

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PARADISE CONCEPTS, INC. T/A	:	
KENWOOD POOLS, MWS, LLC T/A	:	
WIN HOME INSPECTION	:	Civil Action No. 2:20-cv-02161
ELIZABETHTOWN, MQRE, LLC and	:	
others similarly situated.	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
THOMAS W. WOLF, Governor of the	:	
Commonwealth of Pennsylvania,	:	
RACHEL LEVINE, M.D., Secretary of	:	
the Pennsylvania Department of	:	
Health, DENNIS M. DAVIN,	:	
Pennsylvania Department of	:	
Community and Economic	:	
Development, and KALONJI	:	
JOHNSON, Commissioner of the	:	
Pennsylvania Bureau of Professional	:	
and Occupational Affairs.	:	
	:	
Defendants.	:	

SECOND AMENDED COMPLAINT

Introduction

This is a challenge to Governor Thomas W. Wolf’s policy of granting waivers to so called non-life sustaining businesses which allow those businesses to operate notwithstanding general orders shuttering all non-life sustaining businesses. This complaint also challenges the policy that permits certain in person transaction to occur in the real estate industry. Plaintiffs are businesses who were denied waivers under the policy. And two of the plaintiffs are businesses in the real estate industry that are denied the ability to perform in person services.

Plaintiff, Paradise Concepts, Inc. t/a Kenwood Pools, is a swimming pool retail store located in Levittown. Kenwood Pools operates a retail store that sells pool products such as pool and spa chemicals, maintenance equipment, and accessories. Kenwood Pools also performs on site pool servicing. Kenwood Pools derives at least 70% of its revenue from retail sales from its store and at most 30% of its revenue from on-site pool servicing.

Plaintiff, MWS, INC. d/b/a WIN Home Inspection, is a home inspection company located in Elizabethtown, PA 17022. WIN conducts residential home inspections for residential real estate sales. WIN derives nearly all of its revenue from residential home inspections for residential real estate transactions.

Plaintiff, MQRE, LLC, is a real estate brokerage located in Philadelphia. MQRE derives nearly all of its revenue from commissions generated from the sale of residential real estate.

Defendants are Pennsylvania Governor Thomas W. Wolf, Secretary of the Pennsylvania Department of Health, Rachel Levine, and Secretary of the Pennsylvania Department of Community, Economic Development, Dennis M. Davin, and the Acting Commissioner of the Pennsylvania Bureau of Professional and Occupational Affairs, Kalonji Johnson.

On March 19, 2020, Governor Wolf and Secretary Levine issued respective executive orders shuttering all non-life sustaining businesses (the “Business Closure Orders”). The stated purpose of these orders was to slow or control the spread of COVID-19. The Business Closure Orders stated that non-life sustaining businesses

increased the risk of transmission and community spread of COVID-19. Despite this apparent increased risk, the Governor permitted non-life sustaining businesses to apply for a waiver from the Business Closure Orders through the Department of Community and Economic Development (DCED), which is the executive agency Governor Wolf tasked with processing the waiver requests (the “Waiver Policy”). If granted a waiver, a non-life sustaining business would be permitted to operate.

Over 42,000 businesses applied for waivers. The DCED granted nearly 7,000 waivers, including one for Governor Wolf’s family business, Wolf Home Products. However, on April 3, 2020, the Governor abruptly ended the Waiver Policy with numerous applications still pending.

Governor Wolf and Secretary Levine determined that businesses, like Kenwood Pools, WIN, and MQRE, were not life sustaining. Plaintiffs complied with the Business Closure Orders and closed immediately and remain closed. However, Plaintiffs later learned that their competitors had been granted waivers under the Waiver Policy.

After Kenwood Pools learned that two competitors had applied for and been granted waivers under the Waiver Policy, Kenwood applied for a waiver too. But the DCED denied its application without explanation.

WIN also applied for a waiver but was denied by the DCED. However, WIN learned that a competitor had been granted a waiver to permit it to perform home inspections. Without a waiver, WIN cannot perform any in home inspections.

MQRE did not apply for a waiver because it believed that the effort would be futile. However, MQRE later learned that a competitor, located only a few blocks from its office, had been granted a waiver that permitted it to conduct real estate sales. Without a waiver, MQRE cannot, among other things, perform any in person showings of homes that are available for sale or lease.

Then, on April 28, 2020, Commissioner Johnson issued a Memorandum “Second Revised Limited Guidance for Real Estate Professionals, Appraisers, Notaries, Title Companies, and Home Inspectors” (the “Real Estate Policy”). Under that memorandum, companies like WIN and MQRE, could perform limited in person services but only for homes that were under agreement before March 18, 2020. They could engage in these activities regardless of the actual closing of the property.

