

STATE OF ILLINOIS
IN THE FOURTH JUDICIAL CIRCUIT
CLAY COUNTY

JAMES MAINER, KALI MAINER, and)
HCL DELUXE TAN, LLC, an Illinois)
Limited liability company,)

2020CH9

Plaintiffs,)

Vs.)

Case No. 2020-CH-_____

ILLINOIS DEPARTMENT OF PUBLIC)
HEALTH and DR. NGOZI EZIKE, in her)
official capacity as Director of the Illinois)
Department of Public Health,)

Defendants.)

VERIFIED COMPLAINT

Plaintiffs, JAMES MAINER, KALI MAINER and HCL DELUXE TAN, LLC., by and through their attorneys, Thomas G. DeVore, Erik D. Hyam, and DeVore Law Office, LLC., state as their Verified Complaint for Declaratory and Injunctive Relief against Defendants, ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and DR. NGOZI EZIKE in her official capacity as Director of the Illinois Department of Public Health, as follows:

FACTS COMMON TO ALL COUNTS

1. Plaintiffs JAMES MAINER and KALI MAINER (the "Mainers") are husband and wife who reside in Clay County, Illinois.
2. James Mainer is an U.S. Army veteran who enlisted following the terrorist attacks of September 11th, 2001 and served during Operation Iraqi Freedom being a member of one of the

first U.S. Army units to arrive in Baghdad, Iraq following the U.S. Invasion.

3. The Mainers have three (3) children ages 12, 10 and 8.

4. Plaintiff, HCL DELUXE TAN, LLC. (“HCL”) is a limited liability company organized and existing under and by virtue of the laws of the State of Illinois.

5. The Mainers are the only members and managers of HCL.

6. HCL rents and occupies a small store front in Clay City, Clay County, Illinois.

7. HCL operates an indoor tanning salon and also has a small retail shop.

8. HCL closed its doors in March of 2020 following the imposition of an executive order issued by Governor J.B. Pritzker which deemed HCL’s business to be “non-essential” and ordered all such businesses closed until further order.

9. The closure of HCL placed a significant financial burden on HCL and the Mainers.

10. Such burden included the requirement to continue paying rent and utilities despite being unable to earn any revenue.

11. HCL remained closed until May 6, 2020.

12. HCL has been open to the public since May 6, 2020 without any objection from local public health officials.

13. Defendant, Illinois Department of Public Health (the “Department”), is a state executive agency created by the Illinois Legislature pursuant to the Illinois Department of Public Health Act (“IDPHA”). See *20 ILCS 2305 et seq.*

14. Defendant, Dr. Ngozi Ezike (“Ezike”) is the Director of the Department who is tasked with administering, overseeing, and executing all the duties and functions of the Department.

15. The Department is the agency of the State of Illinois charged with supervision of

the interests of the health and lives of the people of the State. (See 20 ILCS 2305/2(a).)

16. The Department has “supreme authority on matters of quarantine and isolation...”
Id. (Emphasis Added.)

17. The Illinois General Assembly has, subject to certain procedural due process protections, delegated to the Department specific authority to close a business. (See 20 ILCS 2305/2(b).)

18. Pursuant to the IDPHA, in order to close a business, the Department must (1) obtain the consent of the business owner, (2) obtain a court order, or (3) issue a summary closure of the business and obtain a court order within 48 hours of the summary closure. (See 720 ILCS 2305/2(c).)

19. The IDPHA requires the Department to provide very specific notice to an individual or business sought to be closed, which notice requires that the Department advise of the right to counsel and counsel will be provided for someone if they cannot afford one. *Id.*

20. The Illinois Legislature explicitly provided a clear right of due process to any individual or business which might be quarantined, isolated, or closed, by the Department.

21. The legislature defined the burden upon the Department requesting a Court ordered closure of business thus:

“To obtain a court order [for closure], the Department, by clear and convincing evidence, must prove that the public's health and welfare are significantly endangered by a person or group of persons that has, that is suspected of having, that has been exposed to, or that is reasonably believed to have been exposed to a dangerously contagious or infectious disease including non-compliant tuberculosis patients or by a place where there is a significant amount of activity likely to spread a dangerously contagious or infectious disease. The Department must also prove that all other reasonable means of correcting the problem have been exhausted and no less restrictive alternative exists.” 20 ILCS 2305/2(c)

22. The statute recognizes the right to be free to keep one's business open, even in a

public health emergency, unless the deprivation thereof is taken consistent with the procedural safeguards within the IDPHA.

23. On or about May 15, 2020, the Department and Ezike filed a Notice of Emergency Amendment (“the Amendment”) to the Illinois Administrative Code (the “Code”). A true and accurate copy of the Amendment is attached hereto as Exhibit A and incorporated by reference as if fully restated herein.

24. The Department of Public Health published the Amendment on May 18, 2020.

25. The Amendment adds Section 690.40 to Title 77, Chapter I, Subchapter k, Part 690, Subpart A of the Code which new section is entitled “Pandemic or Epidemic Respiratory Disease – Emergency Provisions EMERGENCY[.]”

