Real Estate Developer/Landfill: New York Court Addresses Common Law Action/Diminution in Value Claim

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New York Supreme Court ("Supreme Court, Appellate Division") addressed in a March 15th Memorandum and Order ("Order") issues arising out of a common law judicial action filed by a real estate developer against a landfill. See *William Metrose Ltd. Builder, et al. v. Waste Management of New York,* LLC, 2024 WL 1129989.

The Plaintiff sought damages for the alleged diminution in the value of its properties.

Waste Management of New York, LLC ("Defendant") is stated to own and operate the second largest landfill in the State of New York. The Plaintiff owns properties near the landfill.

Alleged noxious odors emanating from the landfill are alleged to have caused Plaintiff difficulty in selling/developing its properties.

Plaintiff commenced the judicial action seeking:

. . . damages for the diminution in the value of its properties, which allegedly led to lost profits and harm to its business reputation.

The causes of action alleged by Plaintiff included:

- Trespass
- Negligence/Gross Negligence
- Private Nuisance
- Public Nuisance

The trespass cause of action was dismissed by the trial court. Defendant's motion to dismiss the other causes of action was denied.

The Supreme Court addressed on appeal the Defendant's argument that the trial court should have granted a Motion to Dismiss the other causes of action. In addressing each cause of action, the Supreme Court held:

- Private Nuisance – Applicable to one that threatens one person or relatively few. Plaintiff's allegations indicated that the noxious odors affected a large number of community residents. Therefore, the private nuisance was deemed dismissed.
- Public Nuisance – Consists of:
- Substantial interference with the exercise of a common right of the public
- Offends public morals

- Interferes with the use by the public of a public place
- Endangerment or injury the property, health, safety, or comfort of a considerable number of persons
- Must be shown that the person suffered personal injury beyond that suffered by the community at large – Plaintiff was noted to have suffered a special injury because it suffered lost profits and other substantial economic loss. However, the Supreme Court held that Plaintiff did not allege sufficient facts because it failed to allege that it sustained any harm or damages that were different in kind, not merely in degree, from the community at large. It pointed to the other property owners who also suffered diminution in the value of their properties and the only difference being a greater degree of damages because Plaintiff owned more of those properties.
- Negligence/Gross Negligence – Recovery requires that the Plaintiffs sustain either physical injury or property damage resulting from the Defendant's alleged negligent conduct. Defendant does owe surrounding property owners a duty of care to avoid injuring them. Nevertheless, the question was whether Plaintiffs sustained the required injury. The Supreme Court also dismisses this cause of action stating:

Finally, we conclude that the cause of action sounding in negligence and gross negligence must also be dismissed. "To recover in negligence [or gross negligence], a plaintiff must sustain either physical injury or property damage resulting from the defendant's alleged negligent conduct ... This limitation serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims" (*Davies*, 200 AD3d at 16 [internal quotation marks omitted]; see *generally Colnaghi, U.S.A. v Jewelers Protection Servs*., 81 NY2d 821, 823 [1993]). Although defendant "undoubtedly owes surrounding property owners a duty of care to avoid injuring them ..., the question is whether plaintiff[ ] sustained the required injury" (*Davies*, 200 AD3d at 16). Here, plaintiff alleges, in essence, "that the noxious odors have physically invade[d] [its] properties, substantially interfering with [its] use and enjoyment thereof and diminishing the[ ] property values" (*id.* [internal quotation marks omitted]). Even if, as plaintiff alleges, the odors "have a continuing physical presence" (*id.* at 16-17), plaintiff "ha[s] not alleged any tangible property damage or physical injury resulting from exposure to the odors" and, "likewise, the economic loss resulting from the diminution of plaintiff['s] property values is not, standing alone, sufficient to sustain a negligence claim under New York law" (*id.* At 17; see *Beck v FMC Corp*., 53 AD2d 118, 120-121 [4th Dept 1976], *affd* 42 NY2d 1027 [1977]; cf. *Dunlop Tire & Rubber Corp. v FMC Corp*., 53 AD2d 150, 154-155 [4th Dept 1976]; *D'Amico*, 2019 WL 1332575, *4, 2019 US Dist LEXIS 50323, *11-12).

Although Defendant "undoubtedly owes surrounding property owners a duty of care to avoid injuring them . . . the question is whether Plaintiff sustained the required injury. Here, Plaintiff alleges in essence that the noxious odors have physically invaded its properties, substantially interfering with its use and enjoyment thereof and diminishing the property values. Even if, as Plaintiff alleges, the odors "have a continuing physical presence," Plaintiff "has not alleged any tangible property damage or physical injury resulting from exposure to the odors" and, "likewise the economic loss resulting from the diminution of Plaintiff's property values is not, standing alone, sufficient to sustain a negligence claim under New York law.

A copy of the Order can be downloaded here.