The Waiver Policy and the Real Estate Policy are unconstitutional for several reasons. First, they violate the substantive due process clauses of the Fifth and Fourteenth Amendments because it lacks uniform guidelines and was applied arbitrarily. The Waiver Policy lacked any uniform standards, rules, regulations, or guidelines against which requests for waivers were judged. *Smith v. Goguen*, 415 U.S. 566, 572–73 (1974)(due process requires “legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement.’”) Instead defendants have kept those rules – to the extent they exist - secret. Defendants also have applied them in a patently arbitrary manner because certain businesses received waivers while nearly identical businesses were denied. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845, (1998)(“[t]he

touchstone of due process is protection of the individual against arbitrary action of government.”) Regarding the Real Estate Policy, certain conduct can occur based on an arbitrary date on which an agreement of sale was executed.

Second, the Waiver Policy violates due process’s “constitutional cousin” the equal protection clause of the Fourteenth Amendment. Plaintiff’s businesses are like their competitors in all relevant respects. They serve the same customers, have similar operations, and are located within the same area. Yet plaintiffs were inexplicitly denied waivers while their competitors had their waivers granted. Those competitors continue to operate to plaintiffs’ detriment. The equal protection clause does not permit state officials to give special treatment to certain non-life sustaining businesses which is different from the treatment given to all other so-called non-life sustaining businesses.

Plaintiffs requests a declaratory judgment, injunctive relief, attorneys fees and costs.

Parties, Jurisdiction, and Venue

1. Plaintiff, Paradise Concepts, Inc. t/a Kenwood Pools (“Kenwood Pools”), is a Pennsylvania corporation with a place of business located in Levittown, PA.

2. Plaintiff, MRS, LLC, d/b/a WIN Home Inspection Elizabethtown, is a Pennsylvania limited liability company with place of business located in Elizabethtown, PA.

3. Plaintiff, MQRE, Inc., is a Pennsylvania corporation with a place of business located in Philadelphia, PA.

4. Plaintiffs file this complaint on their own behalf and others similarly situated.

5. Defendant, Governor Thomas W. Wolf, is the Governor of the Commonwealth of Pennsylvania and is responsible for enforcing the laws of the Commonwealth of Pennsylvania, including the Business Closure Orders and the Waiver Policy. Governor Wolf is named in his official capacity.

6. Defendant, Rachel Levine, is the Secretary of the Pennsylvania Department of Health and is responsible for enforcing and implementing laws, regulations and policies aimed at the public health of Pennsylvania and its citizens, including the Business Closure Orders. Secretary Levine is named in an official capacity.

7. Defendant, Dennis M. Davin is the Secretary of the Pennsylvania Department of Community and Economic Development and is responsible for enforcing and implementing the Waiver Policy, including rendering decisions on the granting or denial of a waiver from the Business Closure Orders. Secretary Davin is sued in his official capacity.

8. This Court has jurisdiction to hear this case under 28 U.S.C. §§ 1331, 1343 and 28 U.S.C. § 1367.

9. Venue is proper under 28 U.S.C. § 1391(b).

Background

A. The Business Closure Orders.

10. On March 19, 2020, in response to the COVID-19 pandemic, Governor Wolf issued an executive order prohibiting all non-life sustaining businesses from operating. A copy of the March 19, 2020 executive order is attached at Exhibit “A.”

11. Life sustaining businesses were permitted to remain open.

12. Governor Wolf’s executive order did not define the terms non-life sustaining business and life sustaining business.

13. However, the executive order attached a list of the types of businesses that he considered life sustaining.

14. That same day Secretary Levine issued a nearly identical order also requiring the closure of non-life sustaining businesses. A copy of Secretary Levine’s March 19, 2020 order attached at Exhibit “B.”

15. Secretary Levine’s order stated that non-life sustaining businesses create conditions that “will increase the risk of transmission and risk of community spread of COVID-19.”

16. That order does not explain why life sustaining businesses do not also create conditions that “will increase the risk of transmission and risk of community spread of COVID-19.”

17. Governor Wolf’s March 19, 2020 executive order and Secretary Levine’s March 19, 2020 order are referred to collectively as the “Business Closure Orders.”

B. The waiver application for non-life sustaining businesses.

18. On March 20, 2020, Governor Wolf issued a press release stating that non-life sustaining businesses could seek a waiver from the DCED (the “Waiver Policy”). A copy of the press release is attached at Exhibit “C.”

19. The press release does not indicate the rules, regulations, and standards upon which requests for waivers would be judged.

20. Rather, according to the press release, “a team of professionals at DCED will review each request and respond based on the guiding principle of balancing public safety while ensuring the continued delivery of critical infrastructure services and functions.”

