CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 33
HEARING DATE: 03/18/21

15. TIME: 9:00 CASE#: MSC20-02513
CASE NAME: KATZ & KATZ HOSPITALITY VS CO
HEARING ON DEMURRER TO COMPLAINT of KATZ & KATZ HOSPITALITY GROUP LLC FILED BY CONTRA COSTA COUNTY HEALTH SERVICES, CHRIS
**** TENTATIVE RULING: ****

Counsel to appear for oral argument for the following tentative ruling that issued on March 3, 2021.

Before the Court is Defendants' Demurrer to Plaintiff's First Amended Complaint. Plaintiffs Katz & Katz Hospitality Group LLC, Bar Cava LLC, and Lotus Organic LLC challenge Contra Costa Regional Order No. HO-COVID 19-37 (the County Order), which formally implemented, *inter alia*, a temporary prohibition on on-site, outdoor dining at restaurants set forth in the State of California's December 3, 2020 "Regional Stay At Home Order" (the State Order) in response to rising cases of COVID-19 infection. The County Order was implemented in advance of the triggering event set out in the State Order (less than 15% hospital intensive care unit availability) and was then rescinded effective December 17, 2020, when the State Order came into effect. The Complaint seeks a declaration that the County Order violates Article 1, Section 1 of the California Constitution and an order permanently enjoining Defendants from enforcing the County Order.

For the following reasons, Defendants' demurrer is sustained without leave to amend.

Requests for Judicial Notice
Plaintiffs' Request for Judicial Notice of the Declaration of Dr. Farnitano and the documents from Los Angeles County Case No. 20STCP03881 at Exhibit D to Plaintiffs' opposition is granted-in-part and denied-in-part: the Court takes judicial notice of the existence of these documents, but the statements within them are not subject to judicial notice. (See *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914 ["a court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."] (italics original)).

Plaintiffs' Request for Judicial Notice of the various website and news media articles at Exhibits A, C, D and G-2 and the press conference recordings or press releases at Exhibits A-1and B is granted-in-part and denied-in-part: the Court may take judicial notice of the existence of these

documents and recordings, but the statements within them are not subject to judicial notice. (*Ragland v. U.S. Bank National Assn*. (2012) 209 Cal.App.4th 182, 193; *Unlimited Adjusting Grp., Inc. v. Wells Fargo Bank, N.A.* (2009) 174 Cal.App. 4th 883, 888 [statements of fact contained in press release are not subject to judicial notice.])

Plaintiffs' Request for Judicial Notice of the January 2021 Stanford University Study at Exhibit F is denied. The COVID-19 virus is a novel and evolving subject of scientific study and thus the assertions and findings contained therein are not "facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias" etc. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.)

Plaintiffs' Request for Judicial Notice of the documents evidencing population and ICU data at Exhibits G, G-1, H, and H-1 is granted. Evidence Code § 452 (h).

Legal Standard for Ruling On Demurrer

In ruling on a demurrer, the Court must accept as true all well-pled factual allegations of the complaint, but not legal or factual conclusions or contentions of law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865; *Carloss v. County of Alameda* (2015) 242 Cal.App.4th 116, 123 [citing *Blank v. Kirw*an (1985) 39 Cal.3d 311, 318].) In determining whether a complaint states a claim for relief, the Court gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 [citation omitted].) The Court also considers matters of which the Court can properly take judicial notice. (*Carloss v. County of Alameda*, supra, 242 Cal.App.4th at 123.)

Leave to amend should be denied when "there are no circumstances under which an amendment would serve any useful purpose." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 460 [citation omitted]). For leave to amend to be granted, a Plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 349.)

Analysis

There is no dispute that the County Order was rescinded effective December 17, 2020 and is no longer in effect. (Defendant's Request for Judicial Notice, Ex. 1.) Plaintiffs' request for declaratory and injunctive relief is therefore moot.

