

**IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS**

IN RE: COVID-19 LITIGATION

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CASE NO. 20 MR 589

HON. RAYLENE G. GRISHCHOW

**RESPONSE TO DEFENDANTS' MOTION TO DISMISS
SECOND AMENDED COMPLAINT**

NOW COMES the Plaintiff, FOX FIRE TAVERN, LLC (“FoxFire”), by and through its attorneys, Myers, Earl & Nelson, P.C., and for its *Response to Governor and IDPH’s Motion to Dismiss Foxfire’s Second Amended Complaint* filed under 2-615 (hereinafter “Motion”), states as follows:

I. Introduction.

We have been here before, and quite frankly, it is exhausting. Again, we have an immense *Motion* purportedly grounded in Section 2-615. This time, however, said *Motion* contains vast swaths of factual allegations not found in the pleadings, conflates pleading requirements with burden of proof requirements, sprinkles in dispositive summary judgment elements, and all the while seeks not to simply strike a count, but dismiss the entire action. The *Motion* is meticulously researched and thoughtfully written, to be certain, but it weaves a tapestry of legal obfuscation. Untangling it is not easy.

For at least the fourth time now, the State argues Foxfire’s case must be dismissed (with prejudice) because there is no “viable” cause of action. (*See State’s original Motion to Dismiss filed 11/10/20, its 2-615 Motion to Dismiss filed 11/24/20, its Motion to Dismiss Amended Complaint filed 1/13/21, and its Motion to Reconsider filed 4/21/21*). The present *Motion* again claims legal deficiency. Yet again, it is not simply a motion to strike (claims are stricken, causes

of action are dismissed), but one which goes for the legal jugular of dismissal of the action itself due to non “viability.” (*State’s Motion*, pp. 1, 5, 12, 16 & 24). For reasons unknown, the State seems unable to accept the Second District and this very Court’s finding of viability of an “arbitrary and unreasonable” claim.

The constitutional issues in this case are clear. Our Governor declared all 102 counties of the State a disaster area for more than a year, not simply the worst hit counties, but all of them. As we stand here today, the Governor still proclaims that every single county remains a “disaster area.” While Covid-19 has been a terrible trial, the focus of this case is the unprecedented duration and scope of Governor Pritzker’s rule by executive fiat. Never in our State’s history has an executive used a “temporary” emergency power across an entire state for calendar years. The gravamen of Plaintiff’s case has always been that our Governor seized on the ambiguity of the Illinois Emergency Management Agency Act, specifically his ability to control “ingress and egress,” the “movement of persons” and the “occupancy of premises” in a (state sized) disaster zone, and wandered far beyond his constitutional role as chief executive. He created and then perpetuated new law via executive order. As it pertains to FoxFire, our Governor attempted to stop their use of their own private property for its sole purpose for months – he prohibited indoor dining at an indoor fine dining restaurant in the winter. Our Governor believes his actions were lawful, justified, and cannot be questioned in court. FoxFire posits that this gubernatorial overreach was unreasonable and unconstitutional.

Foxfire contends that our Governor wandered outside his constitutional charge. He created brand new laws via executive order (a legislative function), he extended his own laws for months on end (a legislative function), and he did all of this while maintaining his actions were not reviewable (a judicial function). The Governor’s actions are unprecedented, left unchallenged they

become precedent, and given recent restriction whisperings, may very well happen again. Evaluating these actions is precisely the role of the judiciary. Regrettably, the Governor appears intent on cutting this case off at its pleading stage, before basic factfinding concludes. In this procedural posture the Governor again, for the third (fourth or fifth, depending on how you count) time seeks complete dismissal due to non-viability. What follows is a point-by-point refutation of the State's recycled 2-615 claims.

II. Argument.

a.) Counts I-IV remain in the Second Amended Complaint to preserve the record, they are not an attempt to replead dismissed counts.

