

BEFORE THE ALLEGHENY COUNTY HEALTH DEPARTMENT

THE CRACK'D EGG, LLC,

Appellant,

v.

No. ACHD-22-023

THE ALLEGHENY COUNTY
HEALTH DEPARTMENT,

Appellee.

BRIEF FOR APPELLANT

AND NOW, The Cracked Egg, LLC, by its Counsel, James R. Cooney, submits the within Brief:

Background:

The Cracked Egg, LLC operates a family restaurant at 4131 Brownsville Road, Brentwood, Allegheny County, Pennsylvania. On August 11, 2020, The Allegheny County Health Department (the ACHD), suspended the Cracked Egg's health permit and ordered it to close (the closure order). The closure order was based upon the failure to comply with mask or facial covering guidelines which the ACHD deemed to be an "imminent hazard to public health." The closure order stated that "Failure to close will result in immediate initiation of an enforcement action." However, there was no mention that civil penalties could be imposed for the failure to close.

On September 16, 2020, the ACHD, by its attorney, Vijya Patel, filed a Complaint in Equity in the Court of Common Pleas of Allegheny County. The case was docketed at GD-20-009809. In its Complaint, the ACHD sought to enjoin the

Crack'd Egg from operating until it submitted a COVID-19 Compliance Plan. The Complaint also sought the imposition of Civil Penalties against the Cracked Egg pursuant to Article III of ACHD Food Safety Regulations. The Cracked Egg filed an Answer which asserted that the Covid-19 Mitigation Orders violated its civil rights.

The case was assigned to the Honorable John T. McVay, Jr. By his Opinion and Order entered on February 3, 2021, Judge McVay granted the ACHD's request for injunctive relief. However, Judge McVay did not impose any civil penalties against the Cracked Egg, despite the ACHD's request for the same.

The Cracked Egg filed an appeal to the Commonwealth Court of Pennsylvania. While the appeal was pending, on May 18, 2021, the voters of Pennsylvania passed a Constitutional Amendment which limited the Governor's Emergency Powers to a period of 21 days. As a result of the Constitutional Amendment, Governor Wolf rescinded the statewide masking order as of June 28, 2021.

Oral argument was held before a Panel of the Commonwealth Court (by Zoom) on June 7, 2021. James R. Cooney argued for The Cracked Egg. Vijya Patel argued for the ACHD. During the argument, Ms. Patel asserted that the Constitutional Amendment rendered the case moot. Mr. Cooney responded that the case was not moot since the ACHD could still impose penalties. Ms. Patel countered that the ACHD would waive the penalties since the ACHD's real interest was enforcement of its orders and penalties were only a secondary consideration.

On June 24, 2021, the ACHD lifted its closure order against the Cracked Egg and reinstated its health permit. On December 30, 2021, more than 6 months later, Amanda Mator signed the civil penalty order at issue in this appeal (Transcript, pp. 55-56). To make matters worse, the County waited until March 25, 2022, 3 months later, to send the civil penalty order to the Cracked Egg (Transcript, p. 56; Exhibit "K"). Ms. Mator was unable to provide any reasonable explanation for such delay (Transcript, pp. 56-57).

The civil penalty order imposed civil penalties against the Cracked Egg in the amount of \$13,200.00. The Cracked Egg has filed an appeal which is pending before Hearing Officer John McGowan. The Cracked Egg now files the within Brief in support of its appeal.

DISCUSSION

A. The imposition of penalties violates Appellant's constitutional rights:

In the enforcement proceedings before Judge McVay, the Cracked Egg asserted that enforcement of the Covid 19 mitigation measures violated its constitutional rights. Among other things, the Cracked Egg asserted that:

A. The Commonwealth (and the County) failed to comply with mandatory rule making procedures.

B. The health permit was suspended without notice or a hearing in violation of the Cracked Egg's due process rights.

C. Enforcement of the mitigation measures was contrary to the ruling of the Honorable William S. Stickman, IV in the case of *County of Butler v. Wolf*, 2020 U.S. Dist. LEXIS 167544 (W.D. Pa. 2020).

D. Enforcement of the mitigation measures violated the Cracked Egg's substantive due process rights as well as its right to equal protection.

Although Judge McVay did not accept these arguments, the Cracked Egg clearly had the right to raise them under the Pennsylvania Constitution. See, *PA. Constitution, Article 1, Section 11*, which provides in relevant part, that:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law. . .

Accordingly, the imposition of penalties in retaliation constitutes a violation of civil rights, in and of itself. See, *Mallory v. Norfolk Southern Railway Co.*, 2021 Pa. LEXIS 4318, 266 A.3d 542 (2021); *Churchill Community Development, L.P. v. Allegheny County Health Department*, 2019 Pa. Commw. LEXIS 1125, 225 A.3d 596 (2019).