21. The “team of professionals” adjudicating the waiver requests has never been disclosed.

22. Over 42,000 non-life sustaining businesses applied for waivers under the Waiver Policy.

23. DCED granted nearly 7,000 requests for waivers including a request for the Governor’s family business, Wolf Home Products.

24. However, on April 3, 2020, before processing all requests, Governor Wolf abruptly ended the Waiver Policy.

25. Governor Wolf, Secretary Levine, and Secretary Davin all took part in the implementation and enforcement of the Waiver Policy and the decisions as to which businesses were granted waivers and which businesses were denied waivers.

26. Governor Wolf, Secretary Levine, and Secretary Davin acted under color of state law in the implementation and enforcement of the Waiver Policy and the

decisions as to which businesses were granted waivers and which businesses were denied waivers.

C. The Real Estate Policy.

27. On April 28, 2020, Commissioner Johnson issued “guidance for appraisers, notaries, title companies, and home inspectors.” (the “Real Estate Policy”). A copy of the Real Estate Policy is attached at Exhibit “D.”

28. Commissioner Johnson acted under color of state law in the implementation and enforcement of the Real Estate Policy.

29. Under the Real Estate Policy, appraisers, notaries, title companies, and home inspectors could operate notwithstanding the Business Closure Orders but only for homes that were under contract before March 18, 2020 or where a home buyer had entered into a contract to sell her home before March 18, 2020.

30. The Real Estate Policy permitted appraisers, notaries, title companies, and home inspectors to perform in person activities, including, showings, appraisals, inspections, final walk-throughs, closings, and title insurance activities if the participants wore masks, gloves, and foot coverings at all times.

31. The Real Estate Policy does not explain why such activities do not “increase the risk of transmission and risk of community spread of COVID-19” simply because they are conducted in connection with a home that was under contract before March 18, 2020.

D. Kenwood Pools' waiver request and denial.

32. Kenwood Pools operates a retail store in Levittown that sells pool and spa chemicals, filtration systems, heat pumps, gas heaters, pool toys and accessories, and maintenance equipment to the public.

33. Kenwood Pools also has a swimming pool service department.

34. At least 70% of Kenwood Pools' revenue is generated through the retail store.

35. Early spring is a critical time for Kenwood Pools as it is the time when most swimming pool owners open their pools for the upcoming summer season.

36. When the Business Closure Orders were issued, Kenwood Pools complied with those orders and closed its retail store.

37. However, Kenwood Pools learned that two competitors, LA Pools and Spa and Leslie's Pool Supplies and Service Repairs, had requested and obtained waivers under the Waiver Policy that permitted them to continue their respective retail operations.

38. Like Kenwood Pools, LA Pools and Leslie's operate retail locations which sell pool and spa chemicals, equipment, heaters, pumps, and accessories to the public.

39. Leslie's is located in Fairless Hills, which is approximately 3 miles from Kenwood Pools' location in Levittown.

40. LA Pools is located in Hatboro, Pennsylvania, which is approximately 20 miles from Kenwood Pools' location in Levittown.

41. So, Kenwood Pools decided to request a waiver under the Waiver Policy too.

42. However, despite its business being nearly identical to LA Pools and Leslie's, the DCED denied Kenwood Pool's waiver request without explanation.

E. WIN's request for a waiver and denial.

43. WIN applied for a waiver under the Waiver Policy.

44. But on April 11, 2020, the DCED denied its request.

45. However, WIN learned that its competitor, Trimmer Home Inspections, had received waiver.

46. Trimmer Home Inspections later received confirmation from the Governor's Office that its waiver permitted it to conduct its business in a like manner to so called life-sustaining businesses, including in home inspections.

47. Trimmer Home Inspections is located ten miles from WIN, performs the same services as WIN, and services the same customers as WIN.

F. MQRE's competitor's waiver.

48. MQRE did not apply for a waiver under the Waiver Policy because it thought such efforts would be futile.

49. However, it later learned perhaps it should have.

50. MQRE learned that a realtor located mere blocks from it had received a waiver from DCED.

51. MQRE performs the same type of real estate work its nearby competitor and services the same type of customers.

Class Allegations

52. Plaintiffs sue for themselves and on behalf of two classes of businesses. The first class consists of those businesses that were denied waivers under the Waiver Policy or who applied for waivers under the Waiver Policy but received no response. The second class consists of appraisers, title companies, real estate professionals, and home inspectors who desire to perform services permitted under the Real Estate Policy regarding contracts for sale entered into after March 18, 2020.

53. This class is certifiable under Fed.R.Civ.P. 23(b)(1)A), (b)(1)(B), (b)(2) and (b)(3).

54. The number of the persons in each of these classes makes joinder of the individual class members impractical. In fact, defendants have denied repeated requests, including a request from the Pennsylvania Senate, for a list identifying the names of the businesses that were granted waivers and those that were denied. Moreover, Governor Wolf has closed the Commonwealth's Right to Know Office, which is the agency responsible for handling a request from members of the public for such a list.

55. There are common questions of law and fact common to the class.

56. Plaintiffs' claims are typical of other class members.

57. Plaintiffs will adequately represent the interests of their fellow class members and it has no interest antagonistic to the proposed class. Plaintiffs seek to achieve a common goal shared by all class members.

58. The proposed class qualifies for certification under Rule 23(b)(3), because the common issues of law predominate over the questions affecting individual members, and a class action is superior means of resolving the common legal questions because all class members are subjected to the same violation of their constitutional rights.

CAUSES OF ACTION

COUNT I

Violation of Substantive Due Process under the Fifth and Fourteenth Amendments

59. Plaintiffs incorporates the previous paragraphs by reference.

60. Plaintiffs have a protectable property interest in their right to earn a living, right to operate their businesses free from arbitrary government interference and a right to use their retail locations in a lawful manner.

61. Under the due process clause of the Fifth Amendment to the United States Constitution, “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

62. Under the due process clause of the Fourteenth Amendment to the United States Constitution, no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

63. From inception, courts have explained due process as “the core of the concept to be protection against arbitrary action.” *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)

64. “We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government’” *Id.*

65. The due process clause “like its forebear in the Magna Carta. . . was intended to secure the individual from the arbitrary exercise of the powers of government.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986)

66. The Waiver Policy constitutes arbitrary, capricious, irrational, and abusive conduct in contravention of the due process clauses of the Fifth and Fourteenth Amendments.

67. The Real Estate Policy constitutes arbitrary, capricious, irrational, and abusive conduct in contravention of the due process clauses of the Fifth and Fourteenth Amendments.

68. The Waiver Policy denied Plaintiffs and the class members a protectable property interest.

69. The Real Estate Policy is denying plaintiffs WIN and MQRE a protectable property interest.

70. The Waiver Policy violated plaintiffs’ and their fellow class members’ substantive due process rights.

71. The Real Estate Policy violates MQRE’s, WIN’s, and their fellow class members substantive due process rights.

72. Defendants’ conduct shocks the conscious.

73. Defendants’ conduct does not comport with the traditional notions of fair play and decency. *Lassiter v. Dep’t of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18,

24, (1981)(explaining that the phrase “due process” “expresses the requirement of ‘fundamental fairness.’”)

74. Defendants’ conduct was intentional, wanton, and willful.

COUNT II

Violation of the equal protection clause of the Fourteenth Amendment

75. Plaintiffs incorporates the previous paragraphs by reference.

76. Under the equal protection clause of the Fourteenth Amendment of the United States Constitution, no state shall deny “any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV

77. “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, (2000)

78. The equal protection clause also protects against state action that lacks any uniform set of standards or rules. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

79. Defendants applied the Waiver Policy differently to plaintiffs than they did to their competitors.

80. Plaintiffs’ competitors are similarly situated to plaintiffs in all relevant respects.

81. Defendants did so intentionally.

82. There is no rational basis to explain the difference in treatment.

83. The class members were also treated differently from those similarly situated.

84. Defendants did so intentionally.

85. And there is also no rational basis to explain that disparate treatment.

86. The Waiver Policy lacked uniform standards that applied equally to all applicants for waivers.

87. Defendants violated plaintiffs' and their class members' right to equal protection under the Fourteenth Amendment.

DEMAND FOR RELIEF

88. Plaintiffs respectfully requests that this Court:

- a. Declare that the Waiver Policy violates plaintiffs' substantive due process rights under the Fifth and Fourteenth Amendments;
- b. Declare that the Real Estate Policy violates plaintiffs' substantive due process rights under the Fifth and Fourteenth Amendments
- c. Declare that defendants are violating plaintiffs' federal protected rights under 42 U.S.C. § 1983;
- d. Enter a preliminary injunction, pending final resolution, requiring defendants to continue to process requests for waivers under the Waiver Policy;
- e. Enter a preliminary injunction, pending final resolution, requiring defendants to amend the Real Estate Policy to apply to all real estate

transactions regarding of the date when the contract was entered into;

- f. Enter a preliminary injunction, pending final resolution, requiring defendants to promulgate uniform standards for the adjudication of all requests for waivers;
- g. Enter a preliminary injunction, pending final resolution, requiring defendants to issue plaintiffs' waivers under the Waiver Policy;
- h. Award plaintiffs costs and attorneys fees under 42 U.S.C. § 1988; and
- i. Award all other relief that this Court deems just, proper, or equitable.

Respectfully submitted,

Date: May 8, 2020

By: /s/ Walter S. Zimolong, Esquire
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