Plaintiffs assert that "a demurrer is a procedurally inappropriate method for disposing of a complaint for declaratory relief." (Opp. 11-15.) This is not the whole of the rule. Instead, "where facts appear from the face of the complaint which would justify a trial court in concluding that its determination is not necessary or proper, it has been held that the court may sustain a general demurrer to the complaint for declaratory relief." *Moss v. Moss* (1942) 20 Cal.2d 640, 642. And a "trial court may properly sustain a general demurrer to a declaratory relief action without leave to amend when the controversy presented can be determined as a matter of law." (*Silver v. Los Angeles* (1963) 217 Cal.App.2d 134, 138; see also *City of Fresno v. Calif. Highway Comm.* (1981) 118 Cal.App.3d 687, 699.)

Plaintiffs allege, without reference to supporting facts or evidence, that an actual controversy persists because "Defendants' conduct is likely to recur during the pendency of the COVID-19 pandemic." (Opp. 14:1-3.) The Court declines to speculate on what the County, or the COVID-19 pandemic, may do in the future or to engage in advisory opinion-making. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (*People ex rel. Lynch v. Superior Court,* (1970) 1 Cal. 3d 910, 912.)

Plaintiffs also argue that the California Supreme Court has held that "questions of general public concern do not become moot by reason of the fact that the ensuing judgment may no longer be binding upon a party to the action." *In re William M.* (1970) 3 Cal.3d 16, 23. The issue here is not that the ensuing judgment may no longer be binding on a party to the action, but rather the rescission of the County Order resolves any question of general public concern.

Were Plaintiffs' request for declaratory and injunctive relief not moot, this Court would still sustain the demurrer, for the following reasons.

The rational basis test applies to use of police powers to promote public safety during a public health crisis. The controlling case is *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11. The Supreme Court explained that "when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless: (1) there is no real or substantial relation to public health; or (2) the measures are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law." (*Id*. at 30.)

Plaintiffs argue that the County Order is not rationally related to the purpose of reducing the spread of COVID-19 because, they allege, Defendants have not traced any specific COVID-19 infections to outdoor dining in Contra Costa County; cases are tracked based on the residence of the infected person and not necessarily where transmission occurred; and "a large portion of deaths" have occurred in long term care facilities. (Opp. 5:15-26, citing to First Amended Complaint, Ex. D.) These allegations do not address whether the County Order is rationally related to its purpose; they merely propose alternative bases for government action that Plaintiffs would apparently prefer.

Plaintiffs further contend that County officials "relied heavily on irrational, speculative, and capricious conclusions" in issuing the order, citing the fact that deaths have been lower than originally predicted. (Opp. 18:11-12.) This assertion is refuted by the rationale set forth in the Order itself, which is an exhibit to Plaintiffs' Complaint. On a demurrer, the court disregards factual allegations that conflict with the content of exhibits to the complaint. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505.) The County Order, which is attached as Exhibit A to the Complaint, states on its face the following rationale for its temporary prohibition on on-site, outdoor dining:

> Gatherings of people – social or otherwise – pose risks of virus transmission, even with social distancing and the use [of] face coverings, as neither is 100 percent effective preventing transmission of the virus that causes COVID-19. The transmission risk is higher indoors than outdoors, but even outdoor gatherings can result in viral transmissions, particularly in locations where people remove their face coverings to eat or drink. Large gatherings are more risky than

> small gatherings, and prolonged interactions – i.e., longer than 145 minutes – are more risky than brief interactions…Because of the current case and hospitalization rates, it is necessary to impose additional restrictions on businesses and personal activities."

(FAC, Exhibit A, p. 2)

The purpose of the County Order was to slow the spread of COVID-19 to protect hospital availability. This is an established, legitimate government purpose: the legislature has authorized health officers to "take measures as may be necessary to prevent the spread of disease or occurrence of additional cases" and during a state of emergency, a health officer "may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard." (Health & Safety Code §§ 20175, 101040.)

On its face, the County Order demonstrates a rational connection between its purpose and the prohibition it enacts: it identifies known risk factors for COVID-19 and sets forth measures to reduce those risk factors. (FAC, Exhibit A, p. 2.) Given the plain language of the Order, Plaintiffs have not stated facts showing there is no real or substantial relation to public health; or the measures are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law."