

2022 WL 2288583

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Appeals Court of Massachusetts.

Janet AVILA & others<sup>1</sup>

v.

BOSTON BOARD OF PUBLIC HEALTH  
& others <sup>2</sup> (and a companion case <sup>3</sup>).

<sup>1</sup> Ngozi Moteke-Ogbue, Patrick Ogbue, Antonio Lepe, and David E. Boudreau, Sr.

<sup>2</sup> Dr. Bisola Ojikutu, in her capacity as Executive Director of the Boston Public Health Commission; Rita Nieves, in her former capacity as Interim Director of the Boston Public Health Commission and as an agent of the Boston Board of Public Health; Kim Janey, in her former capacity as Acting Mayor of Boston; the Boston Board of Public Health; and the City of Boston.

<sup>3</sup> Janet Avila & others vs. Dr. Bisola Ojikutu & others.

2022-P-0118

|  
06/22/2022

[Wolohojian, Sacks, Walsh, JJ.](#)<sup>4</sup>

<sup>4</sup> The panelists are listed in order of seniority.

## ORDER

\*1 The defendants have moved to dismiss these consolidated appeals<sup>5</sup> as moot. For the reasons explained in [Lynn v. Murrell](#), 489 Mass. 579 (2022), and in light of the fact that the temporary orders at issue in these appeals have both expired, we allow the motion.

<sup>5</sup> Appeal 22-P-118 is a direct appeal from a judgment of the Housing Court. Appeal 22-P-155 is an appeal from a decision of a Single Justice of the Appeals Court.

Both appeals involve the same parties and raise essentially the same legal issues, and have been consolidated for purposes of appeal.

Background. On August 31, 2021, the Boston Public Health Commission (BPHC) issued a temporary order establishing an eviction moratorium in the city of Boston (first moratorium) due to the COVID-19 pandemic. On October 26, 2021, the plaintiffs -- who are rental property owners and a constable licensed in Boston -- commenced a civil action in the Housing Court, seeking a declaratory judgment that the first moratorium was invalid, and also seeking an injunction that would enjoin the defendants from further enforcing the first moratorium. On November 29, 2021, a judge of the Housing Court concluded that the first moratorium was invalid because it exceeded the BPHC's statutory authority. The parties jointly moved for entry of final judgment, and final judgment to this effect entered on December 27, 2021. The defendants timely appealed.

The defendants then sought a stay of the Housing Court judgment pending appeal from a single justice of this court, pursuant to [Mass. R. A. P. 6 \(a\) \(1\)](#), as appearing in 481 Mass. 1608 (2019). The single justice entered a temporary stay to February 28, 2022, stating that the temporary stay "order is without prejudice to the commission's imposing a new moratorium or extending the current moratorium at that time, though I make no opinion whether such a moratorium or extension would be permissible." The plaintiffs have appealed from the single justice's order.

On February 25, 2022, the BPHC rescinded the first moratorium and issued a second temporary eviction moratorium that would expire on March 31, 2022 (second moratorium). Thereafter, once the single justice's stay and the second moratorium had both expired, the defendants filed the motions to dismiss that are now before us.

Discussion. "It is the general rule that courts decide only actual controversies. We follow that rule, and normally do not decide moot cases." [Boston Herald, Inc. v. Superior Court Dep't of the Trial Court](#), 421 Mass. 502, 504 (1995). A case is moot "[when] a court can order no further effective relief" (quotation omitted). [Branch v. Commonwealth Employment Relations Bd.](#), 481 Mass. 810, 817 (2019), cert. denied sub nom. [Branch v. Massachusetts Dep't of Labor Relations](#), 140 S. Ct. 858 (2020). See [Mullholland v. State Racing Comm'n](#), 295 Mass. 286, 289 (1936) (when "a decision by the court will not be applicable to existing rights, no decision will be

rendered” because “[t]he questions originally involved have become moot”). Here, we agree with the defendants that because the eviction moratoria and the single justice’s temporary stay have all expired, these appeals are moot, as this court can order “no further effective relief.” [Branch](#), *supra*.

Mootness, however, “ ‘[is] a factor affecting [the court’s] discretion, not its power,’ to decide a case.” [Styller v. Zoning Bd. of Appeals of Lynnfield](#), 487 Mass. 588, 595 (2021), quoting [Rosado v. Wyman](#), 397 U.S. 397, 403 (1970). Accordingly, we have discretion to decide the merits of a moot case where

\*2 “(1) the issue was fully argued on both sides; (2) the question was certain, or at least very likely, to arise again in similar factual circumstances; (3) where appellate review could not be obtained before the recurring question would again be moot; and (4) most importantly, the issue was of public importance.”

[Lynn](#), 489 Mass. at 583, quoting [Ott v. Boston Edison Co.](#), 413 Mass. 680, 683 (1992). The first requirement “instructs us not to pass on a moot issue that has not been fully briefed.” [Ott](#), *supra*. In this regard, although we recognize that the issues were litigated in the Housing Court and before the Single Justice, briefs have not yet been submitted in either appeal.

