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Cook County, IL

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2020CH04046

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE TOWN OF CICERO, a municipal corporation,	)	
Plaintiff,	)	
v.	)	No. 2020 CH 04046
CITY VIEW MULTICARE CENTER, LLC, the STATE OF ILLINOIS, the ILLINOIS DEPARTMENT OF PUBLIC HEALTH, GOVERNOR JB PRITZKER, in his official capacity,	)	
Defendants.	)	

STATE DEFENDANTS' RESPONSE
TO THE TOWN OF CICERO'S EMERGENCY MOTION
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendants, the State of Illinois, the Illinois Department of Public Health (the "Department"), and Governor JB Pritzker, in his official capacity, (collectively, the "State Defendants"), by and through their attorney, Kwame Raoul, Attorney General of the State of Illinois, submit this Response to Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

INTRODUCTION

As this Court is aware, COVID-19 is a global pandemic. It has caused a public health crisis throughout the State, particularly in Cook County, which includes Plaintiff, the Town of Cicero. Congregate living facilities, including prisons, State-run group homes, and private nursing facilities are especially vulnerable to outbreaks of COVID-19.

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Illinois has approximately 1,200 long-term care facilities serving more than 100,000 residents. These facilities are licensed, regulated, and inspected by the Department, but the Department does not run the facilities. Each facility is responsible for the residents in their care.

Plaintiff has filed this lawsuit for injunctive relief and abatement of nuisance against City View MultiCare Center ("City View"), a long-term care facility. The Complaint also names the State Defendants as purported necessary parties. Plaintiff does not allege any cause of action against the State Defendants or allege that they have violated a statute or the Constitution. Plaintiff alleges that City View has failed to comply with COVID-19-related orders, directives, and guidelines, resulting in 216 positive COVID-19 cases, including 10 deaths, at City View and, therefore, it is entitled to injunctive relief against City View. Alternatively, Plaintiff alleges that City View's conduct amounts to a public nuisance, which also entitles Plaintiff to injunctive relief against City View. In addition to seeking injunctive relief against City View due to its alleged ongoing public health violations, Plaintiff attempts to seek injunctive relief against the State Defendants in order to remedy *City View's* alleged ongoing misconduct.[1]

Specifically, Plaintiff seeks an order requiring City View to implement certain COVID-19 healthcare-related protocols such as separating and isolating infected residents, proper use of PPE by facility staff and residents, and compliance with applicable state and local laws. See Complaint, p. 26. Alternatively, Plaintiff wants an order transferring the residents to McCormick Place, the closed Westlake Hospital, or some other facility—although the Complaint is unclear as to who

[1] At this time, the State Defendants take no issue with Plaintiff's efforts to protect the residents of City View and the public by seeking appropriate relief against City View. It is Plaintiff's attempt to seek injunctive relief against the State Defendants which is improper.

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should be ordered to do so.[2] Complaint, p. 25. Finally, Plaintiff appears to seek to compel the State Defendants to allocate certain resources specifically to City View, but the Complaint is unclear. Complaint, pp. 25-26.

Plaintiff's claims for injunctive relief against City View aside, Plaintiff is not entitled to preliminary injunctive relief against the State Defendants. First, Plaintiff's claims against the State Defendants are barred by sovereign immunity. Second, this Court should not direct the State Defendants to exercise their executive discretion in any particular way while responding to the current public health crisis. Third, the Nursing Home Care Act, on which the requests for relief against the State Defendants are based, does not provide Plaintiff with any enforcement rights. Fourth, the balance of harms weighs against imposing a mandatory injunction against the State Defendants. For each of these reasons, Plaintiff's request for injunctive relief should be denied.

