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Nuisance—Permanent Damages Awarded in Lieu of an Injunction Where Resultant Damage From Nuisance Was Substantial

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NUISANCE—PERMANENT DAMAGES AWARDED IN LIEU OF AN INJUNCTION WHERE RESULTANT DAMAGE FROM NUISANCE WAS SUBSTANTIAL

Defendant operates a large cement plant near Albany, New York, in which he has invested $45,000,000 and which employs approximately 300 people. Plaintiffs are neighboring land owners alleging injury to their property from dirt, smoke, and vibrations emanating from the plant. Their action is for an injunction to restrain the defendant from maintaining a nuisance and to recover damages sustained to their properties up to time of trial. At the trial court permanent damages, as a possible basis of settlement, were set at $185,000—the reduction in the fair market value of the plaintiffs' land since the construction of the plant in 1962.[1] The court found that although the defendant's cement making operation created a nuisance and damaged the properties of the plaintiffs, the damage was relatively small in comparison to the value of the defendant's operation. The injunction was denied and temporary damages were awarded in the event that the stipulated permanent damages would not be accepted. The Appellate Division affirmed the trial court's decision.[2] The Court of Appeals reversed and remanded the case to determine permanent damages. *Held,* where the economic consequences from the effect of a nuisance are relatively small in comparison to the economic consequences from the effect of an injunction, the plaintiffs will not be granted an injunction if the defendant company pays the plaintiffs permanent damages. *Boomer v. Atlantic Cement Company, Inc.,* 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).[3]

Generally, injunctions are issued not as a matter of right, but in the discretion of the court.[4] It has been traditionally recognized, however, that where a nuisance exists which causes substantial and irreparable injury to nearby property owners, for which there is no adequate remedy at law, the injured owners, as a matter of right, are entitled to injunctive relief.[5] Two limitations on this doctrine of injunction as a matter of right have developed. First, where the public depends upon the operation of a business creating a nuisance, the courts have shown reluctance to grant injunctive

1. Boomer v. Atlantic Cement Co., Inc., 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967).

2. Boomer v. Atlantic Cement Co., Inc., 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (3d Dep't 1968).

3. Hereinafter referred to as the instant case.

4. Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931); Gray v. Manhattan Ry., 128 N.Y. 499, 28 N.E. 498 (1891).

5. Garvey v. Long Island R.R., 159 N.Y. 323, 54 N.E. 57 (1899); Campbell v. Seaman, 63 N.Y. 568 (1876); Little Falls Fibre Co. v. Henry Ford & Son, Inc., 126 Misc. 126, 212 N.Y.S. 630 (Sup. Ct. 1925).

relief.[6] The courts will consider the public interest as well as the private interest of the parties in the litigation.[7] The other limitation upon relief as a matter of right is the doctrine of comparative injury.[8] In determining the propriety of injunctive relief, courts have weighed the probability of hardship to both parties to determine the inherent equities and if much greater injury will result from the issuance of an injunction than by its denial, such relief will be denied. In *Haber* v. *Paramount Ice Corporation*,[9] the court employed such a weighing system to deny an injunction. The plaintiff, who lived next door to the defendant's ice manufacturing company, alleged injury to his premises, to his family's health, and deprivation of the peaceful enjoyment of his home from the defendant's incessant noises and vibrations. The defendant had erected buildings and machinery costing $550,000 and during trial had expended $14,000 more to install new appliances of the most modern and approved type aimed at abating the nuisance. It was held that an inequitable result would follow the granting of a permanent injunction, and the court would fix a sum as permanent damages, giving the defendant the option of paying the sum or accepting the injunction. Thus, based upon the doctrine of comparative injury, the court in its discretion, may also deny injunctive relief and grant permanent damages for a continuing nuisance.[10]

In *Whelan* v. *Union Bag and Paper Co.*,[11] the doctrine of comparative injury was limited to cases where the injury was not substantial. There the defendant owned and operated a pulp mill representing an investment of more than $1,000,000 and employed between 400 and 500 workers from the community. Plaintiff, a "lower riparian owner" of a farm, was injured by defendant's polluting of a stream to the extent of $100 per year. The court considered such damage as substantial and explained that "non-substantial" or "trivial" means inherently so rather than comparatively so. The court, granting an injunction, stated "[a]lthough the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason

6. *E.g.*, Schwartzenbach v. Oneonta Light & Power Co., 144 App. Div. 884, 129 N.Y.S. 384 (3d Dep't 1911), *aff'd on other grounds*, 207 N.Y. 671, 100 N.E. 1134 (1912); Knoth v. Manhattan Ry., 187 N.Y. 243, 79 N.E. 1015 (1907); Pappenheim v. Metropolitan El. Ry., 128 N.Y. 436, 28 N.E. 518 (1891). Most of these cases involve public utility companies and started with the noted elevated railway cases.

