

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 90 MM 2020

Private Properties, LLC, a Pennsylvania Limited Liability Company, Chester Properties, LLC, a Pennsylvania Limited Liability Company, and the Pennsylvania Residential Owners Association, a Pennsylvania Non-Stock Non-Profit on Behalf of all Similarly Situated Parties,

Petitioners

v.

**Tom Wolf, Governor of the Commonwealth of Pennsylvania and
Josh Shapiro, Attorney General of Commonwealth of Pennsylvania**

Respondents

APPLICATION FOR LEAVE

Counsel for Petitioners:

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APPLICATION FOR LEAVE TO FILE A REPLY TO THE ANSWER

AND NOW, come the Petitioners, Private Properties, LLC, Chester Properties, LLC and the Pennsylvania Residential Owners Association, and file this Application for Leave to File a Reply to an Answer stating in support thereof as follows:

1. On May 13, 2020, Petitioners filed a Petition for Extraordinary Relief pursuant to the Court's King's Bench jurisdiction with this Honorable Court.


2. In accordance with the rules, said Petition was set forth in an individually numbered paragraph format.

3. On May 18, 2020, Respondents, Governor Tom Wolf and Attorney General Josh Shapiro, filed an Answer to the Petition.

4. Rather than responding to each numerical paragraph, Respondents filed a brief.

5. At this time, Petitioners request leave of court to file a reply brief. A true and correct copy of the Reply Brief is attached hereto marked as Exhibit "A" and made a part hereof.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents.

Submitted by: Petitioner

Signature: Mary Elizabeth Fischman

Name: Mary Elizabeth Fischman, Esquire

Attorney No. (if applicable): 200390

EXHIBIT A

IN THE SUPREME COURT OF PENNSYLVANIA
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PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

PETITIONERS' REPLY BRIEF TO RESPONDENTS' ANSWER

Introduction:

The Respondents in bad faith misrepresent and obfuscate the regulatory limitations of the Emergency Code and the issues raised by Petitioners.

The Emergency Code vests the Governor with limited authority to suspend provisions of regulatory statutes proscribing the procedures for the conduct of Commonwealth business, or the orders, rules and regulations of Commonwealth agencies. It does not authorize the Governor under the cloak of Executive Order to

violate the separation of powers and invade the exclusive Constitutional authority of its sister branches of government.

The Executive Order impermissibly dictates the internal operations and procedures of the Courts by restricting access and precluding Court administration of pending cases. The plain effect of the Executive Order is to dictate to this Court the processing of landlord and tenant civil actions which have previously been filed pending hearing and those court filings which have been reduced to judgment and await execution.

The Executive Order impermissibly legislates by invalidating the express statutory allowance of the Landlord and Tenant Act to permit waiver of the Notice to Quit permitting immediate access to the Courts without notice. It is the sole province of the General Assembly to amend the Landlord and Tenant Act to strike an affirmative statutory right, not the authority of the Executive.

The Executive Order targets residential property owners from acting to evict tenants “from their homes or residences” “when a landlord. . . intends to evict the tenant and/or lessee for nonpayment of rent;” The Executive Order would equally deny commercial property owners access to the Courts when it denies access by restricting: “All eviction timelines must be computed with a start date of July 10, 2020. . . and any eviction proceedings may commence.” The Executive Order

would further deny real property possession proceedings by property owners for non-monetary reasons including criminal acts, nuisance and drug related offenses.