STANDARDS FOR OBTAINING A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION

A temporary restraining order ("TRO") and a preliminary injunction are essentially the same type of relief, with the exception being that a TRO is of limited duration compared to a preliminary injunction. *See In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075 (1st Dist. 2007) (citing *Kable Printing Co. v. Mt. Morris Bookbinders Union Local 65-B*, 63 Ill. 2d 514, 524 (1976)); 735 ILCS 5/11-101. Preliminary injunctive relief is an "extraordinary remedy" that "should be granted only in situations of extreme emergency or where serious harm would result if the preliminary injunction was not issued." *World Painting Co., LLC v. Costigan*, 2012 IL App (4th) 110869, ¶11 (quoting *Clinton Landfill, Inc. v. Mahomet Valley Water Auth*., 406 Ill. App. 3d 374, 378 (4th Dist. 2010)). The purpose of such relief is limited—in rare cases of extreme

[2] Presumably, such an order would be directed to both City View and the State Defendants, as it is to be done "pursuant to a plan implemented and executed by the State, IDPH and the Governor's office." Complaint, p.25.

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emergency, it is intended to preserve the status quo until the merits of the case are decided. *Clinton Landfill*, 406 Ill. App. 3d at 378. "Courts do not favor mandatory preliminary injunctions, and such relief is justified only so as to maintain the status quo to avoid irreparable harm." *Shodeen v. Chi. Title & Trust Co.,* 162 Ill. App. 3d 667, 673 (2d Dist. 1987).

Traditionally, both a preliminary injunction and a TRO require the plaintiff to establish the following: (1) it has a clearly ascertained right that needs protection; (2) there is a likelihood of success on the merits; (3) it is likely to suffer irreparable harm without the injunction; and (4) it has no adequate remedy at law. *See In re Estate of Wilson*, 373 Ill. App. 3d at 1075; *Bd. of Educ. v. Miller*, 349 Ill. App. 3d 806, 814 (1st Dist. 2004). These four elements must be satisfied even in those cases where the plaintiff can point to an emergency. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006).

Even if the plaintiff is able to satisfy the four elements for preliminary injunctive relief, he has the additional burden of establishing that the benefits of granting the preliminary injunction exceed the injury to the defendant and the public. *Prairie Eye Ctr., Ltd. v. Butler*, 305 Ill. App. 3d 442, 445 (4th Dist. 1999). This means that the court must balance the harms in weighing the decision to award preliminary injunctive relief. *Liebert Corp. v. Mazur*, 357 Ill. App. 3d 265, 287 (1st Dist. 2005).

ARGUMENT

I. Plaintiff Cannot Establish That It Has A Clearly Ascertained Right That Needs Protection or A Likelihood of Success on the Merits Against the State Defendants.

A. Plaintiff's Claim for Injunctive Relief Against the State Defendants Is Barred By Sovereign Immunity.

The State Lawsuit Immunity Act provides that the State "shall not be made a defendant or party in any court" except as provided in the Court of Claims Act, the Illinois Public Labor

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Relations Act, the State Officials and Employees Ethics Act, and Section 1.5 of the State Lawsuit Immunity Act. 745 ILCS 5/1. "The doctrine of sovereign immunity 'protects the State from interference in its performance of the functions of government and preserves its control over State coffers.'" *State Bldg. Venture v. O'Donnell*, 239 Ill. 2d 151, 159 (2010), quoting *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 188 (1984) and *S.J. Groves & Sons Co. v. State*, 93 Ill. 2d 397, 401 (1982). The determination of whether an action is one against the State depends on the issues involved in the lawsuit and the relief sought therein. *Carmody v. Thompson*, 2012 IL App (4th) 120202 ¶ 21. The Circuit Court lacks jurisdiction to hear a claim when sovereign immunity applies. *Id.*

Any relief against the State of Illinois is barred by sovereign immunity. The State Lawsuit Immunity Act, by its terms, applies where a plaintiff names the State itself as a defendant. *See Smith v. Jones*, 113 Ill. 2d 126, 132 (1986) ("the State . . . can never be a proper party defendant in an action brought directly in the circuit court"); *see also Welch v. Ill. Sup. Ct.*, 322 Ill. App. 3d 345, 350-51 (3d Dist. 2001) ("The doctrine of sovereign immunity has not been confined to actions that name the State as a defendant."). Here, the Complaint names the State itself as a Defendant, and the prayer for relief seeks to impose obligations upon the State. Sovereign immunity bars both.

