 6, 2020.

At the hearing on August 10, 2020, Atilis argued that there was "no evidence" or "science" showing that Atilis was "a danger to the public" and that issue needed to be addressed. The court again informed the parties that this "focus on the merits of the DOH closure order" was "not appropriate in these proceedings" and was a matter for the Appellate Division. The court granted the Commissioner's request for an order permitting the placement of a new barrier barring entry to Atilis.

On August 13, 2020, Atilis filed a motion to stay the July 24 order because Smith and Trumbetti had pending criminal charges in Bellmawr Municipal Court based on their alleged violations of the Governor's EOs.[2] Atilis argued it

[2] That same day, Atilis filed a notice of appeal challenging the Commissioner's July 1 order.

was unconstitutional to "force" the owners to choose between defending Atilis in the civil proceedings or invoking their right to remain silent in the municipal court proceedings. The motion was not heard until months later due to delays in receiving a transcript of the July 24 hearing.

The Commissioner argued Atilis had prevented placement of barriers at the gym, with the co-owners and others remaining camped inside. She reiterated that Atilis continued violating the court orders and the most recent DOH orders and argued that sanctions were necessary to compel compliance. The Commissioner noted the GoFundMe campaign raised more than $263,000, and that amount should be considered in setting the sanction to "disincentivize the continued contempt." Atilis argued it was inappropriate to consider a Rule 1:10-3 motion while municipal criminal charges were pending against Trumbetti and Smith, because the proceedings involved "identical charges" and that there was no evidence the gym was unsafe. Atilis also claimed the GoFundMe money was intended to pay the bills incurred while the gym was closed.

On August 18, 2020, the trial court granted the Rule 1:10-3 motion, finding Atilis violated the July 24 court order. It found Atilis knowingly operated in violation of the DOH and court orders "in a willful and contumacious manner," including "[k]icking down the barrier" the court had authorized. The

court again rejected Atilis' continued attempts to collaterally attack the validity of the EOs and DOH orders.

The court awarded the requested attorney's fees and imposed a sanction of $15,497.76 per day of non-compliance, finding that amount was within Atilis' means due to its ongoing fundraising efforts. It stated the sanctions were imposed for the "express and sole purpose" of compelling compliance with the July 24 court order and were not punitive.

On August 27, 2020, the Governor issued EO 181, which stated that "with strict mitigation protocols in place, safe operations [could] resume inside" gyms and fitness centers. Exec. Order No. 181 (Aug. 27, 2020), 52 N.J.R. 1712(a) (Sept. 21, 2020). These protocols included: (1) limiting occupancy of indoor premises to twenty-five percent of stated maximum capacity, excluding staff; (2) installing physical barriers between customers and employees or otherwise ensuring six feet of distance between those individuals except during payment; (3) limiting the use of equipment to one person at a time, excluding family and household members, caretakers, and romantic partners; (4) sanitizing equipment before and after use; (5) demarcating and posting signs denoting six feet of spacing in common areas and where people may form lines; (6) requiring infection control practices such as regular hand washing; (7) providing

sanitization materials to staff and customers; (8) following sanitization protocols in the event of an exposure to COVID-19; and (9) requiring workers and customers to wear masks while indoors, except for medical reasons or in the event that wearing a mask would "inhibit that individual's health." Ibid. EO 181 stated that gyms were permitted to open indoor premises to the public only if they complied with these health and safety guidelines. Ibid.

On August 28, 2020, the Commissioner issued a third order to Atilis directing it to follow the requirements of EO 181. Based on the issuance of this order, the State moved to dismiss Atilis' direct appeal from the July 1 DOH closure order as moot. We granted the motion.