We begin with what was presumed obvious – the reason Counts I through IV remain in the *Second Amended Complaint*. Plaintiff agrees with the State's contention that these counts were dismissed with prejudice by this Court. (*State's Motion*, p. 5). Said dismissal was based on the Second District opinion, which all parties and the Court believed summarily resolved each as a matter of law. Thus, their inclusion in the present pleading was not an attempt to breathe life into the legally dead, but simply to preserve the record. As this Court knows, and it is assumed the State is aware, if an amended complaint is complete in and of itself, and if it abandons or does not “refer to or adopt prior pleadings,” said earlier pleadings are deemed withdrawn – no longer considered part of the case at bar for the purposes of the appellate record. *Skarin Custom Homes, Inc. v. Ross*, 388 Ill. App. 3d 739, 746 (2d Dist. 2009). Given the severity of this rule, the undersigned included Counts I through IV to avoid abandonment – no more, no less. There is no intent to replead. We are all aware the only remaining claims reside in Count V. The State's request that Counts I-IV “should again be dismissed with prejudice” misses the mark. (*State's Motion*, p. 5). One cannot not re-dismiss that which has been prejudicially dismissed. Nothing more need be said on this point.

b.) The Defendants' 2-615 problem(s).

Before delving into the 2-615 weeds, this Court is urged to remember the standard governing this section. In ruling on a motion to dismiss brought thereunder, a court “should deny the motion unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover.” *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 924 (4th Dist. 1992). Foxfire acknowledges that portions of the complaint are in fact alleged based on “information and belief,” but this is permissible. Since this is not a discovery motion, FoxFire merely informs the Court that it believes the Governor possesses additional data, which was withheld, which no privilege log was produced on, and which is highly relevant to the facts of the case at bar. FoxFire is attempting to resolve such at present with a Request to Admit. Given these facts, all claims by the State that the pleadings should be dismissed due to insufficient factual allegations should be ignored. A party should not be permitted to complain of factual deficiencies due to their own incomplete production. This alone makes the present *Motion* premature, if not improper.

Next, FoxFire concedes that the State can test the legal sufficiency of a complaint which alleges unconstitutional executive orders through 2-615. *See Terry v. Metro. Pier & Exposition Auth.*, 271 Ill. App. 3d 446, 450 (1st Dist. 1995). Where the State goes wrong, however, is that such a motion is to only attack the complaint’s legal sufficiency; it is not to raise affirmative factual defenses or the Governor’s own rendition of facts necessitating his actions. *DeWoskin v. Loew's Chicago Cinema, Inc.*, 306 Ill. App. 3d 504, 513-14 (1st Dist. 1999). Unfortunately, the present *Motion* engages in the forbidden, it interjects its own facts throughout. (*State's Motion*, pp. 1-3 & 17-19). Discarding such, and taking all well pled facts and reasonable inferences as true, the sole 2-615 question is: whether “sufficient facts are stated in the complaint which, if true, **could** entitle plaintiff to relief.” (emphasis added) *Id.* at 514. This is not a high burden, and, is indisputably met.

- c.) *The Governor’s continual assertion of no “viable” cause of action must stop. Both the Second District’s Opinion and this Court’s April 7, 2021, Order, establish a viable cause of action on reasonableness grounds. While the State may disagree with that holding, it is not in dispute.***

Both the Second District’s opinion and this Court’s April 7, 2021, ruling could not be clearer: a viable cause of action exists on reasonableness grounds. (*See this Court’s April 7, 2021, Order*, pp. 4-5). As it turns out, the State admitted viability in its earlier *2-615 Motion* when they conceded that FoxFire has an avenue to challenge the arbitrary and unreasonable nature of EO61 by alleging: “the orders violate the state or federal constitution.” (*See Governor and IDPH’s Motion to Dismiss FoxFire’s Amended Complaint*, filed 1/13/21, p. 5). That was half a year ago. Now, after the arbitrary and unreasonable claims have been further parsed out into four distinct constitutional violations, “non-viability” and outright dismissal are back on the table. (*State’s Motion*, pp. 1, 5, 12, 16 & 24). It was believed the parties understood that while a standalone claim for unreasonableness may not exist, constitutional claim(s) unquestionably do. Now that those constitutional claims have been re-pled, the State again pivots to claim: “Foxfire cannot prevail on its constitutional challenges to EO61.” (*Id.* at 26). First, there was no viable action, then there was a constitutional reasonableness action, and now there is no longer viability, again. We need to stop going backwards.