26. The Amendment imposes an immediate closure of HCL’s business pursuant to Section 690.40(b)(3) thereof.

27. The Amendment imposes criminal punishment upon any person or entity that violates the closure. (See Section 690.40(c) of the Amendment.)

28. The Amendment provides no notice nor any mechanism to challenge the Department’s closure of Plaintiff’s business.

29. The Amendment vitiates the procedural due process required by statute.

30. The Amendment vitiates the substantive due process specifically defined by the legislature by vitiating the burden of proof required for a closure of business.

31. The Amendment is an absolute violation of the rule making authority for the Department as the Department has infringed upon the purview statute, which is a power vested solely with our legislative branch.

32. Moreover, it is an infringement on the authority of this Court who is vested with

the discretion of determining as to whether or not an order of closure shall issue.

COUNT I
DECLARATORY JUDGMENT

33. Plaintiffs restate and reallege the facts and allegations contained in paragraphs 1 through 32, inclusive, as if fully restated herein.

34. Plaintiffs have a right to seek a declaration that the Defendants usurped authority vested solely with the Illinois Legislature by unlawfully implementing its recent emergency rule to provide sweeping substantive and procedural legal reforms, granting new powers and authority to the Department, stripping Plaintiffs of their due process rights provided by the Legislature, and vitiating the oversight of the Courts in determining the propriety of an order to close a business.

35. Defendants' brazen usurping of authority of the legislative and judicial branches of government now provides an automatic closure, without due process of law, of those businesses defined in the Amendment.

36. The Amendment unlawfully denies Plaintiffs the right to keep the business open, absent it constituting a clear public health risk as determined by a Court of this state, a right which the Legislature explicitly provided by statute.

37. The Illinois Administrative Procedure Act applies to and governs the rulemaking and regulatory actions of the Department. (*5 ILCS 100/1-5 and 1-20*)

38. The Illinois Administrative Procedure Act requires that all rules enacted by the Department comply with the provisions of Article 10 of the Illinois Administrative Procedure Act.

39. The Illinois Administrative Procedure Act only authorizes the Department to enact rules that either (1) establish procedures governing contested matters before the Department or (2) implement or prescribe existing law or policy. (*See 5 ILCS 100/5-10(a).*)

40. The Illinois Administrative Procedure Act does not give the Department statutory

authority to enact rules that change the law.

41. The IDPHA specifically provides the Department may “adopt, promulgate, repeal and amend rules and regulations...” (See *20 ILCS 2305/2(a)*.)

42. Nothing within the powers granted to the Department by the Legislature allows the Department to amend or repeal any portion of a statute passed by the Legislature.

43. The Amendment violates the Illinois Administrative Procedure Act because it unlawfully removes the procedural due process and substantive safeguards guaranteed to any individual or business whose quarantine, isolation or closure is sought by the Department.

44. The Amendment violates the Illinois Administrative Procedure Act because it dramatically expands the powers, specifically limited by the Legislature, of the Department to close a business.

45. For the same reason, the Amendment violates the Illinois Administrative Procedure Act and the IDPHA, because the Amendment creates a substantive change in the law, which the Department does not have the authority to enact.

46. Because the Amendment violates the Illinois Administrative Procedure Act and the Department exceeded its statutory authority in enacting the Amendment, the Amendment is invalid and void *ab initio*.

47. A justiciable controversy exists between the Plaintiffs and the Defendants concerning the authority of the Department to enact the Amendment to Title 77, Chapter I, Subchapter k, Part 690, Subpart A of the Code and validity of the Amendments to Title 77, Chapter I, Subchapter k, Part 690, Subpart A of the Code.

48. Under the provisions of 735 ILCS 5/2-701, this Court is vested with the power to declare the rights and liabilities of the parties and to provide such other and further relief as may

be necessary to enforce the same.

WHEREFORE, Plaintiffs JAMES MAINER, KALI MAINER and HCL DELUXE TAN, LLC., respectfully pray this Honorable Court enter an order:

(a) Declaring that the Illinois Department of Health exceeded its authority under the Illinois Administrative Procedure Act in vitiating the procedural and substantive due process provided by the legislature under 20 ILCS 2305 *et seq.*

(b) Specifically, declaring that the Illinois Department of Public Health exceeded its authority under the Illinois Department of Public Health Act in removing the procedural and substantive safeguards contained in 20 ILCS 2305/2(c);

(c) Declaring that the Amendment to Title 77, Chapter I, Subchapter k, Part 690, Subpart A of the Illinois Administrative Code is void and invalid;

(d) An award of attorneys' fees pursuant to 5 ILCS 100/10-55(c);

(e) An award of costs; and

(f) Such other relief as this Court deems to be equitable and just.

COUNT II
COMPLAINT FOR PERMANENT INJUNCTION

49. Plaintiffs restate and reallege the facts and allegations contained in paragraphs 1 through 48, inclusive, as if more fully restated herein.

50. The implementation of the Amendment will cause immediate and irreparable damage to Plaintiffs as, among other things, the Plaintiffs right to freely move about and the right of a business to be open have been stripped away without due process as guaranteed by the legislature pursuant to the IDPHA.