7. *See* Wormser v. Brown, 149 N.Y. 163, 43 N.E. 524 (1896).

8. Also called the "balance of hardships" or "balance of conveniences" doctrine; *see* 4 BROOKLYN L. REV. 71 (1934).

9. 239 App. Div. 324, 267 N.Y.S. 349 (2d Dep't 1933), *aff'd*, 264 N.Y. 98, 190 N.E. 163 (1934); *see* Kraatz v. Certain-Teed Products Corp., 20 N.Y.S.2d 13 (Sup. Ct. 1940); Bentley v. Empire Portland Cement Co., 48 Misc. 457, 96 N.Y.S. 831 (1905).

10. Garber v. Ruble Corp., 160 Misc. 716, 290 N.Y.S. 633 (Sup. Ct. 1936).

11. 208 N.Y. 1, 101 N.E. 805 (1913).

for refusing an injunction."[12] Therefore, as a result of *Whelan,* where an injury was not inherently slight or trivial, even assuming the injury was small as compared with the loss to the defendant, an injunction would not be denied.[13] The converse of *Whelan,* that an injunction would be denied that would cause great injury or inconvenience to a defendant while conferring slight benefit to a plaintiff where his injury is non-substantial, has also been true.[14] In addition, through an extension of *Whelan,* injunctive relief may be made conditional upon the defendant's abatement of a nuisance. Where such relief is awarded, the court usually gives the defendant an opportunity to correct the condition which causes the nuisance.[15] Such relief may also be made conditional upon the defendant's paying permanent damages to the plaintiff.[16]

In the instant case, the court overruled the *Whelan* doctrine that an injunction would be granted whenever damage to the plaintiff is substantial.[17] The court based its decision on the comparative injury exception to the rule which allows injunctive relief as a matter of right, noting that here injunctive relief would close the plant since no methods to eliminate such nuisance had yet been developed nor would be developed in the near future.[18] It characterized such relief as a "drastic remedy" in light of the defendant's large investment and the number of persons employed.[19] The court concluded that the award of damages would do justice because it fully compensates the litigants for their economic loss in property devaluation,[20] and that the payment of damages would be effective incentive for

12. *Id.* at 5, 101 N.E. at 806. While *Whelan* involves riparian rights rather than a nuisance, analogous processes of balancing the equities, to determine whether an injunction should issue, are used in both situations. *See* Kennedy v. Moog Servocontrols, Inc., 21 N.Y.2d 966, 237 N.E.2d 356, 290 N.Y.S.2d 193 (1968); Stroebel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900).

13. In Spadafora v. Nolan Corp., 66 N.Y.S.2d 127 (Sup. Ct. 1946), the action was to restrain defendants from using a factory building which adjoined plaintiff's residence in such a manner as to produce offensive odors, noise, soot and vibrations to the injury of the plaintiff's property. The conditions which caused the nuisance had already been remedied; notwithstanding, temporary injunctive relief was granted.

14. *E.g.,* Forstmann v. Joray Holding Co., 244 N.Y. 22, 154 N.E. 652 (1926); McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 (1914).

15. *E.g.,* Hadcock v. Gloversville, 96 App. Div. 130, 89 N.Y.S. 74 (3d Dep't 1904).

16. Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936).

17. Whelan v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913).

18. 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 317. It should be noted that at the trial court, 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967), the granting of an injunction was precluded due to the defendant's immense investment in the Hudson River Valley, its contribution to the Capital District's economy, and its immediate help to the education of children in the town through the payment of substantial sums in school and property taxes. The court, in so deciding, relied on McCann v. Chasm Power Co., 211 N.Y. 301, 305, 105 N.E. 416, 417 (1916), which held that the right to an injunction is always discretionary.