B. The County waived its right to impose civil penalties:

On June 7, 2021, during the argument before the Commonwealth Court, Vijya Patel asserted that the ACHD would waive the civil penalties since the ACHD's real interest was enforcement of its orders, and penalties were only a secondary consideration. See Responses to Discovery Requests, Number 14.

As counsel of record, Ms. Patel clearly had the authority to waive the civil penalties on behalf of the County. See, *3 P.L.E., Attorneys, Section 34* (2023):

The implied authority of an attorney at law in this state is very broad as to those things which arise in the regular course of

the litigation and pertain to the conduct of an action...

See also, *Lerner Master Fund, LLC v. Paige*, 476 B.R. 867 (M.D. Pa. 2012) and cases cited therein. As stated by the Court:

In matters concerning the management of the litigation, implied authority is initially presumed for the sake of judicial efficiency; an attorney may typically enter into procedural stipulations and agreements. See *City of Philadelphia v. Schofield*, 375 Pa. 554, 101 A.2d 625, 627 (1954); *Grocery & Food Warehousemen Local Union No. 635 v. Kroger Co.*, 364 Pa. 195, 70 A.2d 218, 219 (Pa. 1950); see generally, *In re Gsand*, 153 F.2d 1001, 1005 (quoting *Starling*, 333 Pa. 124, 3 A.2d 387, regarding general powers of attorney during litigation).

C. Civil penalties are barred by the doctrine of collateral estoppel:

As set forth above, the County sought to recover civil penalties in the case before Judge McVay. Although Judge McVay granted the County's request for an injunction, he failed to impose any civil penalties against the Cracked Egg. Based upon the same, the County's current attempt to impose penalties is barred by collateral estoppel.

Pennsylvania law is clear that the doctrine of collateral estoppel applies to administrative proceedings. See, *Yonkers v. Donora Borough*, 1997 Pa. Commw. LEXIS 863, 702 A.2d 618 (1997):

Collateral estoppel is a legal doctrine intended to preclude the re-litigation of issues of law or fact in a subsequent action. *PMA Insurance Group v. Workmen's Compensation Appeal Board (Kelley)*, 665 A.2d 538 (Pa. Cmwlt. 1995), *petition for allowance of appeal denied*, 544 Pa. 618, 674 A.2d 1078 (1996). A decision of a workers' compensation judge can have preclusive effect in subsequent workers' compensation proceedings, *Patel v. Workmen's Compensation Appeal Board (Sauquoit Fibers Co.)*, 88 Pa. Commw. 76, 488 A.2d 1177 (Pa. Cmwlt. 1985), as well as later civil and administrative proceedings. *Grant v. GAF Corporation*, 415 Pa. Super. 137, 608 A.2d 1047 (1992), *aff'd*, 536 Pa. 429, 639 A.2d 1170 (1994).

See also, *Cohen v. St. Mary Medical Center*, 22 Pa. D. & C. 5th 83 (Bucks 2011).

D. The civil penalties violate the Cracked Egg's right to due process of law:

The law is clear that:

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

BMW of North America v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996).

Here, the County failed to provide the Cracked Egg with any advance notice that it would be subject to civil penalties. None of the inspection letters sent to the Cracked Egg made any reference to penalties for the alleged violations (Transcript, pp. 42, 44). In fact, although the inspection letters threatened an "enforcement action," none of them notified the Cracked Egg that civil penalties could or would be imposed (Transcript, pp. 44-45, 77-78). Even the Closure Order issued by the County (Exhibit "D") fails to make any reference to civil penalties (Transcript, p. 49).¹

Moreover, the Cracked Egg had no advance notice of the severity of the civil penalties. Amanda Mator testified that she calculated the civil penalties based upon a civil penalty worksheet (Transcript, pp. 29-34; Exhibit "J"). However, Ms. Mator admitted that the worksheet was never provided to the

¹ Amanda Mator testified that the alleged violations were based upon Article III entitled "Food Safety" (Transcript, pp. 47-48). However, there is nothing in Article III that requires the wearing of face masks (Transcript, pp. 47-48)

Cracked Egg (Transcript, pp. 33-34). This is troubling in that Ms. Mator testified that there is nothing in Article III that references a civil penalty worksheet (Transcript, p. 60).

E. The civil penalties imposed are punitive:

The law is clear that civil penalties are imposed to induce compliance with an order or to deter future violations. See, *KIKO Energy, LLC v. PA PUC*, 653 Pa. 1, 209 A.3d 246 (2019); *Commonwealth v. PA Power Company*, 490 Pa. 399, 416 A.2d 995 (1980).

In the present case, the Cracked Egg cannot be compelled to comply with the statewide universal masking order as such order was rescinded on June 28, 2021. Accordingly, imposition of the civil penalties is nothing but punitive.