On August 31, 2020, the Commissioner moved to amend the court order clarifying that the same sanctions would be imposed if Atilis did not comply with the August 28 DOH order. As part of its opposition, a certification by Trumbetti represented that Atilis had ceased operating as a gym and was now an extension of a Senate campaign. Trumbetti averred that Atilis had "stopped accepting payment from its gym members," and that to gain access, individuals must agree to be a volunteer for the campaign. During the motion hearing, Atilis argued that enforcing the August 28 DOH order would violate the First Amendment rights of the owners and visitors to "associate and participate in

political activities." It also claimed Atilis was not operating for a profit and that there was "no science" supporting the protocols set forth in EO 181. Atilis also contended that EO 181 and the August 28 DOH order was improperly issued without "public input" in violation of the Administrative Procedure Act (APA).

The court permitted Atilis to submit an expert report from EHA Consulting Group, LLC (EHA) describing and evaluating its COVID-19 mitigation strategies and adjourned the hearing. The hearing resumed on September 18, 2020. The court found Atilis' online posts and messages, as well as the EHA report, "substantially undercut[] the suggestion that indoor fitness activities" were not taking place inside the gym. It stated that Atilis' "own statement" confirmed that "they are a gym." The court permitted Atilis to submit an additional certification regarding its mask-wearing policy.

As to Atilis' Fifth Amendment concerns, the court stated it was not compelling testimony by either owner; it simply offered them the opportunity to submit papers if they chose to do so. Trumbetti submitted a supplemental certification reiterating that Atilis was a campaign location operated by volunteer staff and had not accepted any fees for new gym members since August 21, 2020. The Commissioner submitted a supplemental certification outlining the ongoing violations, including Trumbetti's refusal to allow local

health officials to enter and inspect the premises. Her certification also noted that Atilis filed a lawsuit against Bellmawr regarding the revocation of its mercantile license.[3]

The trial court found Atilis was operating as a gym and had violated the August 28 DOH order. An amended order was entered on October 8 maintaining the same level of daily sanctions for violating the August 28 DHO order.

As to the motion to stay the July 24 court order, Atilis claimed it was unable to defend itself in the enforcement proceedings without waiving Trumbetti and Smith's Fifth Amendment right against self-incrimination in the pending municipal court proceedings. Atilis also averred that its owners were asked to answer information subpoenas in violation of their rights. The court rejected Atilis' Fifth Amendment argument and denied a stay. The court explained that "at no time" during the proceedings that led to the July 24 court order were any "official questions posed to" Smith or Trumbetti, and that the court did not make any adverse inferences against Atilis.

Thereafter, Atilis moved for reconsideration and vacatur of the November 18 order denying the stay. The Commissioner moved to impose judgment in the amount of $123,982.08, representing the eight days of the daily sanction amount

[3] The outcome of that lawsuit is currently on appeal.

of $15,497.76 for non-compliance with the October 8 court order and August 28 DOH closure order. In support, she submitted a detailed certification and several more social media posts by Smith, Trumbetti, and gym patrons in November 2020. In response, Atilis again attempted to collaterally attack the EOs and DOH orders by arguing that they were arbitrary and capricious because they lacked scientific support. Atilis further asserted the Governor lacked statutory authority to maintain a state of emergency under the DCA and EHPA, and that the DCA was an unconstitutionally broad delegation of legislative power to the Governor.

On May 11, 2021, the court issued an order and statement of reasons that: (1) denied reconsideration of the November 18 court order; (2) denied vacatur of portions of the August 18 and October 8 court orders; (3) granted the Commissioner's application for entry of judgment against Atilis, Trumbetti, and Smith, jointly and severally, in the amount of $123,982.08; and (4) stated any violation of the order shall subject Atilis to summary contempt proceedings.

The court found that Atilis had violated the October 8 court order. It stated that it would not reconsider its imposition of joint and several liability for the sanctions upon Trumbetti and Smith, finding their "culpability and responsibility" for Atilis' "ongoing and willful non-compliance is indisputable

and uncontroverted." The court found Trumbetti and Smith solely owned Atilis and had "instrumental control over and involvement with the contemptuous conduct," it was therefore appropriate to pierce the corporate veil. The court explained it considered the amount raised by Atilis through social media "to support their continued non-compliance" in determining the amount of the sanctions. It once again rejected Atilis' collateral attacks on the EOs and DOH orders because such arguments were not justiciable in an enforcement proceeding and must be raised in a direct appeal from the challenged orders in the Appellate Division. The court further remarked that the arguments concerning the Governor's powers were "misplaced and misdirected as the Commissioner was seeking to enforce her own orders."