I. THE EMERGENCY CODE DOES NOT AUTHORIZE THE GOVERNOR TO MODIFY OR STAY THE COURT'S ORDER OF APRIL 28, 2020 OR THE SUBSTANTIVE TERMS OF THE LANDLORD TENANT ACT

Respondents rely on the Governor's authority under the Emergency Code, 35 Pa.C.S. §7301 *et seq.* The Executive Order states that the Governor "is authorized to issue regulations to temporarily suspend or modify for a period not to exceed sixty (60) days any public health, safety, zoning, transportation (within or across this Commonwealth) or other requirement of statute or regulation within this Commonwealth for which I deem the suspension or modification essential to provide temporary housing for disaster victims." 35 Pa.C.S. §7302(a). The broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth's police power. Friends of DeVito v. Wolf, 2020 Pa. 1987 (cites omitted). The executive branch has misrepresented its limited police power authority under the Emergency Code. The doctrine of the separation of governmental powers into the legislative, executive and judicial [branches] has been inherent in the structure of this Commonwealth's government since its inception. Commonwealth v. Sutley, 474 Pa. 256, 261 378 A.2d 780,782 (1977). The judicial branch has not ceded its power to the Governor to act upon its behalf in regulating statutes such as the landlord tenant law.

While the Governor has expansive emergency management powers, those powers are limited to the suspension of provisions of “any regulatory statute prescribing the procedures for conduct of the Commonwealth business, or other orders, rules or regulations of any Commonwealth agency if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency. 35 Pa.C.S. §7301(f)(1). The effect of the Executive Order is an attempt to regulate the administration of the courts and such an attempt is outside of the police powers granted under the Emergency Code.

Petitioners aver that the issuance of the Executive Order violates their substantive due process rights. Specifically, the Executive Order denies landlords access to the courts. In balancing the rights of Petitioners, subject to the Executive Order, it is clear that the lifting of restrictions has given people the ability to move around the Commonwealth in compliance with COVID-19 guidelines issued by the Secretary of Health. While Petitioners are certainly are not downplaying the COVID-19 pandemic, it must be noted that the Governor has lifted the Stay at Home order and at least two-thirds (2/3) of the counties in Pennsylvania have moved from red to yellow. There is no scientific evidence to rely on that can be determinative as to when counties will move into the “green” stage. Property owners have no guaranty that if this Executive Order is permitted to stand, it will not be reinstated

for subsequent, unknown periods of time. An exercise of police power such that property owners are forced to permit tenants to remain in the property without payment of rent was not contemplated in the promulgation of 35 Pa.C.S. §7301 *et seq.* and is a violation of Petitioners' substantive due process rights.

To constitute a lawful exercise of the state's police power, social and economic legislation must first be directed toward a valid state objective. Gambone 101 A.2d 634, 637. In order to survive a substantive due process challenge, "a statute or regulation must seek to achieve a valid state objective by means that are rationally related to that objective." Kahn v. State Board of Auctioneer Examiners, 577 Pa. 166, 842 A.2d 936 (2004). Kahn at 183 (cites omitted). Its precepts protect fundamental liberty interests from infringement by the government. For substantive due process rights to attach, there must be deprivation of property, right or other interest that is constitutionally protected. The Executive Order deprives property owners of their property rights by denying them the ability to collect rent on properties they own, taking away the threat and process of eviction, a property owner's most effective tool to obtain payment. To withstand a substantive due process challenge, a stated regulation must seek to achieve a valid state objective by means that are rationally related to that objective. While issuing this Executive Order under the guise of protection of housing for disaster victims, the devastating financial impact upon property owners was not taken into consideration. At a time

when counties are being permitted to reopen with adherence to safety and health guidelines put forth by Dr. Levine, there is no rational reason to deny the allowance of eviction proceedings.

II. PETITIONERS' CONSTITUTIONAL RIGHTS ARE VIOLATED BY THE EXECUTIVE ORDER

Article V. Section 10(c) of the state constitution provides that the Supreme Court shall have the power to prescribe general rules governing the conduct of all courts so long as such rules are consistent with the Pennsylvania Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the Pennsylvania General Assembly to determine the jurisdiction of any court..., nor suspend, nor alter any statute of any limitation or repose. All laws shall be suspended to the extent they are inconsistent with the rules prescribed under these provisions. Payne v. Commonwealth Department of Corrections, 582 Pa. 375 (2005) and 871 A.2d 795. It was under this guideline that the Court entered its Emergency Order of Statewide Judicial Administration applicable from May 1, 2020 through June 1, 2020.