Similarly, Plaintiff's prayer for relief against the Department is barred by sovereign immunity because it seeks to direct the Department to exercise its discretion in a particular way, rather than to enjoin ongoing violations of law. For purposes of sovereign immunity, suits against a State department or agency are generally considered suits against the State. *Meyer v. Dep't of Public Aid*, 392 Ill. App. 3d 31, 34 (3d Dist. 2009). A plaintiff may only "seek injunctive relief in circuit court to prevent unauthorized or unconstitutional conduct by the State, its agencies, boards, departments, commissions and agents or to compel their compliance with legal or constitutional

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requirements." *Leetaru v. Bd. of Trustees of Univ. of Illinois*, 2015 IL 117485, ¶ 48. Plaintiff's Complaint does not allege that any of the State Defendants' conduct is unlawful, nor does the prayer for relief seek to enjoin any unlawful or unconstitutional conduct or other ongoing violations of law by the Department. Rather, it asks the Court to order the Department to exercise its regulatory discretion and emergency powers in a particular way. That relief is barred by sovereign immunity.

Plaintiff's prayer for relief against the Governor also is barred by sovereign immunity because it does not fall under the "officer suit" exception. The "officer suit" exception to sovereign immunity allows a circuit court to "prospectively enjoin" conduct by a state officer that "violates statutory or constitutional law or is in excess of his or her authority." *Parmar v. Madigan*, 2018 IL 122265, ¶ 22. This exception does not allow a court to "control the officer's conduct in governmental matters with respect to which he has been granted discretionary authority." *Brucato v. Edgar*, 128 Ill. App. 3d 260, 264 (1st Dist. 1984); *see also Ill. Health Care Ass'n v. Walters*, 303 Ill. App. 3d 435, 439–40 (1st Dist. 1999). Here, Plaintiff has not alleged that the Governor violated the Constitutions or any statutes. It does not allege that the Governor is acting in excess of his authority. Rather, Plaintiff is asking the Court to order the Governor to invoke his emergency powers and his authority to protect public health in a particular way. These powers are inherently discretionary, so the relief requested from the Governor is outside the "officer suit" exception. Accordingly, the prayer for relief against the Governor is barred by sovereign immunity.

Finally, to the extent that Plaintiff is seeking to enforce its municipal ordinances against the State Defendants, "the State is not subject to legislative enactments of a municipal corporation. Broad principles of sovereignty require that a State or its agency or subdivision performing a governmental function be free of municipal control." 1979 Ill. Atty. Gen. Op. 48

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(1979 WL 21235). In addition, "[a] municipal ordinance enacted pursuant to 'Home Rule' powers granted by section 6(a) of article VII of the 1970 Illinois Constitution must be limited to its own affairs and may not affect the affairs of the State." 1980 Ill. Atty. Gen. Op. 155, 1980 WL 26166 (citing *City of Highland Park* v. *County of Cook*, 37 Ill. App. 3d 15, 25-26 (2d Dist. 1975).[3] Plaintiff may impose its ordinances on City View, but it cannot require the State Defendants to enforce or implement its ordinances or the Town President's Executive Orders.

B. Plaintiff's Claim for Injunctive Relief Against the State Defendants Is An Improper Request to Direct the Governor and the Department's Efforts to Protect Public Health In a Particular Way.

The State, the Governor, and the Department are currently responding to an unprecedented statewide public health crisis. In that effort, the Governor and the Department are exercising their discretion to respond to constantly evolving public health needs. The Department, in particular, is staffed with public health experts who are best placed to determine how to use the State's resources to respond to outbreaks of COVID-19 throughout the State. It is inappropriate and inefficient for municipalities to use court orders to direct the Department and the Governor's exercise of their discretion.