Shortly thereafter, the Commissioner requested entry of a final judgment enforcing the August 28 DOH closure order pursuant to Rule 4:67-6, until the earlier of her termination of that order or the Governor's termination of the public health emergency. Atilis did not oppose this request. On May 28, 2021, the court entered the terms of its October 8 enforcement order as a final judgment enforcing the DOH order and upholding the monetary sanctions imposed on August 18, 2020, and May 11, 2021. This appeal followed.

II.

In this appeal, Atilis raises the following points:

> I. THE TRIAL COURT ERRED IN DENYING DEFENDANT['S] MOTION TO STAY OF ENFORCEMENT PROCEEDING IN VIOLATION OF THE 5TH AMENDMENT OF THE US CONSTITUTION.
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> II. THE TRIAL COURT ERRED IN ASSESSING THE FINES AS COERCIVE AND NOT PUNITIVE.
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> III. THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR AN AMENDED ENFORCEMENT ORDER IN VIOLATION OF DEFENDANT'S FIRST AMENDMENT RIGHT.
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> IV. THE EMERGENCY HEALTH POWERS ACT [AND] CLOSURE ORDERS ARE VIOLATIVE OF THE APA, EQUAL PROTECTION CLAUSES IN THE UNITED STATES AND NEW JERSEY CONSTITUTIONS, AND WERE ARBITRARY AND CAPRICIOUS.
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> V. THE CIVILIAN DEFENSE AND DISASTER CONTROL ACT, AND THE EMERGENCY HEALTH POWERS ACT RELIED UPON BY EXECUTIVE ORDERS 103-133, 135-138, 140-166, 168-173, 175, 177-181, 183, 186-187, 189-198, 200, 203-204, 207, 210-211, 214-216, 219-220, 222-223, 225, 228-235, 237-243 VIOLATE ARTICLE III OF THE NEW JEREY CONSTITUTION AND IMPLIED DOCTRINE IN THE UNITED STATES CONSTITUTION DURING AUGUST 2020 – JUNE 4, 2021.
>
> VI. THE DEPARTMENT OF HEALTH ACTIONS TAKEN WERE ARBITRARY AND CAPRICIOUS AND UNCONSTITUTIONAL.

A.

Atilis argues the trial court erred by denying its motion to stay the civil enforcement proceedings until after the pending municipal court charges against Trumbetti and Smith were resolved. Atilis contends this violated Trumbetti and Smith's Fifth Amendment privilege against self-incrimination by forcing them to choose between waiving their right to remain silent and presenting a full defense in the civil proceedings. Atilis asserts the court erroneously found there were no factual disputes. It further maintains that the fact the court did not ask Trumbetti and Smith direct questions is irrelevant, because the two were held personally liable to pay the sanctions against the gym and "information subpoenas" were served upon them. We are unpersuaded.

The trial court's decision whether to stay a proceeding is discretionary and is reviewed for abuse of that discretion. Avila v. Retailers & Mfrs. Distrib., 355 N.J. Super. 350, 354 (App. Div. 2002). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985)).

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in any criminal case. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). It protects against being called as a witness against oneself in a criminal prosecution and also from being forced to "answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Ibid. The privilege is not "dependent upon the nature of the proceeding in which the testimony is sought or is to be used," but instead "applies alike to civil and criminal proceedings, wherever the answer might tend to subject [the person] to criminal responsibility." McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

Similarly, a statute may not force a defendant to choose between his Fifth Amendment right against self-incrimination and his chance to defend himself in another case. State v. Melendez, 240 N.J. 268, 272 (2020). For example, in Melendez, the Court addressed the requirement of N.J.S.A. 2C:64-3(d) that a person who wishes to assert a claim to an asset seized by law enforcement must respond to the State's forfeiture complaint within a time limit. Id. at 272, 279. The Court explained that if the same person faces criminal charges related to the seized property, a response to the forfeiture complaint could incriminate him because

> [t]o defend against a forfeiture complaint, claimants who are also criminal defendants must file an answer that states their interest in the property. In other words, to assert their constitutional right not to be deprived of property without due process, they have to link themselves to alleged contraband and give up their constitutional right against self-incrimination. Alternatively, they can refuse to answer and lose their property.
>
> [Id. at 282.]