51. In addition, Plaintiffs are forced to comply with the unlawful emergency order of the Department or be subject to criminal prosecution and a real likelihood of deprivation of their

liberties for violating the Amendment.

52. Plaintiffs will suffer irreparable injuries based on the implementation of the Amendment because the Amendment infringes on Plaintiffs' procedural and substantive rights.

53. Plaintiffs also have an interest in not being subject to unauthorized rule making by an administrative body.

54. Plaintiffs have no adequate remedy at law because Plaintiffs' only option is to be deprived of their right to operate their business or be subject to further deprivation of their liberties through criminal prosecution.

WHEREFORE, Plaintiffs JAMES MAINER, KALI MAINER and HCL DELUXE TAN, LLC., respectfully pray this Honorable Court enter an order in their favor and against Defendants that grants Plaintiffs the following relief:

- (a) Find Plaintiffs have a right to insist any rule-making of the Department be only as authorized under the Illinois Administrative Code and consistent with the substantive law within Illinois Department of Health Act;
- (b) Find Plaintiffs are irreparably harmed each and every moment this emergency rule is in effect ordering their business closed and subjecting them to the risk of criminal prosecution;
- (c) Find and Plaintiffs have no adequate remedy at law to protect their rights against this unlawful rule of Defendants beyond injunctive relief.
- (d) Find and determine Plaintiffs have a likelihood of success on the merits;
- (e) Entering a permanent injunction ordering the Defendants from enforcing the emergency rule from this date forward;
- (f) An award of attorneys' fees pursuant to 5 ILCS 100/10-55(c);

- (g) An award of costs; and
- (h) Such other relief as this Court deems to be equitable and just.

Respectfully submitted,

JAMES MAINER, KALIE MAINER and
HCL DELUXE TAN, LLC., Plaintiffs.

By: /s/ Thomas G. DeVore
One of Their Attorneys

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Verification

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned, certifies that the statements set forth in this Verified Complaint for Injunctive and Other Relief are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

May 19, 2020
Date

/s/ James Mainer
JAMES MAINER

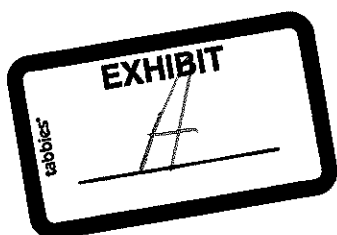


Emergency Rules: Section 690.40 Pandemic or Epidemic Respiratory Disease

The Illinois Department of Public Health issued the following emergency rule in the Control of Communicable Diseases Code (77 Ill. Adm. Code 690), effective May 15, 2020:

Section 690.40 Pandemic or Epidemic Respiratory Disease – Emergency Provisions EMERGENCY

- a) *The State Department of Public Health has general supervision of the interests of the health and lives of the people of the State. As part of that general supervision, the Department has jurisdiction to address dangerously contagious or infectious diseases outbreaks to protect the health and lives of the people of the State. The Department shall take means it considers necessary to restrict and suppress dangerously contagious or infectious diseases, especially when existing in epidemic form. (Section 2(a) of the Act)*
- b) In order to restrict and suppress the novel coronavirus SARS-CoV-2 that causes the coronavirus disease 2019 (COVID-19), a dangerously contagious and infectious respiratory disease in the form of a pandemic or epidemic, which is spread person to person in respiratory droplets released by a person infected with the disease, the Department implements the following restrictions and requirements:
- 1) Businesses and establishments that serve food or beverages, including, but not limited to, restaurants, food buffets, self-serve areas, bars, taverns, pubs, wineries, breweries, or beer gardens, that operate under a permit or license issued by the State or local health authority, shall not allow indoor on-site consumption of food or beverages. Service shall be limited to drive-through, delivery, curbside, or pick up only. Businesses and establishments located in airports and hospitals are exempt from the requirements of this Section.
 - 2) Businesses and establishments that offer indoor fitness, exercise, physical workout or non-medical wellness services, such as health clubs or centers, fitness clubs or centers, gyms, tennis clubs, swimming pools, shall not allow on-site indoor fitness, exercise, workout or non-medical wellness options to customers, including but not limited to, classes, personal training, or individual customer use of exercise equipment or facilities. Service shall be limited to the sale of retail goods via drive-through, delivery, or pick up only, or the use of exercise equipment or the indoor



use of facilities for the recording and streaming of online classes and instructional videos only.

- 3) Businesses or establishments that offer cosmetology, esthetics, nail technology, barber, tanning, body art, or similar non-medical personal care services, treatments, procedures or therapies shall not provide on-site services. Service shall be limited to the sale of retail goods via drive-through, delivery, curbside, or pick up only

- c) Any person who violates the provisions of this Section shall be subject to the penalties set forth in Section 8.1 of the Act.

As the Director of Public Health, I am authorized to institute prosecutions and proceedings for violation of this rule. I also designate local health departments to institute prosecutions and proceedings on businesses or establishments that violate this rule. (20 ILCS 2305/8.1) I direct local health departments to coordinate with Illinois State Police and local law enforcement as provided by the Department of Public Health Act. (20 ILCS 2305/1.1 *et seq.*)

Signed:

