

Governor Wolf's Executive Orders on Evictions During COVID-19 Raise Legal Challenge Under the PA Supreme Court's Extraordinary King's Bench Jurisdiction

I have been a civil litigator since 1984, with a practice focused on real estate related litigation since the early 1990s. In all that time, I have only been involved in three matters invoking the Extraordinary King's Bench Jurisdiction of the PA Supreme Court (42 Pa. C.S.A. Section 502). The latest of those actions is one which we filed by an Emergency Application directly to the PA Supreme Court on May 12th, 2020. *Private Properties, et. al., v. Tom Wolf, Governor, and Josh Shapiro, Attorney General* 90 MM 2020.

The genesis of this action was, of course, the Commonwealth's response to the present COVID-19 pandemic. By now, we are all too familiar with Governor Wolf's Emergency Disaster Declaration of March 6, 2020, his Executive Order of March 19th, closing non-essential businesses, and his April 1, 2020 Stay at Home Order. During this unprecedented shutdown of most businesses, the legal profession has adapted as best we can to work in new ways, from our homes, using new (for us) digital and virtual means of conducting arguments and hearings, and balancing our clients' needs and legal rights against the restrictions of a public health emergency.

My practice includes representing many commercial and residential landlords including many residential Landlord Tenant Actions to evict tenants and collect unpaid rent and compensation for damage to rented property. In late March, we saw the complete shutdown of pending evictions and lockouts, and struggled to provide advice and solutions to clients who had tenants damaging properties, disregarding prohibitions in leases on home businesses (for example, a common basement commandeered as a welding shop), as well as pet restrictions and occupancy limitations. By mid-April, we saw many landlords who were not receiving substantial portions of their rental income, from tenants who had been laid off, businesses which had been shuttered, and college students who had moved back to parents' homes as their schools shifted to virtual classes.

On April 28th, the PA Supreme Court entered its *per curiam* Order ([No. 531 and 532, Judicial Administration Docket](#)), charting a path for PA courts

to reopen, and specifically ending its previously ordered March 16th stay on dispossession of property, evictions, ejectments and other displacements from a residence. The April 28th Order provided in pertinent part that as of May 11th, “the statewide suspension of procedures related to dispossession of property shall cease” (Id, Section IX, p. 12). In its very order, the PA Supreme Court cited its constitutional conferred general supervisory authority over all courts and magisterial district judges pursuant to Article V, Section 10(a) of the PA Constitution.

On the 29th and 30th of April, we began review of all pending eviction and ejectment actions in our office and started to reach out to clients on the most serious of those actions to prepare to resume our efforts on May 11th. However, at about noon on May 7th, lobbyists for the Pennsylvania Residential Owners’ Association (PROA) alerted us to an urgent press conference called by Governor Wolf and Attorney General Shapiro for 1pm that day. Along with other PROA board members, I watched the press conference, and heard the Governor and Attorney General explain the Governor’s Executive Order of that date “suspending evictions until July 10th.

I immediately expressed to my fellow board members my concerns about the Separation of Powers, the Governor’s and Attorney General’s misconception that landlords with substantial lost rent but little or no payroll could receive Federal Payroll Protection Plan loans to cover their lost rent, as well as their apparent lack of understanding that most commercial lease actions are by confession of judgment, not eviction, and most residential leases in PA include clauses waiving the statutory notice to vacate.

I read the Governor’s April 7th Executive Order after the news conference that day, trying to understand the constitutional basis for his action. I read the laws cited in the preambles to that order, and the Governor’s acknowledgment that under the Supreme Court’s order of April 28th, the suspension of eviction and ejectment actions was due to end on May 11th. However, the Governor’s May 7th order did not mention any constitutional rationale for its contradiction of the April 28th order of the PA Supreme Court.

I thought the PA Constitution was so explicit on the Court’s role and that of the Governor regarding administration of the courts that the Supreme Court would clarify its own constitutional role in administration of the courts with the Governor by the end of the day on May 7th, or Friday, May

8th, and there would be an Amended Executive Order. When that did not happen, and an Associated Press reporter asked me what we were going to do about it, I discussed this issue with Attorney Lee Stivale of Springfield, PA (who succeeded me as chairman of the board of PROA), and we agreed to file a King's Bench Petition if the Court did not act sua sponte by Monday, May 11th. We enlisted the help of Attorney Beth Fischman of my office, and jointly filed on May 12th.

The Supreme Court received our petition on May 13th, and ordered that the Governor and Attorney General file an Answer by May 18th. We had discussions with the Governor's attorneys on Friday, May 15th, to attempt to resolve our concerns, but no resolution was possible, and the Governor and Attorney General answered our petition in Brief format on May 18th. That Answer cited other directives like the federal CARES Act, argued that the PA Supreme Court's order contemplated "other directives" and suggested that the governor's Executive Order of May 7th was the type of order contemplated by the Court. The Governor's and Attorney General's Answer also relied heavily on the PA Supreme Court's April 13th, 2020 decision upholding the Governor's authority to close Pennsylvania businesses during the Disaster Emergency in [Friends of Danny DeVito v. Wolf](#) WL 1847100 (Pa April 13, 2020).

However, a reading of PA Supreme Court's *Friends of DeVito* opinion shows that the Court's analysis in that case that the Governor's pandemic Executive Orders did not violate the Separation of Powers between coequal branches of government (in DeVito Legislative and Executive branches) was based on the explicit passage of the Emergency Code, whereby the legislature specifically ceded specific short term authority to the Governor. The PA Supreme Court did not similarly specifically cede its authority over the courts to the Governor.

Action Housing, Neighborhood Legal Services, The Community Justice Project, Senior Law Center, Pittsburgh United, Pittsburgh Union of Regional Renters, Tenant Union Representative Network, and the Cities of Pittsburgh and Philadelphia filed Amici Curiae briefs in opposition to our petition. While those briefs cited voluminous amounts of statistics on the pandemic and its effects on tenants, those filings did not cite any constitutional provisions, statutory or case law in support of the Governor's order.

Following the filing of Governor's and Attorney General's Answer, on May 21st, the Governor amended his Executive Order on May 21st, clarifying

that his original order of May 7th did not prevent the filing or continuing proceedings on evictions for alleged non-monetary defaults of Pennsylvania residential leases.

As requested by the Court, [we filed a supplementary brief](#) on issues of separation of powers and deprivation of substantive due process on June 1st, and the Governor and Attorney General [filed their brief](#) on those issues on June 4th, after which the Court marked the case as submitted on briefs. In the Governor's and Attorney General's June 4th brief, they further clarify that the Executive Orders of May 7th and 21st "does not impact evictions where the tenant has waived his or her right to receive a notice (to vacate)". (Respondent's Br. p.22).

Through the process of this action, the Governor's Amended Order and brief, it is clear that evictions for non-economic reasons as well as economic evictions on the vast majority of Pennsylvania residential leases which contain waivers of notice can now proceed. We await a decision from the PA Supreme Court on the constitutional separation of powers issue and remaining substantive due process issues as this article goes to print.