The Court concluded this was an "untenable situation," id. at 272, because "a defendant's choice to file an answer under those circumstances is not freely made." Id. at 282.

Relying on Lefkowitz and Melendez, Atilis argues that the trial court erred by not staying the Rule 4:67-6 and Rule 1:10-3 proceedings until the municipal court charges were resolved. These cases do not stand for the proposition that a civil action may not go forward while a criminal charge is pending. Instead, in Melendez, the court ruled that an individual's response to a forfeiture complaint could not be used against him or her in a later criminal proceeding. Id. at 282. Similarly, in Lefkowitz, the court ruled that if a witness is compelled to provide testimony in another action, "his answers are inadmissible against him in a later criminal prosecution." 414 U.S. at 78. The Court also held a statute could not force someone to give up this immunity "under threat of

substantial economic sanction" if they refused. Id. at 82-83; accord Garrity v. New Jersey, 385 U.S. 493, 497-500 (1967) (where police officers were required to answer questions in an internal investigation on pain of removal from office if they refused, the answers could not be used against them in a later criminal prosecution).

Lefkowitz and Melendez make clear that when testimony is required by a statute or under some other coercive authority in one proceeding, that testimony may not be used against the declarant in a later criminal action. The civil proceeding need not be stayed. Indeed, Lefkowitz determined the Constitution permits the compelling of incriminating testimony in the first proceeding so long as "neither it nor its fruits are available for [] use" in a subsequent criminal trial. 414 U.S. at 84. In that manner, Trumbetti and Smith's Fifth Amendment rights are protected. Accordingly, the denial of Atilis' motion for a stay was not an abuse of discretion. See State v. Kobrin Securities, Inc., 111 N.J. 307, 312-13 (1988) (finding that defendants facing criminal charges could choose to assert their Fifth Amendment privilege in a civil action but had no right to "be relieved of the burden of that choice" by a stay of that action).

In Kobrin Securities, the Court explained the issue is whether refusing the stay "would thereby expose to unnecessary adverse consequences the defendant

exercising the constitutional privilege." Id. at 314. The trial court should consider "whether the civil proceeding seeks only a monetary recovery by government against a defendant" and "whether the two actions are nearly identical in scope." Ibid. Importantly, the Court stated that "when relief is sought to prevent continued injury to the public . . . the civil proceedings should not be stayed except in the most unusual circumstances." Ibid.

Applying these principles, we conclude that the stay was properly denied. Atilis' continued violation of the EOs, DOH orders, and court orders posed a risk of "continued injury to the public." Ibid. Additionally, the trial court did not substantively question Trumbetti and Smith, and the information subpoenas served upon them merely requested financial information relevant to collection of the imposed sanctions.

B.

We next address the enforcement of the August 28 DOH order. Atilis contends that on August 21, 2020, it "became an official location of the Rik Mehta for Senate campaign," had stopped charging membership fees, and that "[a]ll persons entering" on or after that date "were volunteers for the campaign." Arguing it was no longer operating as a gym, the order violated its First Amendment rights to free speech and to peaceably assemble.

Our scope of review is limited. An appellate court "should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 5 N.J. 474, 483-84 (1974)).

Our careful review of the record convinces us that the trial court's finding that Atilis was still operating as a gym and violated the restrictions imposed on gyms was supported by "adequate, substantial and credible evidence." Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002). Significantly, none of Atilis' social media accounts mentioned the Mehta campaign even though Atilis contended the premises were being used solely as a site for volunteers to perform work for that campaign. Instead, Atilis posted videos of its interior showing people using workout equipment. Moreover, Trumbetti stated in his certification that those entering the premises were given disinfectant spray bottles to use on the gym equipment, further evincing that exercise activities were taking place. The court's findings and conclusions did not "offend the interests of justice." Griepenburg, 220 N.J. at 254.

