

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,

Court File No. 19HA-CV-20-4167

Plaintiff,

vs.

**ORDER FOR
CONTEMPT**

Lionheart L.L.C. d/b/a Alibi Drinkery,

Defendant.

The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of the District Court, on January 5, 2021, for an Order to Show Cause hearing on Plaintiff's motion for contempt for violation of the Temporary Injunction the Court issued on December 29, 2020, and Defendant's motion to rescind the Temporary Injunction. The Court previously granted an *Ex Parte* Motion for a Temporary Restraining Order on December 18, 2020 brought by the State of Minnesota, by its Attorney General Keith Ellison ("Plaintiff"), against Defendant Lionheart L.L.C. d/b/a Alibi Drinkery ("Defendant").

Assistant Attorney General Elizabeth Odette and Assistant Attorney General Jason Pleggenkuhle appeared on behalf of Plaintiff. Attorney Michael Padden appeared on behalf of Defendant.

The Court has considered the pleadings, exhibits, files, records, submissions, and the affidavits submitted to the Court. The Court accordingly makes the following findings of fact, conclusions of law, and enters the following Order.

ORDER

- 1.) Defendant’s request to rescind the temporary injunction is **DENIED**.
- 2.) The State’s motion for contempt is **GRANTED**.
- 3.) The Defendant is found in Contempt. Defendant is in violation of the Temporary Injunction issued by this Court. The penalty for this civil constructive contempt is a \$3,000 fine per day that the Defendant is in violation of the Injunction.
- 4.) This matter will be set for trial by separate order.
- 5.) The attached memorandum is incorporated in the Order as Findings of Fact and legal rationale for the Court’s decision.

BY THE COURT:

Dated: _____, 2021

Jerome B. Abrams
Judge of District Court

MEMORANDUM

Procedural History

Governor Tim Walz declared a peacetime emergency on March 13, 2020 due to the COVID-19 pandemic spreading across the United States. It quickly reached both the largest cities as well as the smallest towns in Minnesota. The peacetime emergency declared by Governor Walz continues as of the date of this order to address the ongoing public health concerns. Governor Walz issued Executive Order 20-99, at issue in this case, on November 18, 2020 with restrictions for on-premises dining lasting until December 18, 2020 at 11:59 p.m. On

December 16, 2020, Governor Walz issued Executive Order 20-103, which extended the restrictions from Executive Order 20-99 until January 10, 2021, but modified 20-99 to allow outdoor dining.

The State of Minnesota, by and through the Minnesota Attorney General's Office ("Plaintiff") filed a Summons and Complaint against Lionheart L.L.C d/b/a Alibi Drinkery ("Defendant") on December 17, 2020 alleging violations of Order 20-99 and requesting relief.

Plaintiff filed an ex-parte Motion for a Temporary Restraining Order (hereinafter "TRO") and Temporary Injunction enjoining Defendant from all business operations that were in violation of Executive Order 20-99. Specifically, Plaintiff sought a TRO to stop Defendant from allowing on-premises dining in violation of Executive Order 20-99. The Court granted the request for a TRO on December 18, 2020 and set an initial hearing date of December 22 to hear argument on the temporary injunction. Counsel for Defendant appeared at the December 22 hearing and requested an additional day for the Court to consider a newly filed response from Defendant as well as to provide Plaintiff an opportunity to respond to Defendant. The request was granted and a hearing on the merits of the temporary injunction request was held on December 23, 2020. The Court issued a Temporary Injunction on December 29, 2020. Upon Plaintiff's request for an Order to Show Cause and motion for contempt filed on December 31, 2020, this Court issued an Order to Show Cause on January 3, 2021 scheduling a hearing for January 5, 2021. Defendant filed a motion to rescind the Temporary Injunction Order on January 4, 2021, arguing that the injunction was issued based upon false and inaccurate COVID-related death statistics.

Summary of Facts

On December 15, 2020, Defendant publicly advertised that they would be open for indoor dining. This caused Plaintiff to contact Defendant and warn them that violating the Executive Order would lead to the State pursuing legal consequences for non-compliance. Despite this, Defendant opened their business to the public in violation of the Executive Order. Media coverage showed, and law enforcement verified, that Defendant continued to operate for several days. Plaintiff contacted Defendant at its publicly-listed email address to notify them that Plaintiffs would be bringing a motion for temporary restraining order and temporary injunction. Based on this information and the affidavits and court filings, the Court issued the Temporary Restraining Order on December 18, 2020. Following the hearing on December 23, 2020, the Court issued the Temporary Injunction that is currently in effect.