The judiciary is a constituent or coordinate part of government; it is not subordinate to other powers, nor does it depend for existence on the legislative will. Its powers come directly from the people, without intervening agency. From the very nature of its time-honored powers, it should be kept a separate, distinct and independent entity in government... The domain of the judiciary is in the field of the administration of justice under the law; it interprets, construes and applies the law. Sutley citing Commonwealth v. Widovich, et al, 295 Pa. 311, 322, 145 A.295, 299 (1929).

Article I §11 provides:

“All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”

Courts have long recognized that the judicial branch is not subordinate to the other branches of government but is coequal, distinct and independent. By limiting landlords’ access to the courts, the Executive Order is unconstitutional.

Petitioners assert Executive Order issued by Governor Tom Wolf usurped the powers of the judicial branch and the Judiciary’s order of April 28, 2020.

The Executive Order states:

“WHEREAS, the Supreme Court of Pennsylvania issued Orders that acted to prevent the judiciary from effectuating an eviction, ejection or other displacement from a residence based upon a failure to make a monetary payment, but the statewide judicial suspension of procedure related to the disposition property extends only until May 11, 2020 (emphasis added).

Respondents mistakenly believe the Governor has the authority to override not only the Supreme Court order of April 28, 2020, but also local judicial district orders which have stayed eviction actions until June 1, 2020, including but not limited to the 1st Judicial District of Pennsylvania, 5th Judicial District of Pennsylvania, 51st Judicial District of Pennsylvania, 53rd Judicial District of Pennsylvania. Of the many powers enumerated in the Emergency Code, the ability or authority to change or contradict an emergency order from the judiciary is not

found. While this Commonwealth has never been faced with a pandemic of this magnitude, it is difficult to imagine that 35 Pa.C.S. §7302(a) is meant to support an Executive Order that both deprives landlords of access to the courts and exerts executive supremacy over the Judicial branch in Violation of Article V of the Pennsylvania Constitution.

As was found in Sutley, any encroachment upon the judicial power by the legislature is offensive to the fundamental scheme of our government. Accordingly, an encroachment such as occurred with the Executive Order upon the judiciary, is just as offensive to the fundamental scheme of our government. The attempt by the Governor to impose and alter not only the Court's Executive Order of April 28, 2020, but also the very substance of the Landlord and Tenant Act of 1951, is an assault upon the Court's authority and Petitioners' important constitutional rights.

Under the Pennsylvania Constitution, as more specifically set forth in article V §13(a-c), only the Supreme Court shall exercise general supervisory authority over all the courts... The Supreme Court shall have the power to prescribe general rules governing practice, procedures and conduct of all courts... The Executive Order, by denying access to the courts and extending the deadline beyond that ordered by the Supreme Court, clearly usurps the authority of the Supreme Court and contradicts and renders the court action of April 28, 2020 as it relates to evictions, a nullity.

Respondents address the constitutional matter raised by merely stating that “the Governor’s Order does not foreclose bringing evictions and foreclosures; it merely extends the time on statutory preconditions, after which, lenders and landlords may commence foreclosure and eviction actions. None of these actions usurp the Court’s powers under Article V of the Pennsylvania Constitution”. The Governor is without the constitutional authority to “merely extend time”. As has oft been cited throughout the legal system, “justice delayed is justice denied”. (United States ex rel. Geisler v. Walters, 510 F.2d 887, 893 (3d Cir. 1975), Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987) Liberty Bank v. Ruder, 402 Pa. Super. 561, 566, 587 A.2d 761, 764 (1991), Story v. Kindt, 26 F.3d 402, 408 (3d Cir. 1994)).