C.

Atilis next argues the sanctions imposed were punitive rather than coercive. It asserts the gym grossed only $8,352 in July 2020, so sanctions of over $15,000 per day were improper "punishment" beyond its ability to pay, rather than an appropriate measure to compel compliance with the Commissioner's orders as permitted by Rule 1:10-3.

A state administrative agency may bring an action in Superior Court "to enforce a written order or determination entered by it, whether final or interlocutory." R. 4:67-6(a). In turn, a litigant in "any action" may "seek relief by application in the action" to enforce a court order. R. 1:10-3. A motion to enforce litigant's rights may be filed under Rule 1:10-3 "[n]otwithstanding that an act or omission may also constitute a contempt of court" under Rule 1:10-1 or -2. Ibid. "The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under [Rule 1:10-3]." Ibid.

We review a trial court's order enforcing litigant's rights for abuse of discretion. Wear v. Selective Ins. Co., 455 N.J. Super. 440, 458 (App. Div. 2018). As we have noted, an abuse of discretion occurs if a decision is made without a rational explanation, departs from established policies, or rests on an

impermissible basis. Flagg, 171 N.J. at 571. The factual findings of the trial court are entitled to deference so long as they are supported by sufficient credible evidence in the record. Griepenburg, 220 N.J. at 254.

An agency seeking enforcement of its order under Rule 4:67-6 or a court order under Rule 1:10-3 "must show that the defendant has failed to comply with the order and that the court's assistance is necessary to secure compliance." State Dep't of Env't Prot. v. Mazza & Sons, Inc., 406 N.J. Super. 13, 29 (App. Div. 2009). If the court determines that there was non-compliance with the order, that the violating party was able to comply, and that the failure to comply was not excusable, it "may impose appropriate sanctions." Milne v. Goldenberg, 428 N.J. Super. 184, 198 (App. Div. 2012).

Relief under Rule 1:10-3, such as incarceration or a monetary sanction, "is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of" the order a party has violated. Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997). The scope of relief awarded must be "limited to remediation of the violation." Abbott v. Burke, 206 N.J. 332, 371 (2011). "The particular manner in which compliance may be sought is left to the court's sound discretion." Bd. of Educ. of the Twp. of Middletown v. Middletown Twp. Educ. Ass'n, 352 N.J. Super. 501, 509 (Ch. Div. 2001). Thus, "a court is not

required to utilize a particular method—shown to be ineffective—only because it is more tepid than a severe method more likely to gain compliance." Ibid. Lesser sanctions are not mandated when the court is "satisfied that this method will not gain immediate compliance." Id. at 509-10.

When "molding an appropriate remedy" under Rule 1:10-3, "a court's balancing of its coercive powers with care and mercy should not lose sight of" any "continuing harm" caused by the violating party's "contumacious conduct." Id. at 510. Ultimately, "[t]he goal is to sufficiently 'sting' the offending party in order to compel compliance" going forward. Id. at 511 (quoting E. Brunswick Bd. of Educ. v. E. Brunswick Educ. Ass'n, 235 N.J. Super. 417, 422 (App. Div. 1989)). This "sting" need not be limited to the moving party's "actual damages," but must be within the offending party's "reasonable economic means." Holtham v. Lucas, 460 N.J. Super. 308, 322 (App. Div. 2019). The court must consider "the offending party's ability to pay and the sanction's impact on that party in light of its income, status and objectives" and "must not be so excessive as to constitute ruinous punishment." E. Brunswick, 235 N.J. Super. at 422-23.

