

**United States Court of Appeals
For the First Circuit**

No. 20 1428

GABRIEL SCHMITT, on behalf of himself, resident of the Commonwealth of Massachusetts,

Plaintiff Appellant,

v.

GOVERNOR CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth
of Massachusetts,

Defendant - Appellee.

Before

Thompson, Kayatta and Barron,
Circuit Judges.

JUDGMENT

Entered: August 28, 2020

Plaintiff-Appellant Gabriel Schmitt, proceeding pro se, appeals the district court's order denying his motion for a temporary restraining order. This court entered an order directing Schmitt to show cause why the appeal should not be dismissed for lack of finality, and Schmitt has responded.

This court generally lacks jurisdiction to review the denial of a temporary restraining order, subject to certain exceptions decidedly inapplicable to this case. See *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 692 F.2d 814 (1st Cir. 1982). After reviewing Schmitt's submissions and relevant portions of the record, we DISMISS the appeal for lack of finality. See Local Rule 27.0(c) (court may dismiss at any time if jurisdiction is lacking).

Dismissed.

By the Court:

Maria R. Hamilton, Clerk

cc:

Gabriel Schmitt, Maura T. Healey

Appendix B

United States District Court
District of Massachusetts

Gabriel Schmitt,

Plaintiff,

v.

Governor Charlie Baker,

Defendant.

Civil Action No.
20-10618-NMG

ORDER

GORTON, J.


Having considered the ex parte emergency motion for a temporary restraining order filed by pro se plaintiff Gabriel Schmitt ("plaintiff") as well as the Complaint, the Court finds that plaintiff has not demonstrated that he will suffer irreparable injury, loss or damage resulting from his temporary inability to serve process on defendant, Governor Charlie Baker. See Fed. R. Civ. P. 65(b).

Accordingly, plaintiff's motion for a temporary restraining order (Docket No. 5) is **DENIED**, without prejudice. Plaintiff has filed a complaint against Governor Charlie Baker in his official capacity and has therefore effectively sued the Commonwealth of Massachusetts. He may accomplish service of process by complying with Massachusetts Rule of Civil Procedure 4(d)(3). If and when

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he does so, the Court will consider, on an expedited basis, any further motion by plaintiff for injunctive relief based upon allegations in the Complaint provided the Commonwealth receives notice thereof.

So ordered.


Nathaniel M. Gorton
United States District Judge

Dated March 31, 2020

Appendix C Extended Versions of Statutory Provisions Involved:

Chapter 639 Civil Defense Act of 1950

11. Section 4 in pertinent part:

“(Defendant) may cooperate with the federal government, and with other states and private agencies in all matters pertaining to civil defense of the commonwealth and the nation, and may propose a comprehensive plan and program for the civil defense of the commonwealth, and in accordance with said plan and program may institute training and public information programs and take all other preparatory steps, including the partial or full mobilization of civil defense organizations in advance of actual disaster as he may deem necessary.”

12. Section 5 in pertinent part

“or other cause a condition exists in all or in any part of the commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food; or whenever the accidental release of radiation from a nuclear power plant endangers the health, safety, or property of people of the commonwealth, the governor may issue a proclamation or proclamations setting forth a state of emergency,

(a) Whenever the governor has proclaimed the existence of such a state of emergency, he may employ every agency and all members of every department and division of the government of the commonwealth to protect the lives and property of its citizens and to enforce the law. Any member of any such department or division so employed shall be entitled to the protection of existing applicable provisions of law relative to any type of service of the commonwealth as well as the protection afforded by this act.

(b) After such proclamation has been made, the governor may, in the event of disaster or shortage making such action necessary for the protection of the public, take possession (1) of any land or building, machinery or equipment; (2) of any horses, vehicles, motor vehicles, aircraft, ships, boats or any other means of conveyance, rolling stock of steam, diesel, electric railroads or of street railways; (3) of any cattle, poultry and any provisions for man or beast, and any fuel, gasoline or other means of propulsion which may be necessary or convenient for the use of the military or naval forces of the commonwealth or of the United States, or for the better protection or welfare of the commonwealth or its inhabitants as intended under this act. He may use and employ all property of which possession is taken, for such time”

13. Section 7 in pertinent part: “Additional Powers of Governor During State of Emergency.

“During the effective period of so much of this act as is contingent upon the declaration of a state of emergency as hereinbefore set forth, the governor, in addition to any other authority vested in him by law, shall have and may exercise any and all authority over persons and property necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces thereof, and specifically, but without limiting the generality of the

foregoing, the governor shall have and may exercise such authority relative to any or all of the following:"

... "(c) Policing, protection or preservation of all property, public or private, by the owner or person in control thereof, or otherwise."

.... "(g) Assemblages, parades or pedestrian travel, in order to protect the physical safety of persons or property."

13. Section 8 in pertinent part: Executive Orders, General Regulations, and Written Instructions of Governor; Violations; Penalties.

"The governor may exercise any power, authority or discretion conferred on him by any provision of this act, either under actual proclamation of a state of emergency as provided in section five or in reasonable anticipation thereof and preparation therefor by the issuance or promulgation of executive orders or general regulations, or by instructions to such person or such department or agency of the commonwealth, including the Massachusetts Emergency Management Agency, or of any political subdivision thereof, as he may direct by a writing signed by the governor and filed in the office of the state secretary. Any department, agency or person so directed shall act in conformity with any regulations prescribed by the governor for its or his conduct."

General Laws of Massachusetts

14. General Laws Chapter 111 Section 6: Power to define diseases deemed dangerous to public health; control and prevention

"Section 6. The department shall have the power to define, and shall from time to time define, what diseases shall be deemed to be dangerous to the public health, and shall make such rules and regulations consistent with law for the control and prevention of such diseases as it deems advisable for the protection of the public health. The department shall also have the power to define, and shall from time to time so define, what diseases shall be included within the term venereal diseases in the provisions of the laws relative to public health."

15. General Laws Chapter 17 Section 2 A:

"Upon declaration by the governor that an emergency exists which is detrimental to the public health, the commissioner may, with the approval of the governor and the public health council, during such period of emergency, take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease.

The commissioner, with the approval of the public health council, may establish procedures to be followed during such emergency to insure the continuation of essential public health services and the enforcement of the same.

Upon declaration by the governor that such emergency has terminated, all powers granted to and exercised by the commissioner under this section shall terminate.”

First Amendment to the constitution of the United States:

16. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.