We are not persuaded by the plaintiffs’ argument that the issue is likely to arise again because the Boston public health authorities might impose a new, identical, eviction moratorium at any time. This assertion is “speculative and insufficient to confer a stake in the outcome of [these] particular appeal[s].” [Lynn](#), 489 Mass. at 584, quoting [Commonwealth v. Delmore D.](#), 480 Mass. 1009, 1009 n.2 (2018). As in [Lynn](#), the eviction moratoria were issued in the context of specific conditions and exigencies existing at that moment in time given the evolving, serious, and global COVID-19 pandemic. For example, the moratoria “[were] issued to address an earlier variant of COVID-19 at a time when the [city] had a limited number of protective measures at its disposal,” [Lynn](#), *supra* at 585, when the number of confirmed COVID-19 cases and the rate of positive COVID-19 test results in Suffolk County were higher than they are now, see Massachusetts Department of Public Health, County Level Positivity Rates - June 8, 2022, <https://www.mass.gov/doc/county-level-positivity-rates-june-8-2022/download>, and when Boston residents did not have access to therapeutic treatments for COVID-19 that can be administered at home, see Massachusetts Department of Public Health, Treatments for COVID-19, <https://www.mass.gov/infodetails/treatments-for-covid-19>. Accordingly, we are unpersuaded that any future

eviction moratorium is inevitable, or that its terms would be identical to the ones at issue in these appeals. “[T]he factual underpinnings of the dispute have so changed or are likely to so change as to make an appellate decision ‘a useless and inappropriate exercise.’ ” [Lockhart v. Attorney Gen.](#), 390 Mass. 780, 784 (1984), quoting [Reilly v. School Comm. of Boston](#), 362 Mass. 701, 707 (1976).

We are also not persuaded that, were an eviction moratorium substantially identical to the one challenged by the plaintiffs to be reimposed by the Boston public health authorities sometime in the future, the moratorium would evade appellate review. See [Ott](#), 413 Mass. at 683. Issues apt to evade appellate review generally involve “evanescent, time-defined actions,” [Aquacultural Research Corp. v. Austin](#), 88 Mass. App. Ct. 631, 634 (2015), and “[s]o far questions related to COVID-19 have not fit into this category. Since its emergence in the United States in early 2020, it has been consistently unclear how long COVID-19 will pose a substantial threat to public health.” [Lynn](#), 489 Mass. at 587. We are not willing to conclude that, if Boston’s public health authorities in the future reimpose an eviction moratorium, that moratorium “would not last long enough to enable appellate review of a challenge to [it].”<sup>6</sup> [Lynn](#), *supra*. Further, “[o]ur appellate system has the capacity to move rapidly when circumstances warrant prompt resolution of an important issue.” [Ott](#), *supra* at 684. See [Desrosiers v. Governor](#), 486 Mass. 369, 371 (2020) (parties litigating constitutional challenge to Governor Baker’s COVID-19 emergency orders jointly petitioned for leave to transfer case to single justice of Supreme Judicial Court for reservation and report to obtain speedy resolution).

<sup>6</sup> The plaintiffs argue that their challenge to Boston’s expired eviction moratoria is still “actually live and not speculative” because Somerville has a “virtually identical” eviction moratorium that is still in effect, and the continued existence of this moratorium shows that “[t]he issue ... is not just capable of evading review but almost certainly will.” If anything, we think this argument cuts the other way: a person aggrieved by the Somerville eviction moratorium is free to challenge it in court, and the very persistence of that moratorium shows that it is not the sort of evanescent issue that would be likely to evade appellate review.

\*3 **Conclusion.** Because we conclude that both appeals are moot, and we decline to exercise our discretion to reach the merits, we allow the defendants’ motions to dismiss. “[I]n conformity with our past practice when a case becomes moot on appeal,” [Reilly](#), 362 Mass. at 696, and see [United States v. Munsingwear, Inc.](#), 340 U.S. 36, 39-40 (1950), we vacate both the December 27, 2021 Housing Court judgment and the February 14, 2022 order

of the single justice, with a notation that the decision is not on the merits, but because the appeals are moot.<sup>7</sup>

<sup>7</sup> The plaintiffs argue that the defendants are not entitled to vacatur of the Housing Court judgment because they “deliberately moot[ed] the appeal.” See [United States v. Garde](#), 848 F.2d 1307, 1310 (D.C. Cir. 1988), quoting [Center for Science in the Pub. Interest v. Reagan](#), 727 F.2d 1161, 1166 (D.C. Cir. 1984) (suggesting [Munsingwear](#) vacatur is inappropriate where appellate review of issue is prevented “not by happenstance, but by the deliberate action of the losing party”). We are unpersuaded by this argument because the second eviction moratorium followed the contours of the single justice’s order, and it indicated that the public health authorities were promulgating it to phase out eviction controls in orderly fashion in response to “continued improvement in the prevalence and severity of the

COVID-19 pandemic in Boston,” rather than to gain any litigation advantage.

#### All Citations

Not Reported in N.E. Rptr., 2022 WL 2288583