Temporary Injunctions are subject to an immediate appeal pursuant to Rule 103.03(b) of the Rules of Civil Appellate Procedure. This Court issued a Temporary Injunction on an expedited basis with the knowledge and understanding stated by Defendant, as they described it in their filing with the Court that this is solely a legal issue, *i.e.*, challenging the underlying Executive Order. As of this date, Defendant has not appealed the Temporary Injunction.

This Court's Orders and the Executive Orders were issued for several purposes, including preventing the spread of the COVID-19 virus, to protect the capacity of our health care system and hospitals, etc. The increased hospitalizations due to the virus place an extra burden on hospitals and emergency rooms such that hospitals may not be able to provide care for other, non-COVID emergency health needs, such as victims of car crashes and heart attack patients. Each day that the Defendant remains in violation of the injunction, the health and welfare of the public are at risk and are being irreparably harmed.

Individuals continue to have the right to eat and drink at either outdoor venues. The Executive Order does not prohibit the activity entirely, but restricts the indoor public gathering in order to protect the health of the public. These restrictions in turn are based on public health data as well as the current rate of spread of the disease in the community.

Following the issuance of the Temporary Injunction on December 30, 2020, Defendant announced and advertised via Facebook that they would open for indoor dining on December 31, 2020. After the Temporary Injunction was in effect and served on Defendant via counsel of record, Defendant opened for business at 11:00 a.m. on December 31, 2020, and has continued to operate in violation of the injunction and Executive Orders.

Defendant represented to the Court in a December 22, 2020 affidavit that “starting as of today, we have closed our doors.” (Zarza Aff. ¶ 5). These statements were and are false, inconsistent with Defendant’s Facebook posts, what media reports showed, Plaintiff observed, and law enforcement determined. (Second Aff. of Marie Siliciano; Aff of Marianne Ellis). Defendant was open for business on the afternoon of Friday, January 1, 2021 violating the Executive Order with more than 5 patrons eating and drinking indoors. Defendant was observed open at approximately 11:41 a.m. on January 2, 2021 violating the Executive Order with more than 5 patrons eating and drinking indoors. Defendant posted on the business’s public Facebook page on January 2nd “Enjoy the final game of the season at Alibi” referencing a Vikings game scheduled for January 3, 2021. Defendant was again observed on the afternoon of Sunday, January 3, 2021 with more than 5 patrons eating and drinking indoors. Yet again, Defendant was observed on January 4, 2021 violating the Executive Order.

Defendant’s establishment has been open for indoor on-premises consumption of food and beverages since the Temporary Injunction was issued. Defendant intentionally and

purposefully is violating the Temporary Injunction. More than five patrons were permitted inside the establishment, unmasked, not observing social distancing and consuming food and beverages. The record reflects there is also no dispute that this is a violation of the Temporary Injunction and the Executive Orders. Defendant is in constructive contempt of this Court's Order for Temporary Injunction as defined in Minnesota Statutes §588.01, subd. 3(3)¹.

The Court is authorized to impose sanctions for contempt by Minnesota Statutes §588.10 where “[u]pon the evidence so taken, the court or officer shall determine the guilt or innocence of the person proceeded against and, if the person is adjudged guilty of the contempt charged, the person shall be punished by a fine of not more than \$250, or by imprisonment in the county jail, workhouse, or work farm for not more than six months, or by both.” For constructive civil contempt, “[i]t must appear that the right or remedy of a party to an action or special proceeding was defeated or prejudiced by it before the contempt can be punished by imprisonment or by a fine exceeding \$50.” Minn.Stat. §588.02.

In order to impose a penalty for civil contempt for failure to comply with a court's order the order itself must clearly define the action a party must or must not take. See *Hopp v. Hopp*, 156 N.W.2d 212, 216 (1968).

The State is requesting that the Court impose fines pursuant to §588.10, and asks the Court to go beyond the \$250 fine per violation authorized in the statute. The Court has discretion and inherent authority to impose a fine beyond the statutorily authorized amount in order to induce compliance. *State v. Sports & Health Club, Inc.*, 392 N.W.2d 329, 336 (Minn.

¹ Minn.Stat. 588.01, Subd. 3(3) states: Constructive contempts are those not committed in the immediate presence of the court, and of which it has no personal knowledge, and may arise from any of the following acts or omissions:... (3) disobedience of any lawful judgment, order, or process of the court;....

