

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2020-007629

07/22/2020

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
L. Stogsdill
Deputy

GREGORY REAL ESTATE AND
MANAGEMENT

BRIAN K STANLEY
J MARK HELDENBRAND

v.

MILES M KEEGAN, ET AL

BRETT W JOHNSON
TRACY A OLSON
JOSEPH I VIGIL
COLIN PATRICK AHLER

GREGORY REAL ESTATE
ANN GREGORY
1515 W OSBORN RD
PHOENIX AZ 85015
CASEY & KINSEY RADERMACHER
16237 N 161ST DR
SURPRISE AZ 85374

**UNDER ADVISEMENT RULING
VERDICT**

The Court has reviewed and considered the following:

A. Plaintiff's *Special Action Complaint* and *Application for Order to Show Cause*,
filed July 6, 2020;

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- B. *Real Party-Defendant's Response to Plaintiff's Application for Order to Show Cause*, filed July 10, 2020;
- C. *Real Party-Defendant In Interest Governor Ducey's Request for Judicial Notice and Memorandum In Support*, filed July 10, 2020;
- D. *Plaintiff's Reply to Response to Application for Order to Show Cause*, filed July 13, 2020;
- E. *Plaintiff's Response to Motion for Judicial Notice*, filed July 13, 2020;
- F. *Real Party-Defendant In Interest Governor Ducey's Second Request for Judicial Notice and Memorandum In Support*, filed July 16, 2020;
- G. *Real Party-Defendant In Interest Governor Ducey's Reply in Support of Request for Judicial Notice and Memorandum In Support*, filed July 16, 2020;
- H. *Plaintiff's Response to Governor's Second Motion for Judicial Notice*, dated July 18, 2020; and
- I. The arguments and authorities raised during the oral argument held on July 21, 2020.

Plaintiff filed a single claim Special Action Complaint in the nature of mandamus, and argues that Executive Order 2020-14, *Postponement of Eviction Actions*, issued by Arizona Governor Douglas Ducey on March 24, 2020 (hereafter, "EO 2020-14") is unconstitutional essentially for three reasons: (i) because it was issued by Governor Ducey without valid authority; (ii) because it violates the doctrine of separation of powers set forth in Article 3 of the Arizona Constitution; and (iii) because it constitutes a taking of private property in violation of Article 2, Section 17 of the Arizona Constitution. Real Party-Defendant disagrees, arguing that EO 2020-14 was issued pursuant to the valid authority of the Arizona Governor during a declared Public Health Emergency, and is consistent with the Arizona Constitution. Both sides have agreed that no factual issues are in dispute, and that it is appropriate for the Court to rule on the merits of this case as a matter of law.

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THE COURT FINDS as follows:

1. A.R.S. § 12-2021 establishes that this Court may issue writs of mandamus, and specifically provides: “A writ of mandamus may be issued by the supreme or superior court to any person, inferior tribunal, corporation or board, though the governor or other state officer is a member thereof, on the verified complaint of the party beneficially interested, to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.” Relief previously obtained through a writ of mandamus must now be obtained in a Special Action. Rule 1(a), *Arizona Special Action Rules of Procedure*. A special action is appropriately taken where, as here, no equally “plain, speedy and adequate remedy by appeal exists.” *Id.*; *Andrews v. Willrich*, 200 Ariz. 533, 535 (App. 2002). In addition, special action jurisdiction is warranted in cases such as this one because Plaintiff raises constitutional issues of first impression and statewide importance. *Martin v. Reinstein*, 195 Ariz. 293, 300-01 (App. 1999).
2. This Court has jurisdiction and venue is proper.
3. Taking judicial notice of the matters identified by Real Party – Defendant In Interest Governor Ducey is appropriate pursuant to Rule 201, *Arizona Rules of Evidence*. The matters which Governor Ducey requests the Court to take judicial notice of constitute facts and public records that can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned. Taking judicial notice of these matters demonstrates reality that Arizona leaders and the general population perceived Covid-19 to be an emergent problem and a virus to which swift and urgent attention was required. At oral argument, Plaintiff essentially conceded that taking action to address Covid-19 and its spread constitutes a legitimate state interest. Although possible to quibble with some of the factual details contained in the records, it is appropriate to take judicial notice of such records to reflect what was, and is, being reported in public records about Covid-19. The Court has given the facts of which it has taken judicial notice the weight that each is worth.

