

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. 09-4078-F

MASSACHUSETTS REPUBLICAN PARTY,

Plaintiff,

v.

DEVAL PATRICK, GOVERNOR,

Defendant.

**GOVERNOR'S OPPOSITION TO PRELIMINARY INJUNCTION
AND GOVERNOR'S MOTION TO DISMISS COMPLAINT**

The defendant Governor of the Commonwealth opposes the preliminary injunction motion of the Massachusetts Republican Party (MRP) on three grounds: (1) the Governor's authority to file an emergency declaration immediately putting St. 2009, c. 92 ("Chapter 92") in effect, whether or not a referendum petition to repeal the law has been filed, is squarely confirmed by Opinion of the Justices, 368 Mass. 889 (1975), and thus the MRP has no likelihood of success on the merits of its claim; (2) the Governor has already taken all steps necessary to appoint a Senator pursuant to Chapter 92, and thus there is nothing left for this Court to enjoin; and (3) in any event it is highly doubtful, in light of separation of powers principles, that this Court could issue an injunction running directly against the Governor, as the MRP requests. The Governor also moves to dismiss the complaint for failure to state a claim and as moot.

FACTUAL BACKGROUND

In response to the vacancy in the United States Senate resulting from the death of Sen. Edward M. Kennedy, the Legislature enacted and on September 24, 2009, the Governor signed

Chapter 92, which amends G.L. c. 54, § 140, to authorize the Governor to make a temporary appointment to fill the vacancy, pending a special election. See Ex. A (Chapter 92). Pursuant to his express constitutional authority under Mass. Const. amend. art. 48, Referendum, Part II, the Governor filed a letter with the Secretary of the Commonwealth at 10:20 a.m. on September 24, declaring Chapter 92 to be an emergency law that “should take effect forthwith.”¹ The Governor’s declaration (attached as Ex. B) stated that Chapter 92:

is an emergency law and, in my opinion, the immediate preservation of the public peace, health, safety or convenience requires that such law should take effect forthwith.

This Act provides for the temporary appointment of a United States Senator, pending the special election. The purpose of the Act is to ensure that the Commonwealth is fully represented in the United States Senate as it addresses issues of critical importance to the nation and the Commonwealth. That purpose would be frustrated absent this declaration, as the appointment would be delayed for most of the interim period until the special election. Accordingly, so that the people of the Commonwealth may have full representation in the United States Senate without delay, I declare that it is in the public interest and convenience that this Act take effect immediately.

The Secretary thereupon certified that Chapter 92 “takes effect forthwith[.]” See Ex. B (Secretary’s certification on Governor’s emergency declaration).

Shortly thereafter, the Governor appointed Paul G. Kirk, Jr., to fill the vacancy, and the Governor transmitted the certificate of appointment to the Secretary of the United States Senate. See Ex. C (certificate of appointment and letter of transmission). Mr. Kirk is scheduled to be

¹ The cited portion of art. 48 provides in pertinent part as follows (with emphasis added):

[I]f the governor, at any time before the election at which it is to be submitted to the people on referendum, files with the secretary of the commonwealth a statement declaring that in his opinion the immediate preservation of the public peace, health, safety or convenience requires that such law should take effect forthwith and that it is an emergency law and setting forth the facts constituting the emergency, then such law, if not previously suspended as hereinafter provided, shall take effect without suspension, or if such law has been so suspended such suspension shall thereupon terminate and such law shall thereupon take effect[.]

sworn in today, September 25, 2009, in Washington, D.C.

The MRP now claims that Chapter 92 is not yet in effect and seeks an order enjoining the Governor from making an appointment pursuant to Chapter 92.

ARGUMENT

I. The Governor Has Clear Authority to File an Emergency Declaration Putting a Law Into Immediate Effect, Whether or Not a Referendum Petition to Repeal Such Law has Been Filed.