- d.) *The claim that Count V should be dismissed (with prejudice) because of a failure to “allege a violation of the Illinois constitution” is disingenuous.***

Deciphering the Governor’s 26 page argument is difficult. Nevertheless, it appears to argue that dismissal is proper because there are no clear allegations of constitutional violations. (*State’s Motion*, pp. 1, 4, 6, including fn. 5). This is nonsense. The State’s own *Motion* has no problem identifying the four constitutional violations alleged: 1) separation of powers, 2) substantive due process, 3) equal protection, and 4) procedural due process. (*State’s Motion*, pp. 1 & 4). The State

is quite aware of the grounds they are being called to defend. While more specific factual allegations may supplement the pleadings upon completion of discovery, as will be shown below, each constitutional claim is sufficient to stand on its own at present.

e.) The Second Amended Complaint properly pleads ultimate facts establishing a constitutional separation of powers claim.

Next, the State's *Motion* incorrectly pigeonholes the Plaintiff's separation of powers claim and the entire analysis devolves accordingly. Looking to the pleading itself, and not the State's rendition thereof, FoxFire alleges: a) that the Governor used his purported IEMAA authority to legislate the use of private property; b) that his action is indisputably a legislative function – whether engaging in lawmaking or utilizing the Legislature's police power to promulgate regulations to protect the public health; and, c) that through EO61's progeny (which now include EO 2020-70, EO 2020-73, EO 2020-74, and EO 2021-01) he extended his lawmaking shut down for a quarter of a year – far more than “temporary” emergency use. (*Second Amended Complaint*, ¶¶ 35-36, 73-74).

The State may recast FoxFire's separation of powers claim as solely about unconstitutional delegation of lawmaking authority, but that is not what is at issue. This is not about an improper delegation, but improper seizure of power. The present separation of powers claim argues that the Governor himself has run afoul of the separation of powers principle found in Article II, Section I, of our Constitution. All ultimate facts required to plead a separation of powers violation are present. (*See Complaint, “Facts Common to All Counts,”* ¶¶ 73, 74, & 80). Our Governor has done more than “temporarily” veer into the legislative and judicial lanes.

f.) Not only does the Complaint plead sufficient ultimate facts to allege a substantive due process violation, but the State's Motion imposes the wrong standard of review.

Turning our gaze to substantive due process, and streamlining a complex analysis, Defendants contend that the *National Paint* case – which establishes that a right to buy spray paint is not a fundamental right – makes clear that Corporations cannot have fundamental rights, and without the presence of a fundamental right, FoxFire’s substantive due process claim is subject to rational basis review. (See *State’s Motion*, pp. 11-17) *Nat’l Paint and Coatings Ass’n v. City of Chicago*, 45 F. 3d 1124, 1129 (7th Cir. 1995). Under such review, the State wants this Court to believe that FoxFire cannot prevail under any facts or circumstances. While tidy and well written, this argument improperly cherry picks language from non-analogous cases to establish the wrong standard and reach the wrong conclusion. Thankfully for all, this Court does not have to go through the mountain of case law found in the Defendants’ *Motion* to determine the propriety of the substantive due process claim. Only a single Illinois Supreme Court case is needed – *LMP Services Inc. v. City of Chicago*, 2019 IL 123123.

Before diving into this seminal case, we must take note that the Governor’s *Motion* does the opposite of what is required in any substantive due process analysis, it fails to describe properly and “carefully” the right infringed. *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 72. According to Defendants, the right at issue is the temporary suspension of the right to serve food patrons indoors. (*State’s Motion*, pp. 11 & 16). This is not the right at issue. FoxFire’s infringed right is a corporation’s right to use its private land/property for the purpose of pursuing its lawful business. This is not even about pursuing a trade, but private property right infringement. (*Complaint*, ¶ 1-3, 35).