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4. When EO 2020-14 was issued, it contained several specific findings, including:
- WHEREAS, in order to prevent the spread of COVID-19 and protect citizens from individuals who may become infected, the Centers for Disease Control and Prevention have recommended that people self-isolate if they have been exposed to COVID-19 or if they have a condition that puts them at risk for serious harm by the disease; and
* * * *
 - WHEREAS, the anticipated loss of work and income for Arizonans and their families may impact their ability to pay for their rental housing, resulting in landlords initiating eviction proceedings to remove them from their residences; and
* * * *
 - WHEREAS, to further protect public health, it is necessary to . . . avoid the serious consequence of Arizonans losing their rental housing.

[EO 2020-14, at pp. 1-2]

5. The conditions underlying these findings have not changed. Consequently, the factual underpinnings of EO 2020-14 remain.¹
6. Arizona Governor Ducey was empowered by Arizona law to issue EO 2020-14, and he did not act arbitrarily, capriciously, or without recourse when doing so. Governor Ducey's declaration of a public health emergency is justified under Arizona law. A.R.S. § 36-787. The issuance of EO 2020-14 does not constitute an abuse of Governor Ducey's discretion. The rational basis of mitigating the spread of Covid-19, by promoting physical distancing through the delay of evictions, exists and supports EO 2020-14.

¹ Only EO 2020-14 is at issue in this case. Although the restriction on enforcement of eviction actions has been extended by Executive Order 2020-49, the propriety of that Executive Order is not at issue in this case and will not be decided (although some of the Court's rationale here may be persuasive to any future litigation over Executive Order 2020-49).

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7. Article 3 of the Arizona Constitution provides: “The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.”
8. EO 2020-14 does not violate the separation of powers doctrine set forth in Article 3 of the Arizona Constitution by having the Executive Branch interfere with the operations of the Judicial Branch for several reasons:
 - a. By its express terms, EO 2020-14 provides: “Unless a court determines on motion of the parties that enforcement is necessary in the interest of justice or is in accordance with A.R.S. § 33-1368, all . . . certified law enforcement officers and any person [subject to the Constable Board] shall temporarily delay enforcement of eviction action orders for residential premises” under certain circumstances. The plain language of EO 2020-14 confirms that EO 2020-14 is directed at officers exercising powers and conducting functions of the Executive Branch – law enforcement officers and constables. Plaintiff, citing *Clark v. Campbell*, 219 Ariz. 66, 71 ¶ 18 (App. 2008) recognizes that “Historically, the officer of constable has been linked with the office of sheriff.” Even though law enforcement officers and constables become “officers of the court” when they carry out duties of their office relating to the enforcement of judicial orders, they nonetheless are performing duties and exercising powers within the province of the Executive Branch.² It

² Whether constables are officers of the Executive Branch or the Judicial Branch remains an open issue under Arizona law. Arizona law provides that “[c]onstables shall attend the courts of justices of the peace within their precincts when required, and within their counties shall execute, serve and return all processes, warrants and notices directed or delivered to them by a justice of the peace of the county or by competent authority.” A.R.S. § 22-131. Arizona law further provides that “the provisions of law relating to sheriffs, as far as applicable, shall govern the powers, duties and liabilities of constables.” A.R.S. § 22-131(D). The Arizona Supreme Court previously has declined to identify whether a constable is an officer of the Executive Branch or the Judicial Branch, stating: “The separate issue of whether a constable is a judicial or an executive officer, though discussed by the parties, is not germane to the disposition of the

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is appropriate and proper for the Arizona Governor to place limitations on the timing of actions permitted to be taken by personnel exercising functions and powers reserved to the Executive Branch.

- b. The Executive Order does not prohibit members of the Judicial Branch from exercising discretion, hearing cases, or issuing eviction orders, nor does it direct what the rulings must be in eviction cases. Courts and judicial officers have the full authority and ability to hear eviction cases and to issue eviction orders. EO 2020-14 merely delays when eviction orders may be enforced by officers of the Executive Branch.
 - c. EO 2020-14 provides for judicial override. A court can make a determination “on motion of the parties that enforcement is necessary in the interest of justice” and direct that enforcement of a residential eviction action order occur immediately.
9. EO 2020-14 does not violate the doctrine of separation of powers set forth in Article 3 of the Arizona Constitution by allowing the Executive Branch to invade the powers of the Legislative Branch for multiple reasons, including:
- a. The Executive Orders of the Arizona Governor have the force of law, but are not laws in themselves. The exercise of the police power conferred upon the Arizona Governor and the Executive Branch by Arizona law results in the issuance of temporary, administrative measures which can