The evidence presented by the Commissioner in support of her Rule 1:10-3 motions showed that during the period in which it was not complying with the DOH orders or the court's orders, Atilis had amassed over $263,000 in donations

in addition to fees collected from gym members. On the GoFundMe campaign website through which it collected these donations, Atilis stated that at least one of the uses of the donations was to "support the [gym's] efforts to reopen and stay open." The very nature of Atilis' non-compliant conduct was that it was "staying open" without regard for the prohibitions and restrictions imposed by the DOH and court orders.

Under these circumstances, the trial court appropriately considered the GoFundMe donations when determining the monetary sanctions to be imposed on Atilis. Had it considered only the membership fees, Atilis would have been left with a large stockpile of money to fund future non-compliance. Far from imposing a "sting" on Atilis sufficient to coerce compliance, Bd. of Educ., Twp. of Middletown, 352 N.J. Super. at 511, this may have given it an incentive to continue the very behavior the Commissioner sought to curtail: to attract more donations from backers impressed with their audacity. Further, the daily sanctions imposed by the court were calculated to deplete Atilis' "war chest" over a period of ten days—if Atilis continued violating the orders for that long. Had Atilis wished to retain a portion of the donations and use them for lawful purposes such as paying its bills, it had only to come into compliance. Despite

the amount of the per diem sanction imposed, Atilis' blatant noncompliance continued. Hence, a lower daily sanction would not have achieved compliance.

The record demonstrates that the sanctions imposed were not punitive, but instead were a coercive measure grounded in Atilis' ability to pay. See E. Brunswick, 235 N.J. Super. at 422-23. We discern no abuse of discretion in the Rule 1:10-3 sanctions imposed. Wear, 455 N.J. Super. at 458.

D.

Atilis collaterally attacked the DOH orders, the EOs, and their statutory underpinnings, the EHPA and DCA, in the trial court proceedings and does so again in this appeal. It argues that the EHPA does not vest the Governor or Commissioner with the power to close a private business. Similarly, Atilis also argues that the designation of businesses as "essential" or "non-essential" was not authorized by the DCA or EHPA, and that the Commissioner's enforcement of the EOs was therefore beyond the "scope of her legislatively delegated powers."

Alternatively, Atilis argues that if the EHPA does delegate such power: (1) the statute is unconstitutional because it treats health care facilities differently from other facilities by giving them the ability to contest closure at a hearing; and (2) the Commissioner and Legislature violated the APA by not

giving thirty days' notice to business owners or engaging in formal rulemaking procedures before issuing closure orders.

Atilis further argues that the EHPA and DCA violate the doctrine of separation of powers. It asserts that the statutes delegate too much power to the executive branch, allowing the Governor to take excessively sweeping actions during the COVID-19 pandemic. Atilis also contends that the EOs were in place for an "extraordinary amount of time," that the business closures were not based on sufficient "scientific evidence" and were therefore "arbitrary and capricious," and that the Legislature should have stepped in to curtail the Governor's exercise of power.

Atilis' collateral attacks are not properly before this court in this appeal. Under Rule 2:2-3(a)(2), a direct appeal may be filed in the Appellate Division as of right "to review final decisions or actions of any state administrative agency or officer." This encompasses the Governor's EOs and the Commissioner's various orders issued to Atilis. Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 571-72 (App. Div. 2000).

Rule 4:67-6(c)(3) provides that except in circumstances not present here, "the validity of an agency order shall not be justiciable in an enforcement proceeding." Rule 4:67-6(c)(1) also states that an enforcement proceeding may

be stayed by order of the Appellate Division if a party appeals pursuant to Rule 2:2-3(a)(2) from the final agency order sought to be enforced, further supporting the conclusion that challenges to agency orders must be brought on direct appeal in this court and may not be considered as part of a Rule 4:67-6 proceeding. See State Bd. of Pub. Utils. v. Valley Rd. Sewerage Co., 295 N.J. Super. 278, 290-91 (App. Div. 1996) (stating that "only this court has the authority to review the merits of State agency action," and finding that trial court was barred from considering the validity of agency's final decision and was bound by the agency's findings of fact in a Rule 4:67-6 proceeding).

