

STATE OF MICHIGAN
IN THE 14TH CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
v

HON. TIMOTHY G. HICKS
File No. 20-1436-CZ

NICHOLAS DANIELS and LANDSCAPE
SUPPLIES, LLC,
Defendants.

_____/
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_____ /

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**OPINION GRANTING PLAINTIFF'S MOTION
FOR A DECLARATORY JUDGMENT**

INTRODUCTION

Defendant conducts business at 3770 Airline Rd. in the city of Norton Shores in Muskegon County. The Prosecutor, on behalf of the People of the State of Michigan, has sued the defendants in this civil proceeding. They seek a ruling from the court.

This judge typically prepares one document which is both an opinion and an order. The court has not done so in in this case so that the ensuing order is (1) shorter and (2) more clearly understood by any interested parties.

The parties have narrowed the scope of this proceeding through negotiations and stipulations found in the file. It is to their credit that they have done this in a lawsuit which only started on Tuesday, April 14, but was presented for resolution within 3 days, on Friday, April 17. The court stresses that, in this lawsuit, any criminal sanctions are not an issue.

The court conducted a hearing, via the Zoom technology, on April 17. This order supersedes any other Cease and Desist orders or guidance from state authorities.

FACTS

The court does not disturb the parties' stipulations of fact.

ANALYSIS AND DECISION

The court is aware that this lawsuit presents important questions about the Governor's Executive orders, issued during these extraordinary times created by the COVID-19 emergency. Nonetheless, the scope of this order is limited to the parties in this lawsuit. As noted above, any criminal sanctions or other financial ramifications are not presented in this litigation.

The parties have distilled the legal issues to three, creating a framework for the issues to be resolved. However, providing the comprehensive guidance the prosecutor seeks, one which would ostensibly establish some rules for similar businesses, requires greater analysis.

Executive Order 42

Executive Order 42 ("EO 42") took effect on April 9 at 11:59 pm and rescinded EO 21. It is lengthy and contains numerous definitions, but its first numbered paragraph says that it "must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life." The Governor's office also prepared a list of frequently asked questions, with answers to those.

That document says this about landscape businesses:

Q: May landscaping, lawncare, tree service, irrigation and related outdoor maintenance companies operate under this order? (Bold in original)

A. In nearly all cases, no. A business cannot designate its workers to perform these services unless the service is necessary to maintain the safety, sanitation and essential operations of a residence. This is a narrow exception that only permits in-person work that is strictly necessary to address a circumstance that **immediately and genuinely impairs the habitability of a home** during the emergency. (This judge has added this bold.)

The April 14 letter from the attorney general and the prosecutor to the defendants also cites this language.

Defendant and his company are clearly in the landscape business, so this order applies to them. The court concludes that delivery of materials to customers is proscribed by EO 42. But some additional issues merit discussion.

The Big Box Stores Do It

There is no disagreement that one can secure the delivery of mulch from other types of businesses. It no doubt seems unfair. Placed into its legal context, this raises a fundamental issue of Equal Protection of the laws.

Unfortunately, this record does not allow the court to properly address this issue. Governments can treat groups differently if they can establish a legal basis for such. For example, some municipalities have different rules for owner-occupied homes versus those owned by landlords. The Governor might be treating these other businesses differently because they have other departments and provide products like food and equipment necessary for vital home repairs or even family health and safety.

The legal basis, the facts necessary to support that treatment, and the type of scrutiny which courts apply to those decisions are undeveloped in this record. This is not necessarily anyone's fault because there is some urgency to entering this decision. It may, in fact, already be in the record and was overlooked here, or the Governor's office may want to consider the issue at some point. But this judge cannot resolve Equal Protection issues here, now.

Guidance from the Michigan Department of Environment, Great Lakes and Energy

("EGLE")

Landscape Supply is on the "official" EGLE list of composting facilities. Defendants submit two bulletins from EGLE which arguably support their position and appear, to some extent, to conflict with the Governor's order. The one sent on March 26 recognizes that waste and materials management activities are essential and necessary activities. The other one speaks to yard waste handling. Defendant also submits documents from a trade group attesting to the importance of mulching and another, unattributed, about hazards presented by improper or careless mulching.

The court denies defendant relief on this argument primarily because the agency guidance cannot overrule the Governor's order, as it is explained in the questions and answers. Further, composting and delivery of materials might be related but are different activities. The court appreciates but is not persuaded by the other materials.

Cyber and Infrastructure Security Agency ("CISA") Guidance

Defendant's exhibit F is a state document adopting a list of critical infrastructure workers from that prepared by CISA. The CISA memorandum was submitted separately with defendant's briefing materials, and is also cited in paragraph 8 of the Governor's order. That citation, in particular, incorporates it into her order and gives it greater weight than the "stand-alone" EGLE guidance.

It seems a bit incongruous to see a section devoted to "Food and Agriculture" in a publication from an agency with a name that starts with "Cybersecurity," but there it is. "Workers who support the manufacture and distribution of forest products, including, but not limited to timber, paper, and other wood products" are considered critical infrastructure workers.

The court denies relief on this basis, since it also runs counter to the Governor's order and the explanation. Yes, some of defendants' products emanate from wood, but it also supplies stones and other types of landscape supplies, and its primary business does not involve the removal and cutting of trees or paper production.

The Parties' Three Questions:

The court started with the parties' three questions:

1. Whether the sale of wood chips to the consumer is part of the necessary and essential waste and waste management activity in the State of Michigan, i.e., necessary and essential...

The court concludes that it is not. There remains that very limited exception defined above and noted in the accompanying order.

2. Whether the sale of wood chips to the consumer is a critical infrastructure job/worker classified by CISA as the sale and distribution of a forest product?

The court concludes that it is not. The CISA guidance says that workers who "support the manufacture and distribution" of forest products are such functions, not those who sell them to customers.

3. If such activities are essential and necessary, does the Executive Order require special conditions in how these functions are to be performed?

Given the two answers above, the court need not answer this question.

CONCLUSION

The court stresses that this opinion is not about the **wisdom** of the order. That topic is left for other discussion in other forums. This opinion is also admittedly modest because the parties' work has essentially narrowed it to one particular activity. However, the accompanying order includes language based both upon the conclusions in this order and the parties' agreement about other activities, so as to gather as much certainty as possible in one place.

This is probably the first of many cases which will be presented as our community deals with the COVID-19 emergency and its effects on our lives. The issue resolved here relates to the practical applications of the Governor's order to these particular facts.

Date: April 17, 2020



Timothy G. Hicks, P35198
Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that on the 17 day of April, 2020, I personally mailed copies of this order to the parties above named at their respective addresses, by ordinary mail and electronic mail.



Nicholas P. Gereaux, Court Officer, 14th Circuit Court