The Judiciary has not issued any order or statement agreeing to cede its power to the Governor, nor has it moved to amend the Constitution to allow the Governor the power to change the rules of civil procedure. In Payne, the Courts stated the power to establish rules of procedure for state courts is exclusive [to the Supreme Court]. The Court further went on to reject the notion that the General Assembly exercised concurrent power in that regard. Payne, 582 Pa. at 385. The Pennsylvania Constitution grants the judiciary – and the judiciary alone – power over rulemaking. Id. The matter of proceeding in landlord tenant actions is procedural in nature and therefore, regulation of such is committed to the exclusive authority of the

Pennsylvania Supreme Court under Pa. Const. art. V. §10(c). Forester v. Hansen, 2006 Pa. Super. 137, 901 A.2d 548. Accordingly, the Executive Order is unconstitutional and interferes with this Court’s exclusive rulemaking authority. By the issuance of the Executive Order, the Governor has clearly interfered and attempted to override the Court’s rulemaking authority.

On May 19, 2020, the Governor, pursuant to Article IV, Section 15 of the Pennsylvania Constitution returned House Bill 2412 to the legislature without his approval. The Governor viewed “this legislation [as] an infringement on the authority and responsibility of the executive and a violation of the separation of powers, which is critical to the proper function of our democracy.” Just as the legislative action set forth in HB 2412 was “an infringement on the authority and responsibility of the executive and a violation of the separation of powers” so is the issuance of the Executive Order an infringement on the authority and responsibility of the Judiciary. In entering the Executive Order, the Governor did exactly what he accused the legislature of attempting – violating the separation of critical powers, which are critical to the proper functioning of our democracy.

III. THE GOVERNOR’S EXECUTIVE ORDER VIOLATES THE PETITIONERS’ RIGHT TO SUBSTANTIVE DUE PROCESS

“It is fundamental to our common law system that one may seek redress for every substantial wrong.” Ayala v. Philadelphia Board of Public Education, 453

Pa. 584, 305 A.2d 877 (1973). The Executive Order violates Art. I, § 11 of the Pennsylvania Constitution, which provides:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may be law direct.

The substantive component of the Due Process Clause provides protection against government interference with certain fundamental rights and liberty interests. Khan v. State Board of Auctioneer Examiners, 577 Pa. 166, 842 A.2d 936, 946 (2004).

Where the right affected is fundamental, “such as the right to privacy, the right to marry, and the right to procreate,” strict judicial scrutiny is applied and the statute “may only be deemed constitutional if it is narrowly tailored to a compelling state interest.” Nixon v. Commonwealth, 576 Pa. 385, 839 A.2d 277, 287 (2003). If the law restricts other important, though not fundamental, rights, the Courts uphold the statute if a heightened standard of scrutiny is applied to an “important” governmental purpose. Khan, 842 A.2d at 946.

The Legislature alone may enact limitations that restrict access to the Courts and this Court would apply an intermediate scrutiny to determine whether the Legislative act impermissibly violated the important, though not fundamental right,

of access to the Courts. See Zaufflik v. Pennsbury School District, 629 Pa. 1, 104 A.3d 1096 (2014).

The Executive Branch is not authorized under any circumstance to define the manner in which access to open courts shall be denied, restricted or otherwise impeded. To the extent that this Court interprets that Emergency Code to permit the Governor by Executive Order to Legislate, then the measure of validity to be applied is the intermediate level of scrutiny. To sustain the validity of the order, the Respondents must demonstrate that the Executive Order is in furtherance of an important governmental interest and that its means are closely related to the governmental purpose.

As discussed above, the Executive order of May 7, is not at all designed to protect the housing rights of persons in leaseholds. The order by its terms unlawfully denies ALL property Owners from access to the Courts, including commercial, industrial and residential. The Order by its terms denies ALL property owners from seeking possession for reasons other than monetary default.

The Executive Order violates the substantive rights of ALL property owners to seek real property possession based upon a waiver of the Notice to Quit, the right to pursue real property possession for pending litigation as well as in the enforcement of judgments entered before the Emergency Disaster was declared.

In summary, the Executive Order is not even rationally related to the articulated purpose and is arbitrary in its effect when it so overly envelopes the important rights of access to the Courts of ALL property owners.

IV. THE ISSUES PRESENTED IN FRIENDS OF DANNY DEVITO V. WOLF ARE DISCRETE, NOT INVOLVED IN THE INSTANT PETITION AND CONCERN A DIFFERENT EXECUTIVE ORDER.