The Governor's authority under Mass. Const. amend. art. 48 to file an emergency declaration putting a law such as Chapter 92 into immediate effect, whether or not a referendum petition to repeal such law has been filed, is unequivocally confirmed by Opinion of the Justices, 368 Mass. 889 (1975) (copy attached as Ex. D). There the Justices concluded that the Governor's "declaration may validly be made before any referendum petition is filed," id. at 894, and "[o]nce the . . . Governor has made the emergency declaration. . . it is quite appropriate in the light of the emergency findings that the law should go immediately into effect." Id. at 894.

As background, laws that may be the subject of a referendum petition² do not take effect until 90 days after enactment, "excepting laws declared to be emergency laws." See art. 48, Referendum, pt. I. Absent an emergency declaration by the Governor,³ if within 90 days of enactment a referendum petition signed by sufficient voters is filed with the Secretary of the Commonwealth, the law is suspended pending the election at which the people vote on whether to approve or repeal the law. See art. 48, Referendum, pt. III, § 3.

² Although certain types of laws are excluded from the referendum--e.g., those relating to religion, or the powers of courts, or certain appropriations, see id. pt. III, § 2--Chapter 92 is not excluded, and the MRP does not argue otherwise.

³ The Legislature may also attach an "emergency preamble" to a law, causing it to go into effect immediately unless otherwise stated therein. Art. 48, Referendum, Part II. That procedure is not at issue here.

But if the governor, at any time before the election at which it is to be submitted to the people on referendum, files with the secretary of the commonwealth a statement declaring that in his opinion the immediate preservation of the public peace, health, safety or convenience requires that such law should take effect forthwith and that it is an emergency law and setting forth the facts constituting the emergency, then such law, if not previously suspended as hereinafter provided, shall take effect without suspension

Art. 48, Referendum, Part II.

In Opinion of the Justices, the Justices were asked “whether a gubernatorial emergency declaration filed with the Secretary before the ninetieth day [i.e., the deadline for filing a completed referendum petition] has the further effect of bringing the law into effect at the time of filing.” Id. at 893. They answered: “such a declaration brings the law into effect immediately.”

Id.

Accordingly, Chapter 92 is in effect and the Governor’s appointment of Mr. Kirk was valid. The MRL has no likelihood of success on the merits of its claim to the contrary. Thus the requested injunction should be refused and the complaint dismissed for failure to state a claim.

II. The Governor has Already Made His Appointment Pursuant to Chapter 92, and Thus There is Nothing for This Court to Enjoin.

The Governor has already completed his appointment pursuant to Chapter 92, and thus there is nothing for this Court to enjoin. A preliminary injunction will issue only where necessary to prevent imminent irreparable harm. Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). Not only has MRP made no showing of “harm,” but it seeks to enjoin that which has already occurred. Its request should be denied. Cf. Levine v. Black, 312 Mass. 242, 244 (1942) (injunction should not be granted where it would serve no useful purpose in protecting party’s rights).⁴ The complaint should be dismissed as moot.

⁴ Even if there were anything to enjoin, the MRP has not made the required showing that the injunction would not adversely affect the public interest. Tri-Nel Management, Inc. v. Board of
(footnote continued)

III. It Is Highly Doubtful, In Light Of Separation Of Powers Principles, That This Court Could Issue An Injunction Running Directly Against The Governor.

Separation of powers principles make it highly doubtful that this Court could issue an injunction running directly against the Governor. Neither mandamus nor declaratory relief is available against the Governor. Town of Milton v. Commonwealth, 416 Mass. 471, 475-76 (1993). “Judicial unwillingness to order the Governor or the Legislature to act is founded on separation of powers principles expressed in art. 30 of the Massachusetts Declaration of Rights.” Id. at 475. These same principles raise serious doubts as to whether an injunction against the Governor is permissible, even if a plaintiff had shown likelihood of success on the merits and a risk of imminent irreparable harm, which the MRP has not.

CONCLUSION

For the foregoing reasons, the Court should deny MRP’s request for a preliminary injunction and dismiss the complaint for failure to state a claim and as moot..

Respectfully submitted,

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(footnote continued)

Health of Barnstable, 433 Mass. 217, 219 (2001). The Governor’s emergency declaration amply sets forth the strong public interest in providing full representation for the Commonwealth in the Unites States Senate.