

STATE OF MICHIGAN
COURT OF CLAIMS

THE GYM 24/7 FITNESS, L.L.C.,

Plaintiff,

v

STATE OF MICHIGAN,

Defendant.

OPINION AND ORDER

Case No. 20-000132-MM

Hon. Michael J. Kelly

Pending before the Court in this putative class action is defendant's motion for summary disposition filed pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). For the reasons that follow, the motion is DENIED without prejudice at this time.

I. BACKGROUND

According to the allegations contained in the complaint, plaintiff is a fitness center located in Alma, Michigan. The complaint has its origins in various executive orders Governor Gretchen Whitmer issued in response to the global COVID-19 pandemic. Plaintiff alleges that the "one constant" in the Governor's orders has been to shut down gymnasiums, fitness centers, recreation centers, and similar facilities. The complaint alleges that the Governor, in shuttering plaintiff's business, acted for a public purpose. Nevertheless, plaintiff seeks just compensation for what it describes as a taking of its property. The complaint raises three claims: (1) inverse condemnation; (2) a taking under the Fifth Amendment to the United States Constitution; and (3) a taking under art 10, § 2 of the Michigan Constitution.

The complaint does not identify the specific Executive Orders at issue, but as defendant points out, this state’s gymnasiums, fitness centers, recreation centers, and exercise facilities—particularly in certain, identified regions in this state—were closed by various executive orders for approximately six months. See, e.g., Executive Order No. 2020-160. After the parties submitted their summary disposition briefing in this case, these facilities were permitted to re-open, on or about September 8, 2020, at 11:59 p.m. See Executive Order No. 2020-176.¹

II. ANALYSIS

Defendant’s motion cites MCR 2.116(C)(7),² (C)(8), and (C)(10). While defendant did not physically attach any documents to its briefing—aside from select caselaw and aside from the Governor’s Executive Orders—it repeatedly relies on various internet materials, which it references in its briefing by providing links to the pertinent websites. Given this reliance on documents that are not part of the pleadings, the Court construes defendant’s motion as invoking only MCR 2.116(C)(10). “Under MCR 2.116(C)(10), a party may be entitled to summary disposition if, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact. . . .” *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009), quoting MCR 2.116(C)(10). The moving party “must support its motion with affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted.” *Id.* If the moving party satisfies its burden and properly supports its motion, “the burden

¹ Because the voluntary cessation of an allegedly unconstitutional activity will not moot a controversy, see *Deakins v Monaghan*, 484 US 192, 200 n 4; 108 S Ct 523; 98 L Ed 2d 529 (1988), and because defendant did not raise a mootness argument, the Court will consider the issues raised by the parties notwithstanding that plaintiff’s facility was presumably allowed to re-open.

² Despite citing MCR 2.116(C)(7), defendant’s briefing made no effort to argue why summary disposition was warranted under that subrule.

then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.* at 370 (citation and quotation marks omitted).

In this putative class action, plaintiff alleges takings claims arising under the Michigan and United States constitutions. “The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth . . . provides that private property shall not be taken for public use, without just compensation.” *Lingle v Chevron USA, Inc*, 544 US 528, 536; 125 S Ct 2074; 161 L Ed 2d 876 (2005). The clause was not intended to act as a limit on “governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” *Id.* (citation and quotation marks omitted; second emphasis omitted). “While scholars have offered various justifications for this regime, we have emphasized its role in ‘bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’ ” *Id.*, quoting *Armstrong v United States*, 364 US 40, 49; 80 S Ct 1563; 4 L Ed 2d 1554 (1960).

The classic example of a taking “is a direct government appropriation or physical invasion of private property.” *Lingle*, 544 US at 537. This type of taking has not been alleged in the instant case. Instead, the primary theory in the instant case concerns regulations effectuated by various Executive Orders and whether those regulations amount to a “regulatory taking.” As explained by the Supreme Court of the United States, “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Id.*

The rub, of course, has been—and remains—how to discern how far is “too far.” In answering that question, we must remain cognizant that government regulation—by definition—involves the adjustment of rights for the public good, and that Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. [*Id.* at 538 (citation and quotation marks omitted).]

Plaintiff's briefing asserts two types of regulatory takings: a categorical taking, see *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302, 330; 122 S Ct 1465; 152 L Ed 2d 517 (2002), and a partial taking. This latter type of regulatory taking is evaluated under what is known as the *Penn Central* test. *Id.*, citing *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). This test "calls for the court to consider three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations." *Grand/Sakwa of Northfield, LLC v Northfield Twp*, 304 Mich App 137, 146; 851 NW2d 574 (2014), citing *Penn Central*, 438 US at 124.