This Court's decision in the matter of Friends of Danny Devito v. Wolf, ___ A.3d ___, 2020 WL 1847100 (Pa. April 13, 2020), did not address and did not resolve any issue raised in the instant Kings Bench Petition; and in fact, concerned a different Executive Order dealing with wholly different regulatory restrictions.

The matter of the Friends of Danny DeVito related to a challenge of the Governor's authority to order closure of physical business operations deemed non-essential. The Petitioners therein asserted that the closure order constituted a regulatory taking without procedural due process, a taking compensable at Law and usurped the important individual rights of free speech and assembly protected by the Pennsylvania Constitution. The Friends of Danny Devito parties did not assert that the Governor's act in any manner denied access to the Court apparatus nor constituted an impermissible intrusion into the exclusive power of this Court to administer court proceedings and operations of the Court, plenary powers vested solely in this Court. To the contrary, the separation of powers issue raised in the

Friends of Danny Devito related to the claim that the Executive Order of March 19, 2020, constituted an impermissible legislative act.

This Court summarily resolved the “separation of powers” issue at page forty three of the decision wherein it held:

“the Emergency Code. . . ., expressly authorizes the Governor to declare a disaster emergency and thereafter to control the ‘ingress and egress to and from a disaster area, the movement of persons within the area’ . . .”

The Court further noted that the General Assembly, through the enactment of the Emergency Code, specifically and expressly authorized the Governor to declare a disaster, *Id.*, it did not address the issue as to whether or not the Executive Order usurped the constitutional authority of the legislature. Conversely, the Supreme Court in its April 28, 2020 Order specifically sought to exercise its constitutional authority to supervise the courts and the Governor’s Executive Order countermanded the April 28, 2020 Order itself.

The Respondents herein proceed to make other irrelevant legal arguments. At page 11 of the Response, the Respondents assert that the notice under the Loan Interest Protection Law and the Homeowners Emergency Assistance Act somehow equates to the provision in the Landlord and Tenant Act related to the Notice to Quit provision. The Petitioner herein does not assert that the Governor is without authority to stay the regulatory process which requires agency face to face meetings

and agency processing. The Emergency Code, 35 Pa. C.S.A §(f)(1), specifically authorizes the Governor to:

Suspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency

The statutory provisions in the Landlord Tenant Act under Section 501, however are expressly waivable¹, do not involve the action or interaction with a Commonwealth agency, and do not involve an order of a Commonwealth agency.

The remaining arguments fashioned by the Respondents related to administrative proceedings as a “precondition” to the filing of a civil matter are again without merit and are designed solely to obfuscate. There is no argument that many statutes provide for “administrative proceedings” which must be exhausted before the filing of a civil action. The Respondent does not appreciate that once a litigant is in court, has a pending civil matter, or when as here, the Notice to Quit may be waived, then the Governor is without authority to intrude into the operation and administration of the court system. The Executive Order unlawfully directs the Courts not to process landlord and tenant matters which were pending as of the date that the Emergency was declared by the Governor,

¹ 501(b): The notice above provided for may be for lesser time or may be waived by the tenant if the lease so provides.

directs the courts not to permit litigants to enforce real property possession judgments previously entered in the courts and directs this Court not to permit filings when there is no “precondition” to the filing of the civil matter.

CONCLUSION:

For the reasons stated above, Petitioners respectfully request this Honorable Court invalidate those portions of Executive Order of May 7, 2020, which thereby restrict, delay and suspend the notice requirements under the *Landlord and Tenant Act of 1951* and restrict, delay and deny access to the Courts for real property eviction proceedings under the *Landlord and Tenant Act of 1951*.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 4,263 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Bradley S. Dornish
Bradley S. Dornish, Esquire

CERTIFICATE OF SERVICE

I hereby certify that I have served this Petitioners' Application for Leave to File a Reply Brief to Respondents' with accompanying Reply Brief upon counsel of record by electronic service.

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