19. 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

20. *Id.* at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

research to minimize nuisance.[21] The majority based recovery of damages on the theory of "servitude of land" imposed upon plaintiffs by defendant's nuisance.[22] In addition, the court reasoned that it should not attempt to eliminate air pollution in a private dispute, since such an undertaking is the responsibility of the legislature.[23] It was emphasized that this remedy does not foreclose "other public agencies from seeking proper relief in a proper court."[24]

Justice Jasen, in his dissenting opinion, distinguished those cases which awarded damages in lieu of an injunction as based upon the public benefit exception to injunction as a matter of right.[25] He concluded that the cement company served its own private interest with no public benefit here. In addition, he urged that it is not "constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the impairment of land is for a private use."[26] Justice Jasen further viewed the decision as compounding a serious health problem that affects the general public by, in effect, licensing air pollution.[27]

Boomer has clearly overruled *Whelan* by denying the plaintiff an injunction where he has suffered substantial injury and awarding permanent damages instead.[28] The propriety of an injunction now rests upon the comparative injuries to the litigants and the extent of the public benefit involved. If the injury to the defendant caused by the issuance of an injunction is far greater than the injury to the plaintiff caused by its denial, an injunction will not issue. Similarly, if there is a large public interest in the facility causing the nuisance, an injunction will not issue. The majority bases its decision upon a balancing of the injuries while the dissenting

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21. *Id.*

22. *Id.* at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319. *See also* United States v. Causby, 328 U.S. 256, 261, 262, 267 (1946).

23. 26 N.Y.2d at 223, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.

24. *Id.* at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317. *See also* Air Quality Act of 1967, 42 U.S.C. § 1857 (Supp. IV 1967); N.Y. PUB. HEALTH LAW §§ 1264-99 (McKinney Supp. 1967). *But cf.* Reynolds Metal Co. v. Martin, 337 F.2d 780 (9th Cir. 1964), holding that an action to abate a private nuisance is in no way precluded because of the overlapping applicability of an air pollution statute.

25. 26 N.Y.2d at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321; *see* Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936); Schwartzenbach v. Oneonta Light & Power Co., 144 App. Div. 884, 129 N.Y.S. 384 (3d Dep't 1911), *aff'd on other grounds*, 207 N.Y. 671, 100 N.E. 1134 (1913).

26. 26 N.Y.2d at 231, 257 N.E.2d at 876, 309 N.Y.S.2d at 321; *see* Fifth Avenue Coach Lines, Inc. v. City of New York, 11 N.Y.2d 342, 183 N.E.2d 684, 229 N.Y.S.2d 400 (1962); N.Y. CONST. art. I, § 7(a).

27. "[C]ement production has recently been identified as a significant source of particulate contamination in the Hudson Valley." 26 N.Y.2d at 229, 257 N.E.2d at 876, 309 N.Y.S.2d at 320.

28. The damage in the instant case which was set at $185,000 at the trial court, clearly comes within the meaning of substantial. In none of the previous cases had an injunction been denied where the continuing nuisance caused substantial damages.

justice rests his decision upon a lack of public benefit. However, the injuries that result in the instant case from the issuance of an injunction touch upon both doctrines, while failing to satisfy either of them. The public interest served by denying the issuance of an injunction is protecting the employment of 300 people from the community.[29] Certainly this is not a public benefit analogous or equivalent to the public benefit in maintaining a public utility company where the public benefit exception to injunction as a matter of right developed.[30] It is clearly an insufficient basis for denying an injunction.[31] The private interest served by denying the issuance of an injunction is protecting the defendant's $45,000,000 investment. However, in order to deny an injunction where the injury that would be caused by its issuance is upon private interests, the court must first balance the hardships and conveniences to both parties.[32] It should be argued that the court cannot disregard the possible injury to the community from pollution, that a use for residential purposes should be accorded greater protection than a use for business, and that the pecuniary value of the respective properties is never decisive.[33] If not, a doctrine of comparative injury, followed to its logical conclusion, would always deprive the small property owner of his rights in favor of the large corporate interest. In the instant case, the pecuniary value of the defendant's investment was compared to the pecuniary value of the plaintiff's damages, resulting in a determination that an injunction would not issue upon the payment of permanent damages.[34] Using the doctrine of comparative injury to create a "servitude in land" also raises the serious question of whether such a weighing system may cause an unconstitutional "taking" or condemnation by private business with the assistance of the courts.[35] The granting of an in-

29. The majority considered this a factor in concluding that an injunction would be a "drastic remedy." 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316. Perhaps, however, the court also considered the payment by defendant of substantial sums in school and property taxes, as the trial court did, 55 Misc. 2d 1023, 238 N.Y.S.2d 112 (Sup. Ct. 1967). In either case the public benefit is a minimal one.