App. 1986). The power to punish for contempt is an inherent power of constitutionally created courts in Minnesota. *Hampton v. Hampton*, 229 N.W.2d 139, 140 (1975). The contempt power exists independent of the contempt statutes. *In Re Welfare of R.L.W.*, 245 N.W.2d 204, 205 (1976). The contempt power is “essential to the effectiveness of all other court powers.” *Id.* at 206. The trial court’s broad discretion to impose a contempt sanction is limited to the extent that certain procedural requirements must be met before the sanction is imposed. *See Hopp v. Hopp*, 156 N.W.2d at 216–17.

The State has established by a preponderance of the evidence that Defendant willfully disobeyed this Court’s Order for Temporary Injunction and is in constructive civil contempt. The Injunction and Executive Orders are clear in the requirements and restrictions that prohibit indoor dining at bars and restaurants. Defendant is fully aware of these restrictions and is flagrantly in violation of the orders.

The Court has discretion as to the amount of the fine. Given the fact that Defendant is purposely promoting its violation of the injunction, exposing a multitude of patrons at the establishment, the fine should be in an amount to achieve compliance. A minimal fine would not lead to compliance with the injunction and would likely result in further spread of Covid-19. In order to achieve compliance, the Court orders that the Defendant will be fined \$3,000 per day, as of the date of this order, it is open for indoor dining in violation of the Executive Orders and the Temporary Injunction.

The Court is restrained to retroactively punish Defendant for violating the injunction before the date of this order. The *Hopp* decision mandates that civil contempt proceeds exist to “secure compliance with an order presumed to be reasonable” and that the Court is barred from retroactive “punishment for past misconduct.” *Hopp v. Hopp* 156 N.W.2d 212 (Minn. 1968).

However, the Court's inability to impose a fine for Defendant's prior action to reopen in defiance of a court order should not be viewed as overlooking harmful behavior. Defendant's conduct is harmful to the community's fight against this ongoing deadly pandemic, endangers numerous others, and insults fellow law abiding citizens.

Defendant's motion to rescind Temporary Injunction

Defendant has moved to rescind the Temporary Injunction based on a challenge that the evidence provided to support the TRO and injunction regarding the number of COVID-related deaths was false or incorrect.

The Court may only rely on the evidence and facts presented to it to determine whether the requirements are met to issue temporary restraining orders and injunctions. The Court understands the Defendant may have minimally supported concerns about inaccurate information but also appreciates that even if the number of deaths attributed to COVID-19 is inflated, there are numerous deaths due to COVID-19. Whether it is inflated –as alleged by defense Counsel-- by 5% or 40%, one fact remains – there are a substantial number of deaths caused by or contributed to by COVID-19. There has been no evidence presented to challenge the number of cases of COVID-19, or positive test result statistics. The Plaintiff presented substantial evidence in addition to the death statistics to support the motion for TRO and Temporary Injunction. The virus has been spreading throughout Minnesota at an alarming rate, causing strains on our healthcare systems, cancellation of events, extended absences from work causing staffing shortages, and challenges to the education system. While the Court is sympathetic to the negative impact the restrictions place on businesses such as Defendant, the Court has already taken that into consideration when issuing its orders.

Defendant is not the only establishment in this situation. It is not relevant to this Court's

legal determinations whether other states have imposed such orders or what their statistics are compared to Minnesota. The Court is aware of the changes to the restrictions that will be taking place as of January 11, 2021. This does not negate the fact that Defendant is in contempt of the injunction issued. Defendant is still obligated to follow the restrictions as imposed by the Executive Orders issued by the governor.

The challenge to the underlying facts is the basis for the matter to proceed to trial. The parties have a right to a contested evidentiary hearing to determine if the Temporary Injunction should be made permanent or dismissed.

Minnesota Attorney Rules of Professional Conduct - Rule 3.7(a) provides that:

A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

The Court notes that defense counsel has submitted an affidavit that includes his personal experiences and observations from his personal actions, some of which took place at an establishment in Wisconsin and anecdotal information regarding his own experience with the virus. The Court does not want to put defense counsel in the position of being a witness in this matter in violation of Rule 3.7(a), nor does it consider information about what is happening in another state, with different guidelines and restrictions, relevant to this matter.

Service of Summons and Complaint on Defendant

Defendant asserts that the owner of Defendant has not been served with the Summons and Complaint. The Affidavit of Service filed on December 18, 2020 indicates that the Summons, Complaint, ex parte motion for TRO and temporary injunction, along with affidavits and declarations was served on December 17, 2020 on an individual that was believed to be

Richard Baldazo, a registered agent of the Defendant. Defendant offers a one-sentence challenge to proper service. This challenge is unavailing.

JBA
1/7/21