F. The County has failed to meet its burden of proof:

The law is clear that the County was required to establish justification for the penalties imposed by a preponderance of the evidence. See, *Stambaugh v. Department of Environmental Protection*, 210 Pa. Commw. LEXIS 671, 11 A.3d 30 (2010):

DEP has the burden of proving its assessment of a civil penalty by a preponderance of the evidence. *Department of Environmental Protection v. Bethenergy Mines, Inc.*, 563 Pa. 170, 176, 758 A.2d 1168, 1171 (2000).

See also, *Redinger v. Allegheny County Health Department*, 2021 Pa. Commw. LEXIS 557, 260 A.3d 1076 (2021) and cases cited therein.

The County has failed to meet its burden as is more fully set forth below.

G. There is no evidence to support many of the violations:

Amanda Mator identified Exhibit "K" as the civil penalty order (Transcript, p. 49). One of the alleged violation dates listed was June 28, 2021 (Transcript, p. 50). However, Ms. Mator admitted that the permit had been reinstated on June 28, 2021 (Transcript, p. 51). In fact, in her letter dated June 24, 2021, Donna Scharding advised the Cracked Egg that:

The Allegheny Health Department will lift its August 11, 2020 closure order against your facility, the Crack'd Egg' located at 4131 Brownsville Road, on June 28, 2021.

(Exhibit 13).

According to the civil penalty order (Exhibit "K"), the Cracked Egg was in violation on March 1, 2021 (Transcript, p. 52). However, the inspection report for March 1, 2021, issued by Otis Pitts, specifically says that "no food was being served" on that date (Transcript, pp. 53-54).

The civil penalty order (Exhibit "K") also asserted that the Cracked Egg was in violation on May 10, 2021 (Transcript, p. 93). However, Angel Costis admitted that the County had no evidence that the Cracked Egg was open on May 10, 2021 (Transcript, p. 93-94).

H. The violation notices sent to the Cracked Egg are hearsay:

The violation notices sent to the Cracked Egg do not qualify as business records and thus are hearsay. For example, Exhibit "A" purports to be a Notice sent to the Cracked Egg on August 12, 2020, regarding the ACHD's alleged inspection of the premises on July 1, 2020. However, Amanda Mator testified that the Notice was actually sent on July 1, 2020, not August 12, 2020 (Transcript, pp.

7-8). Similarly, Exhibit "B" purports to be a Notice sent to the Cracked Egg on August 12, 2020, regarding the ACHD's alleged inspection of the premises on August 5, 2020. However, Amanda Mator testified that the Notice was actually sent on August 5, 2020 (Transcript, pp. 10-11).

The business records exception to the hearsay rule is set forth in *Pa.R.E. 803 (6)*, which provides in relevant part that:

- (6) Records of a Regularly Conducted Activity. A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,
 - (A) the record was made at or near the time by-or from information transmitted by-someone with knowledge;
 - (B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;
 - (C) making the record was a regular practice of that activity;
 - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902 (11) or (12) or with a statute permitting certification; and
 - (E) neither the source of information nor other circumstances indicate a lack of trustworthiness.

The notices sent to the Cracked Egg are dated long after the referenced inspections occurred. Amanda Mator testified that the date on each document "is the date that the County looked at it." This does not justify the County's after-the-fact recording of the inspections.

Moreover, Amanda Mator was not a qualified custodian who could authenticate the records. See, *Keystone Dedicated Logistics, Inc. v. JGB Enterprises*, 2013 Pa. Super. LEXIS 1704, 271 A.3d 961 (2022):

Keystone, however, failed to bring a custodian or other qualified witness to testify. Instead, it presented Richard Coyner to testify regarding their contents. He did not attempt to testify to the preparation or maintenance of the records; indeed, he did not have the

necessary knowledge to do so. This Court has repeatedly emphasized that there is a need for trustworthiness in applying the business record exception. *See, e.g., Birt v. Firstenergy Corp.*, 2006 PA Super 11, 891 A.2d 1281 (Pa.Super. 2006). The business records exception is inapplicable, and the invoices were inadmissible hearsay.

See also, *Hauck v. Unemployment Compensation Board of Review*, 2022 Pa. Commw. LEXIS 21, 271 A.3d 961 (2022).

Counsel for the Cracked Egg objected to the hearsay nature of these exhibits, but his objections were overruled (Transcript, pp. 12-13). This is particularly troublesome since Amanda Mator testified that she **never** visited the Cracked Egg and was not present for any of the inspections (Transcript, p. 46-47). Ms. Mator admitted that she had no personal knowledge of any of the alleged violations and that all of the notices were based upon what someone from her office told her (Transcript, p. 46-47).

CONCLUSION

For all of the foregoing reasons, the Appellant respectfully requests that the Hearing Officer reverse the County's imposition of civil penalties.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I, James R. Cooney, hereby certify, that on the 26th day of May, 2023, I served a true and correct copy of the foregoing **Brief** upon Counsel for the Appellee, by E-mail, addressed as follows:

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