case. Accordingly, we need not reach it.” *Powers v. Carpenter*, 203 Ariz. 116, 120, 51 P.3d 338, 342 (2002). For the reasons stated in the remainder of this decision, the Court believes that it is unnecessary in this case to make the determination about whether a constable is an officer of the Executive Branch or Judicial Branch. However, if such a determination was required to be made in this case, the Court believes that the relevant inquiry under Arizona law involves consideration of the *function* performed by constables, and not only title of the office held. See *Judd v Bollman*, 166 Ariz. 417, 803 P.2d 138 (App. 1990) (holding that a “judge lacked authority to make specific jail designation, which was province of sheriff” based on the reasoning that “the judiciary has no authority to usurp the functions of the executive branch.”) Service of an eviction order, like all other Court orders (Order of Protection, etc.) are functions belonging to officers of the Executive Branch, not the Judicial Branch. It, consequently, is appropriate (and not an infringement of the powers of the Judicial Branch) for the Arizona Governor to direct how Executive Branch functions and powers are to be exercised by government officials.

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be directed at protecting public health during a public health pandemic. *See Globe School Dist. No. 1 of Globe v. Board of Health of City of Globe*, 20 Ariz. 208, 218 (1919) (creation of rules and regulations and adoption of health measures during flu pandemic of 1918 originated from administrative powers, not legislative powers).

- b. The Legislature did not reserve unto itself the power to legislate all matters during times of emergency. Rather, it conferred police powers to the Arizona Governor and the Executive branch to promulgate temporary rules and regulations during times of emergency. A.R.S. §§ 26-301(15) and 26-303. Contrary to Plaintiff's assertion, EO 2020-14 amounts to permissible "filling in the details" of the specific administrative orders required in situations of public health emergencies, as is permitted by Arizona law. *Cook v. State*, 185 Ariz. 185, 187 (App. 2012). Governor Ducey's exercise of the police powers conferred upon his office during a declared public health emergency gives effect to the Legislature's intent.
- c. The very structure of Arizona law confirms the intent of the Legislature to confer upon the Governor the power to administratively manage states of emergency with efficiency, particularly where, as here, the Legislature is not in session. The present actions illustrate the wisdom of Arizona law. Here, the Legislature has been in recess or out of session for most of the time period that EO 2020-14 has been in effect. During this year's Legislative Session, the final day to introduce legislation in the House of Representatives was February 10, 2020, and February 3, 2020 in the Senate. The Legislature adjourned for its Covid-19 recess on March 23, 2020 – the day before EO 2020-14 was issued. The Legislature reconvened briefly in May 2020, before ending the Legislative Session and adjourning on May 26, 2020.³ The utilization of police powers given to the Arizona Governor to manage public emergencies is not an affront of the separation of powers. To the contrary, the Governor's Executive

³ When it reconvened, the Legislature could have addressed or modified EO 2020-14 with legislation, if desired. It did not do so.

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Order represents respect for legislative intent, the conscientious discharge of the Governor's Oath of Office, and fidelity to the Governor's obligation to responsibly use the powers conferred by Arizona law to "fill in the details" needed to deal with emergency situations. A.R.S. § 26-303.

- d. The Court agrees with Plaintiff that the Governor has not convened a special session. However, it cannot be overlooked that the Legislature has the authority to convene a special session, during which it can enact legislation to limit, address, restrict, or eliminate the effects of Executive Orders.⁴ Consequently, there are checks on the use of the Arizona Governor's police powers through Executive Orders. The Arizona Legislature has not convened a special session as of the date of this ruling.
- e. Finally, the Court notes limitations on enforcement of eviction orders are temporary, not permanent. The Executive Order constitutes a delay in enforcement of a statutory right, as opposed to the elimination of a statutory right.

10. Nothing about EO 2020-14 is inconsistent with Article 3 of the Arizona Constitution, or any Arizona law addressing the separation of powers.

11. Article 2, § 17 of the Arizona Constitution provides: "No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide. ... Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question."

⁴. The Arizona Legislature has the power to address the extension of the stay limiting enforcement of eviction orders – if displeased with Executive Order 2020-49 – either during a special session, or during the regular 2021 Legislative Session.