Consequently, while an individual or entity subject to an agency order may seek review of that order in the Appellate Division, absent a stay or reversal of the order by this court, parties are "not free to ignore" the order, which may be enforced in a proceeding brought by the agency before a trial court. Wear, 455 N.J. at 459; see also Mazza & Sons, 406 N.J. Super. at 23-24 (a party affected by a final agency action must file a timely notice of appeal in the Appellate Division; it may not "simply disregard" the order, wait for the agency to bring a Rule 4:67-6 action, "and then challenge the agency action in defense of the enforcement action").

Atilis was on notice that if it wished to mount a challenge to the constitutionality or validity of the EOs and DOH orders, it needed to file a direct appeal from them. The DOH orders stated that they were appealable to the Appellate Division under Rule 2:2-3. Indeed, Atilis filed a timely appeal with this court of the July 1 DOH order, demonstrating that it knew the proper avenue to challenge the validity of such agency actions. The trial court also repeatedly informed Atilis, both on the record during hearings and in its written orders, that Rule 4:67-6(c)(3) prevented it from considering any collateral attacks on the underlying orders. This was a correct interpretation of its role, based on the plain language of the rule.

Moreover, Atilis' Case Information Statement (CIS) does not state that the appeal was filed to challenge these or any other orders by the Governor or Commissioner, instead referring only to the trial court's final judgment of May 22, 2021. See Fusco v. Bd. of Educ. of the City of Newark, 349 N.J. Super. 455, 460-62 (App. Div. 2002) (because the CIS stated the appeal was taken from a specific order denying reconsideration, we limited our decision to issues concerning that order and rejected arguments regarding other orders without discussion). Further, Rule 2:4-1(b) provides that appeals from final decisions or actions of state agencies or officers "shall be filed within 45 days from the

date of service of the decision or notice of the action taken." This appeal was filed on July 9, 2021, well beyond the forty-five-day period to challenge even the most recent relevant EO and DOH orders, which were issued in 2020.

For the sake of completeness, we briefly address Atilis' collateral attacks of the EOs and DOH orders, which lack substantive merit. First, the EHPA grants the Commissioner broad authority to protect the wellbeing of New Jersey citizens when the Governor has declared a public health emergency. Kravitz v. Murphy, 468 N.J. Super. 592, 612 (App. Div. 2021). This includes "primary jurisdiction, responsibility and authority for . . . planning and executing public health emergency assessment, prevention, preparedness, response and recovery for the State." N.J.S.A. 26:13-3(c).

Second, Atilis' APA-based arguments are inapposite. An EO is not an agency rule under the APA. N.J. State Policemen's Benevolent Ass'n v. Murphy, 470 N.J. Super. 568, 593 (App. Div. 2022). Further, the DOH orders at issue were directed specifically to Atilis as an individual business and authorized by the express terms of the EHPA and DCA, and thus are not agency rules under the APA. See Metromedia, Inc. v. Dir., Div. of Tax'n, 97 N.J. 313, 331-32 (1984) (setting forth standards for determining whether an agency decision or other activity constitutes rulemaking under the APA, including whether the

action is intended to have wide or only individual coverage and whether it reflects a policy "not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization").

As to Atilis' separation of powers argument, the Supreme Court held the DCA's delegation of authority to the executive branch "to issue emergency orders to protect the public health, safety and welfare" is not unconstitutional. Worthington v. Fauver, 88 N.J. 183, 206-09 (1982). In N.J. State Policemen's Benevolent Ass'n, we held the EHPA and DCA each empowered the Governor to issue an EO imposing a vaccination mandate for government workers in "covered high-risk congregate settings." 470 N.J. Super. at 575-81. In Kravitz, we held that EO 128, which permitted residential tenants to use their security deposits to pay rent during the COVID-19 emergency, did not violate the separation of powers doctrine. 468 N.J. Super. at 603, 624. Applying these principles, we hold the EOs restricting the operation of gyms during the pandemic are constitutional.

To the extent we have not specifically addressed any of defendant's remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.