Moreover, judicial interference with the exercise of executive discretion conferred by the legislature, except to redress a violation of the Constitution or a statute, violates the separation of powers doctrine. Plaintiff does not allege any cause of action against the State Defendants or allege that they have violated any statute or the Constitution. Rather, Plaintiff alleges that City View has failed to implement appropriate safety measures to prevent the spread of COVID-19. "[A]n officer to whom public duties are confided by law is not subject to the control of the courts in the exercise

[3] Opinions of the Illinois Attorney General are persuasive authority. *Mulligan v. Joliet Regional Port District*, 123 Ill.2d 303, 123 (1988).

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of the judgment and discretion which the law gives to him as a part of his official functions; the reason for this being that the law reposes this discretion in him for that occasion and not in the courts." *Bigelow Grp., Inc. v. Rickert*, 377 Ill. App. 3d 165, 172 (2d Dist. 2007), quoting *People ex rel. Woll v. Graber*, 394 Ill. 362, 370 (1946); *see also People v. Freed*, 328 Ill. App. 3d 459, 466 (4th Dist. 2002) ("Except as provided by the legislature, courts may not intervene in matters that lie within the Department's discretion."). The Complaint's allegations are directed at City View. Plaintiff does not allege any cause of action against State Defendants or allege that they have violated a statute or the Constitution.

Further, the Complaint does not ask the Court to order the State Defendants to perform any nondiscretionary duty. Rather, Plaintiff's prayer for relief asks that the State Defendants be ordered to create and implement a plan to move all City View residents to another facility. That action calls for considerable judgment and discretion, and it would require the State Defendants to exercise their discretionary regulatory and emergency response powers. When enforcing the regulatory requirements of the Nursing Home Care Act and responding to an ongoing, statewide public health emergency, State officials and agencies must be allowed to exercise their discretion and expertise. As such, the Court lacks jurisdiction to direct their actions.

C. Plaintiff Has No Enforcement Rights Against the State Defendants.

Plaintiff appears to rely on the Nursing Home Care Act, 210 ILCS 45/1-101 *et seq.*, for its request for injunctive relief against the State Defendants. That statute, however, does not confer any such right of action on Plaintiff.

Whether a statute creates an implied private right of action presents a question of legislative intent, to be resolved in light of the statute's language and purpose. *Metzger v. DaRosa*, 209 Ill. 2d 30, 34 (2004); *Village of McCook v. Illinois Bell Tel. Co.*, 335 Ill. App. 3d 32, 35–36 (1st Dist.

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2002); *Moore v. Lumpkin*, 258 Ill. App. 3d 980, 989 (1st Dist. 1994). An implied right of action should be found only where, among other things, "the statute would be ineffective, as a practical matter," without it. *Metzger*, 209 Ill. 2d at 39; *see also Abbasi ex rel. Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 395–96 (1999). And where a statute creates a comprehensive regulatory scheme, with extensive provisions for the administration and enforcement of that scheme, courts will not supplement it with implied enforcement rights. *Metzger*, 209 Ill. 2d at 41–43; *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 461–67 (1999); *Abbasi*, 187 Ill. 2d at 391–96.

These cases recognize that the legislature's enumeration of specific rights or remedies normally implies the exclusion of others. *See King v. First Capital Fin. Servs. Corp.*, 215 Ill. 2d 1, 27 (2005) ("Had the legislature intended to provide a cause of action for damages for violation of the Attorney Act, it could have easily done so."); *Metzger*, 209 Ill. 2d at 44 (holding that whistleblower provision in Personnel Code did not create implied private right of action where, among other things, the Code contained other express enforcement provisions, including criminal penalties, a right to administrative review, and a private right of action for other violations); *Fisher*, 188 Ill. 2d at 464–65; *City of Evanston v. Evanston Fire Fighters Ass'n, Local 742*, 189 Ill. App. 3d 233, 244 (1st Dist. 1989). Thus, "[w]here a statute creates a new right or imposes a new duty or liability, unknown to the common law, and at the same time gives a remedy for its enforcement, the remedy so prescribed is exclusive." *Kosicki v. S. A. Healy Co.*, 380 Ill. 298, 302 (1942); *see also People ex rel. Cantazaro v. Centrone*, 48 Ill. App. 2d 484, 486 (1st Dist. 1964) ("Where a remedy is the creature of statute, such remedy may be enforced only in a manner prescribed by that statute.").