30. *See* cases cited note 6 *supra*.

31. It should be noted in connection with the public interest involved, that while both the majority and the dissent talk about air pollution, the instant case is concerned with the law of nuisance and not with the problem of air pollution.

32. *See* cases cited note 9 *supra*.

33. *See* McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance,* 12 MINN. L. REV. 565, 583 (1928).

34. The court also appears to have overlooked the fact that the defendant knew of the plaintiff's presence when he commenced operations in 1962, as well as the probable consequences of the contemplated action. 26 N.Y.2d at 231, 257 N.E.2d at 877, 309 N.Y.S.2d at 322.

35. *E.g.,* Pahl v. Ribero, 193 Cal. 2d 154, 14 Cal. Rptr. 174 (1961), where a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld; its action approaches an exercise of a right of eminent domain in favor of a private person; *see* Fifth Avenue Coach Lines, Inc. v. City of New York, 11 N.Y.2d 342, 183 N.E.2d 684, 229 N.Y.S.2d 400 (1962); N.Y. CONST. art. 1, § 7 (a). Further consideration of this constitutional issue is beyond the scope of this note.

junction, in the instant case, should not have been denied, either upon the showing of public benefit or upon a comparison of the injuries. As a result of *Boomer,* in an effort to further weigh the hardships in their favor, future litigants may have to commence an action before the defendant suffers a large investment in the construction of the facility which threatens to be a nuisance or employs persons from the community.[36] An action to enjoin an anticipatory nuisance, in those cases where a subsequent action to enjoin the actual nuisance would propose a "drastic remedy,"[37] would prevent the defendant's injuries and inconveniences and, therefore, preclude the resulting inequities of an injunction. The court will have to take cognizance of the inequities raised by the overruling of *Whalen* and provide more affirmative protection for the small property owner than *Boomer* seems to allow.

BRUCE V. WEITZEN

RETALIATORY EVICTION—STATUTE PRESCRIBING CRIMINAL PENALTIES FOR LANDLORD REPRISALS AGAINST TENANTS WHO REPORT VIOLATIONS OF HOUSING OR HEALTH LAWS HELD CONSTITUTIONAL

A tenant in a seven-family house registered several complaints with the board of health relating to the condition of her premises. Subsequently, the owner increased the complaining tenant's rent from $117.50 to $175.00 per month. Pursuant to the provisions of the New Jersey retaliatory eviction statute, the State brought criminal charges against the landlord. The statute stipulates that any person who takes or threatens to take a reprisal against a tenant who makes reports of violations of the health or housing code[1] is to be adjudged disorderly, and may be subject to the maximum penalty of six months imprisonment and a $250.00 fine.[2] The tenant testified that

36. *See* Spater, *Noise and the Law,* 63 MICH. L. REV. 1377 (1965).
37. *See* 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

1. Although the statute mentions "health or building codes," not specifically housing codes, the term is included as a "law or regulation which has as its objective the regulation of rental premises." N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969).

2. The New Jersey retaliatory eviction statute in full provides:

> Any person, firm or corporation or agent, officer or employee thereof who threatens to or takes reprisals against any tenant for reporting or complaining of the existence or belief of the existence of any health or building code violation, or a violation of any other municipal ordinance or State law or regulation which has as its objective the regulation of rental premises, to a public agency, is a disorderly person and shall be punished by a fine of not more than $250.00, or by imprisonment for not more than 6 months or both.
>
> In any action brought under this section the receipt of a notice to quit the rented premises or any substantial alteration of the terms of tenancy without cause within 90 days after making a report or complaint or within 90 days after any proceeding resulting from such report or complaint shall create a rebuttable presumption that such notice or alteration is a reprisal against the tenant for making such report or complaint.

N.J. STAT. ANN. § 2A:170-92.1 (Supp. 1969).