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12. EO 2020-14 does not effect a taking, either actual or regulatory, and therefore does not violate Article 2, § 17 of the Arizona Constitution.⁵ There has been no physical invasion or direct appropriation of Plaintiff’s real property. Consequently, there is no actual taking. *Dos Picos Land Ltd. P’ship v. Pima County*, 225 Ariz. 458, 461 ¶ 7 (App. 2010). With respect to a regulatory taking, Plaintiff’s claim fails because EO 2020-14 is supported by the substantial advancement of a legitimate state interest – slowing the spread of Covid-19 – and does not deny the owner of the property an economically viable use of the land. The Court notes that EO 2020-14 expressly protects a landlord’s rights⁶ to receive rent and to demand that a tenant observes all other obligations under lease agreement, providing: “No provision contained in this Executive Order shall be construed as relieving any individual of the obligation to pay rent or comply with any other obligation that an individual may have under a tenancy.” [EO 2020-14 at p. 3, ¶4]
13. EO 2020-14 is constitutional. It does not violate Article 2, Section 17, or Article 3, of the Arizona Constitution. Governor Ducey was authorized and empowered to issue EO 2020-14. Plaintiff’s challenge to EO 2020-14, therefore, is without merit.
14. The Honorable Miles M. Keegan, the Justice of the Peace for the Hassayampa Precinct of Maricopa County and the named Defendant, did not abuse his discretion by applying and following EO 2020-14. His *legal decision* to apply EO 2020-14 and to make a determination of whether immediate “enforcement [was] necessary in the interest of justice,” was not an abuse of discretion. No evidence has been presented suggesting that Justice of the Peace Keegan’s *factual decision* that immediate enforcement was not necessary either amounted to an abuse of discretion or constituted error. Finally, irrespective of whether

⁵ Because no taking has occurred, it is unnecessary for the Court to rule on Plaintiff’s claim that property has been taken without due process of law in violation of Art. 2, § 4 of the Arizona Constitution.

⁶ Plaintiff should not think that the Court has not considered the equities and hardships that Plaintiff and other landlords are incurring by virtue of EO 2020-14 and subsequent Executive Orders. Indeed, the Court has done so. However, in this case, the Court is not being asked to fashion an equitable result, but instead to decide whether EO 2020-14 is constitutional.

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Justice of the Peace Keegan declined to issue an eviction order requiring “immediate” eviction because of EO 2020-14, or whether he actually issued an eviction order but required it to be served only upon the expiration of EO 2020-14, there is neither error nor an abuse of discretion.⁷ Justice of the Peace Keegan’s actions comported with EO 2020-14.

Good cause appearing,

IT IS ORDERED accepting special action jurisdiction.

IT IS FURTHER ORDERED granting *Real Party-Defendant in Interest Governor Ducey’s Request for Judicial Notice and Memorandum In Support*, filed July 10, 2020.

IT IS FURTHER ORDERED granting *Real Party-Defendant In Interest Governor Ducey’s Second Request for Judicial Notice and Memorandum In Support*, filed July 16, 2020.

IT IS FURTHER ORDERED denying Plaintiff’s *Application for Order to Show Cause*, filed July 6, 2020.

IT IS FURTHER ORDERED finding in favor of Defendant and Real Parties-Defendants in Interest, and against Plaintiff, as to the single claim in the Special Action Complaint. Relief in the nature of mandamus is not warranted pursuant to Arizona law. Therefore, all relief sought by Plaintiff is denied and judgment is entered in favor of Defendant and Real Party-Defendants in Interest. Each party shall bear its own attorneys’ fees, costs and expenses in this matter.

⁷ As discussed above, given the language of EO 2020-14, perhaps the most precise action would be to issue an eviction order, and delay the date the eviction order could be served until the day after EO 2020-14, as extended, expired. However, delaying the issuance of the eviction order until EO 2020-14 expires has the same practical effect.

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IT IS FURTHER ORDERED that because no further matters remain pending, and because this is a matter of statewide importance to which prompt appellate consideration is warranted if desired, this Order constitutes a final Judgment in this matter pursuant to Rule 6, *Arizona Special Actions Rules of Procedure*, and Rule 54(c), *Arizona Rules of Civil Procedure*.

DATED: July 22, 2020.



Christopher A. Coury
Superior Court Judge