The principles in these cases are inconsistent with Plaintiff's apparent belief that it has an implied right to enforce the Nursing Home Care Act. The Nursing Home Care Act creates a

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comprehensive regulatory scheme, with detailed provisions for the administration and enforcement of that scheme. In relevant part, it provides as follows:

> The operation or maintenance of a facility in violation of this Act, or of the rules and regulations promulgated by the Department, is declared a public nuisance inimical to the public welfare. The Director in the name of the people of the State, through the Attorney General, or the State's Attorney of the county in which the facility is located, or in respect to any city, village or incorporated town which provides for the licensing and regulation of any or all such facilities, the Director or the mayor or president of the Board of Trustees, as the case may require, of the city, village or incorporated town, *in the name of the people of the State, through the Attorney General or State's Attorney of the county in which the facility is located, may, in addition to other remedies herein provided, bring action for an injunction* to restrain such violation or to enjoin the future operation or maintenance of any such facility.

210 ILCS 45/3-701 (emphasis added). The foregoing language authorizes actions to enforce the Nursing Home Care Act that are brought in the name of the people of the State through the Attorney General or the State's Attorney. It does not confer authority on a municipality to bring such an action on its own behalf—or to seek injunctive relief against the very State agency authorized to enforce the provisions of the statute. The inclusion in the Nursing Home Care Act of an express provision concerning the manner of enforcement indicates a legislative intent to exclude other implied remedies to enforce it.

II. Plaintiff Cannot Establish That It Is Entitled to the Mandatory Injunction It Seeks.

As previously set forth, "[c]ourts do not favor mandatory preliminary injunctions, and such relief is justified only so as to maintain the status quo to avoid irreparable harm." *Shodeen*, 162 Ill. App. 3d at 673. In this case, Plaintiff seeks to alter the status quo in its request for relief. Therefore, Plaintiff cannot justify its request for a mandatory injunction, especially where the interlocutory relief that Plaintiff seeks is essentially the same as the ultimate relief sought in the Complaint. *See Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 123 (2d Dist. 1990) (explaining that "[a] trial court errs

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when it enters a permanent injunction after a hearing" on a motion for TRO or preliminary injunction "or grants the ultimate relief sought").

III. The Balance of Harms Weighs Against Entering an Injunction Against the State Defendants.

Finally, Plaintiff cannot establish that the benefits of preliminary injunctive relief against the State Defendants exceed the harm that will befall the State and the public should a mandatory injunction issue. As of May 4, 2020, the State has identified 63,840 positive COVID-19 cases, including 2,662 deaths, in several counties throughout Illinois. In light of the magnitude and fluidity of the circumstances, it is imperative that the State Defendants, and the Department in particular, be able to continue to exercise their discretion in determining how to allocate State resources to best address the current public health crisis. Plaintiff seeks an order requiring the State Defendants to implement and execute a plan specifically concerning City View, including potential transfer of *all* City View residents to an alternate care facility[4] and daily inspections by the Department to ensure City View's compliance. It is in the public's best interest that decisions regarding the State's response to the current pandemic be made by State officials charged with protecting the public health in the entire State and in reliance upon experts in the field. Such decisions should not be made by the courts on an *ad hoc* basis.

[4] Plaintiff proposes transfer of its residents to Westlake Hospital or McCormick Place. However, Westlake Hospital is currently closed and is not operational, and plans for deconstruction of the McCormick Place Alternative Care Facility are now underway. https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2020/may/McCormickPlaceUpdate.html

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CONCLUSION

WHEREFORE, for the foregoing reasons, the State Defendants respectfully request that this Court deny Plaintiff's Emergency Motion for Injunctive Relief to the extent it seeks a temporary restraining order or preliminary injunction against the State Defendants.

Respectfully submitted,

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