With this right accurately defined, we turn our analysis to whether it is fundamental. On this point the State goes to great lengths arguing that businesses cannot have fundamental rights, and irrespective of this conclusion, the right at issue is anything but fundamental. (*State’s Motion*,

pp. 12-15). Instead of scrutinizing the myriad of cases the State cites – especially the litany of non-analogous federal cases – FoxFire again redirects this Court to a single case issued by our State’s highest court on substantive due process - *LMP Services, Inc. v. City of Chicago*, 2019 IL 123123.

Any reasonable interpretation of *LMP Services* finds that businesses do have fundamental rights, and moreover, “brick and mortar” restaurants have protected property interests within the context of substantive due process. Although the focus of *LMP* is on food truck restrictions, our highest court wrestled therein with the property rights food trucks versus standard “brick and mortar” restaurants, which is of great assistance to us. The takeaways from this case are manifest. First, according to *LMP*, the plaintiff’s business did in fact have protected interests. *Id.* at ¶ 23. While the Court found that a food truck business did not have a constitutionally protected property interest to conduct business at a particular location (as it was mobile), the Court also found that “brick and mortar” restaurants are different – they have constitutionally protected property interest to use their property in the pursuit of their business. *Id.* These holdings are clear and prescient: FoxFire has a fundamental and protected interest to use its private property for a lawful purpose.

So, contrary to the Governor’s *Motion*, Foxfire submits that it does enjoy a protected and fundamental property interests which EO61 infringes upon. *See also Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 142 (3d Cir. 2000). Consequently, because EO61 constitutes executive interference with private property use, the standard to be applied is actually “strict scrutiny.” In order to survive this review, the Governor’s numerous executive orders must be narrowly tailored to serve a compelling interest. The tables have turned considerably. Be that as it may, unlike the State, the undersigned submits resolution of this issue is not proper 2-615 fodder, but for a later time.

Pausing for a moment, it is necessary to note the legal depths we have arrived at in our 2-615 analysis. While FoxFire still engages in basic discovery, the parties presently argue about the Constitutional review standards to be applied by the Court at a hearing. Most of this argument is more appropriate in a partial summary judgment setting, not some all-encompassing 2-615 Motion. We are not arguing about defects apparent on the face of pleadings. Here, the State conflates pleading burden with the persuasion burdens. It is respectfully submitted that the State needs to stop bringing the same 2-615 Motion with an action of unquestionable viability. Challenging what the Plaintiff must prove at trial, without allowing them to fully engage in discovery, has the process backwards.

g.) Equal protection propriety.

Because the equal protection analysis is similar to the due process analysis, and because this brief is already long enough, FoxFire adopts the analysis above. Again, FoxFire reminds the Court it is still engaged in discovery, and after a few additional areas of inquiry are resolved, it will be positioned to provide more concrete allegations beyond “information and belief.” It is impossible for FoxFire to plead more specific equal protection claims while the Governor omits certain data concerning restaurants.

h.) The Procedural Due Process red-herring.

In closing, the State’s Motion raises a red-herring argument concerning procedural due process – that the Governor is not required to provide “predeprivation process before implementing EO61.” No kidding. No one disputes this, nor has FoxFire alleged a predeprivation denial. Since this point is not disputed nor even argued, it is nothing more than a legal red-herring.

We all know basics of due process requirements: notice and an opportunity to be heard. The irony here is that the Governor consistently claims that the existence of our case exists is

evidence of post-deprivation due process. (*State's Motion*, p. 22). Such a claim is circular reasoning at its finest. The Governor has consistently argued (both orally and in briefs) that his actions are not reviewable by the courts – the only remedy being voting him out of office. Our Chief Executive's legal position is that his actions are not reviewable, this case must be dismissed summarily, and this summary dismissal – which is clearly not a decision on the merits – is sufficient process. Such a position is indefensible.

III. Conclusion

For the foregoing reasons the Plaintiff, FOX FIRE TAVERN, LLC, respectfully prays that this Honorable Court deny the relief sought in the *Governor and IDPH's Motion to Dismiss Foxfire's Second Amended Complaint*, and grant such other and further relief as the Court deems appropriate in the circumstances.

Respectfully submitted,

/s/ **Kevin L. Nelson, Esq.**
(one of the Attorneys for FoxFire)

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