Plaintiff also asserts an inverse condemnation claim. This type of claim "is a cause of action against a governmental defendant to recover the value of property which has been taken . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Mays v Snyder*, __ Mich __; __ NW2d __ (2020) (Docket Nos. 157335-157337; 157340-157342), slip op at p. 9 (opinion by BERNSTEIN, J.). "Inverse condemnation can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a taking." *Id.*

As defendant points out, the above standards are not the only pertinent ones in this case, however. This case arises out of government action designed to combat the COVID-19 pandemic. The framework for evaluating government action designed to curb public health emergencies requires a degree of deference to the government's action. See *Jacobson v Massachusetts*, 197 US 11; 25 S Ct 358; 49 L Ed 643 (1905). As synopsised by the United States Court of Appeals for the Fifth Circuit, "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *In re Abbott*, 954 F3d 772, 786 (CA 5, 2020). A state's ability

to protect its citizenry from threats such as COVID-19 flows from the police power of the state. *Id.* at 783, citing *Jacobson*, 197 US at 27. Recently, “[c]ourts from across the country have reaffirmed the historical principle that states and municipalities are granted broad powers to combat the spread of dangerous communicable diseases.” *TJM 64, Inc v Harris*, __ F Supp 3d __, __ (WD Tenn, 2020), slip op at 3 (further citation omitted). Moreover, “the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts.” *League of Independent Fitness Facilitators & Trainers, Inc v Whitmer*, 814 Fed Appx 125, 128 (CA 6, 2020).

In that vein, defendant’s briefing cites examples where emergency measures designed to curb public health threats were found to not constitute a regulatory taking. For instance, earlier this year, the Pennsylvania Supreme Court characterized executive orders designed at slowing the spread of COVID-19 as “a classic example of using the police power to protect the lives, health, morals, comfort, and general welfare of the people.” *Friends of Danny DeVito v Wolf*, 227 A3d 872, 896 (PA, 2020). The Pennsylvania Supreme Court rejected a claim by the petitioners in that case that an executive order temporarily closing certain businesses amounted to a regulatory taking. *Id.* And in *National Amusements Inc v Borough of Palmyra*, 716 F3d 57, 61, 63 (CA 3, 2013), the United States Court of Appeals for the Third Circuit held that the closure of an open-air flea market for five months in order to clear unexploded artillery shells did not amount to a regulatory taking. After citing the notion that public health measures which close establishments “have long been considered permissible exercises of the police power” and not takings, the Third Circuit had little trouble concluding that temporarily closing a market in order to clear unexploded artillery shells “constituted an exercise of its police power that did not require just compensation.” *Id.* at 63. The *Nat’l Amusements* Court cited other examples of temporary closures, such as closing

buildings that have been damaged by fire, as permissible exercises of the police power that do not amount to regulatory takings. *Id.* at 63.

However, the state’s ability to act pursuant to the police power, even during a pandemic, is not absolute. *Maryville Baptist Church, Inc v Beshear*, 957 F3d 610, 615 (CA 6, 2020) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”). As recognized in *Jacobson*, the police power of the state “may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.” *Jacobson*, 197 US at 38. Citing principles of separation of powers, however, the *Jacobson* Court explained that the scope of this type of judicial review is narrow:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, *if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. [*Id.* at 31 (emphasis added).]

With that backdrop, the pertinent inquiry in this case is whether the closure of plaintiff’s facility was arbitrary and oppressive, whether it has no substantial relation to the public health, or whether it is a plain, palpable invasion of rights. On the briefing and documentary evidence presented in the parties’ briefing, the Court concludes that summary disposition is not warranted at this time. In that regard, defendant appears to take the position that any measure taken under the name of public health is permissible and that the Court must conclude that the restrictions at issue were reasonable and not arbitrary because defendant has declared them as such. Indeed, defendant’s briefing makes many factual assertions without any documentary evidence to support those assertions. Caselaw, while giving leeway to the state’s public health measures, does not give

that much leeway, however. Defendant has produced no evidence in support of its initial decision to close fitness facilities, nor has it provided evidence that informed its decision to continue to prohibit use of the facilities, even in a reduced or limited capacity. Nor has defendant produced evidence suggesting why other indoor activities were permitted to resume—such as casinos in August 2020—but gyms and fitness centers remained closed at that time. And while defendant cursorily cites after-the-fact internet materials as justifications for its decisions, there is no documentary evidence suggesting whether the state relied on these materials, or any other evidence, in its decision-making.³ Defendant’s citation to these materials, with no indicia of whether this information ever informed the pertinent decisions in this case, does not satisfy defendant’s burden as the moving party on a motion for summary disposition under MCR 2.116(C)(10).⁴ See *Barnard Mfg*, 287 Mich App at 369-370. Even with the deferential manner of review that applies, the documentary evidence is not sufficient for the Court to make an informed decision on the pertinent inquiry demanded by *Jacobson* and its progeny. As a result, summary disposition will not issue at this time.

³ To the extent defendant cites an August 2020 research paper from the Centers for Disease Control and Prevention, it is not apparent how this paper, published nearly five months after fitness facilities were forced to close, could have informed defendant’s initial round of decision-making. Nor is it apparent how this August 2020 research paper demonstrates that decisions made in March 2020 were not arbitrary or oppressive.

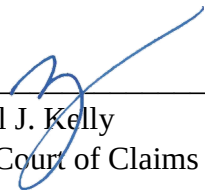
⁴ It should also be noted that some of the materials—which do not appear to be peer-reviewed—do not appear to support defendant’s position. For instance, the article entitled: “*Is Group Exercise Safe? Study Raises Questions about Coronavirus Risk in Gyms*,” suggest ways in which indoor exercise *can* be performed safely, contrary to what has been asserted by defendant.

III. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is DENIED without prejudice.

This is not a final order and it does not resolve the last pending claim or close the case.

September 24, 2020



Michael J. Kelly
Judge, Court of Claims