

William Metrose Ltd. Bldr./Dev. v Waste Mgt. of N.Y., L.L.C.
2022 NY Slip Op 35214(U)
December 2, 2022
Supreme Court, Monroe County
Docket Number: Index No. E2018006780
Judge: Debra A. Martin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

WILLIAM METROSE LTD. BUILDER/DEVELOPER,

Plaintiff,

vs.

DECISION AND ORDER

Index No. E2018006780

WASTE MANAGEMENT OF NEW YORK, L.L.C.,

Defendant.

APPEARANCES: For Plaintiff:
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For Defendant:
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MARTIN, J.

Before the Court is defendant Waste Management of New York, LLC's ("Waste Management") motion to renew its original motion to dismiss per CPLR 2221 (e) (2) and to dismiss plaintiff William Metrose LTD. Builder/Developer's ("Metrose") second amended complaint. Metrose filed the second amended complaint after this Court generally denied Waste Management's motion to dismiss the amended complaint, upholding all the causes of action except for the trespass cause of action. (*William Metrose LTD. Builder/Developer v Waste Management of New York, L.L.C.*, Sup Ct,

Monroe County, October 10, 2019, Martin, J., Index No. E2018006780) (“Metrose I”).¹

The second amended complaint retained Metrose’s causes of action sounding in negligence, gross negligence, private nuisance, and public nuisance.

In the interest of judicial economy, the Court relies upon the facts detailed in Metrose I.

The impetus for Waste Management’s renewal motion is the decision by the Third Department in *Davies v Dunn & Co., LLC* (200 AD3d 8 [3d Dept 2021] *leave to appeal denied*, 38 NY3d 902 [2022]), which it contends is controlling precedent that this Court must follow. In *Davies*, the Third Department granted defendant-landfill’s motion to dismiss the nearby residents’ complaint that asserted, in part, causes of action for public nuisance and negligence for defendant’s alleged failure to prevent noxious odors emanating into their residential neighborhood. Waste Management argued that this Court “is obligated” to follow the Third Department’s holding that the “the economic loss rule bars negligence claims based on landfill odors where the plaintiff does not allege personal injury or tangible property damage” and that allegations of diminution of property and stigma are insufficient to support a cause of action. (Waste Management’s memorandum of law in support of its motion to dismiss and/or renew, at 1.) As to the causes of action of public and private nuisance, Waste Management averred that, as in *Davies*, Metrose’s alleged damages were tied to the reduction of property values caused by the negative economic impact of the noxious odors, which were suffered by the community at large, and, as a matter of law, were insufficient to support a private nuisance cause of action.

¹ It is significant to note that Waste Management did not appeal this Court’s October 10, 2019 decision.

Metrose opposed the motion, arguing that there has been no meaningful change in the law to justify a motion to renew since the Third Department merely applied the Court of Appeal's reasoning in *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, (96 NY2d 280 [2001]), which this Court also applied in *Metrose I*. Therefore, in its opposition to defendant's motion, Metrose reasoned this Court should follow law of the case doctrine and not revisit legal issues Waste Management raised in its first motion to dismiss. Metrose submitted that *Davies* is distinguishable since the noxious odors there were transient, whereas here the noxious odors have a continuing physical presence. Further, the number of impacted parties in the instant case is different from that in *Davies*.

Significantly, Metrose pointed out that this Court previously ruled that Metrose incurred special damages in addition to those commonly experienced by neighboring properties, including curtailment in the use and enjoyment of the property and decrease in property values, so the nuisance causes of action should survive this motion. Specifically, this Court found that Metrose additionally suffered "significant lost profits associated with the development and sale of real property and harm to business reputation and good will that extend[ed] *beyond the housing development.*" (*Metrose I.*) Metrose insisted that Waste Management misapplied *Davies*, pointing to the Third Department's citation to *Leo v General Elec. Co.* (145 AD2d 291), thereby confirming that plaintiffs have standing to bring nuisance actions when they demonstrate that they suffered a unique harm not suffered by the community at large.

Decision

CPLR R 2221 governs a motion to renew, which is the proper application if a party is seeking to be relieved from a prior order "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." (CPLR 2221 [e] [2].) Furthermore, "a clarification of the decisional law is a sufficient change in the law to support renewal." (*Dinallo v DAL Elec.*, 60 AD3d 620, 621 [2nd Dept 2009].) Such a motion will be granted if the movant demonstrates that there have been new facts, a change in the law or an intervening clarification of the law that would change the prior determination. (see *Nationwide Affinity Ins. Co. of Am. v. PFJ Med. Care P.C.*, 180 AD3d 1381, 1382 [4th Dept 2020].) However, if the movant merely applied the existing law, then renewal should be denied. (*Shatz v Chertok*, 203 AD3d 527 [1st Dept 2022], *appeal dismissed*, 38 NY3d 1162 [2022]; see *Kreisler v B-U Realty Corp.*, 198 AD3d 568, 568-69 [1st Dept 2021].)

The Court must first evaluate whether the Third Department's decision in *Davies* clarified or changed the law set forth in *Madison* or merely applied long standing law. In *Madison*, the Court of Appeals dealt with an "urban disaster" caused by a partial collapse of a 39-story office tower, with bricks, mortar and other material falling onto the street in a prime commercial location "crammed with stores and skyscrapers." (532 *Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 286 [2001].) City officials directed the closure of 15 heavily trafficked blocks on Madison Avenue for two weeks and longer. Plaintiff, a deli located one-half block from the collapse, closed for five weeks. In the companion case, *5th Ave. Chocolatiere v 540 Acquisition Co.*,

plaintiffs were two retailers situated two blocks away, "suing on behalf of themselves and a putative class of "all other business entities, in whatever form, including but not limited to corporations, partnerships and sole proprietorships, located in the Borough of Manhattan and bounded geographically on the west by Fifth Avenue, on the east by Park Avenue, on the north by 57th Street and on the South by 42nd Street." (*Id. at* 286.) Another companion case, *Goldberg Weprin & Ustin v Tishman Constr.*, involved the collapse of a 48-story construction elevator tower in the "heart of bustling Times Square," resulting in the closure of surrounding streets and evacuation of nearby buildings. Plaintiffs were retailers, professional firms, and area residents, potentially numbering in the thousands, with "putative plaintiffs as diverse as hot dog vendors, taxi drivers and Broadway productions." (*Id. at* 287.)

The *Davies* decision dealt with a class action consisting of plaintiffs who resided within 1.5 miles of defendant's landfill² and who claimed that the noxious odors emanating from the landfill interfered with their ability to use and enjoy their property and caused diminution of their property's values. (*Davies v S.A. Dunn & Co., LLC*, 200 AD3d 8, 15 [3d Dept 2021], *lv to appeal denied*, 38 NY3d 902 [2022].) The Court defined the "community at large" as the other "homeowners and renters impacted by the landfill's odors", which included plaintiffs. (*Id.*)

² "The complaint alleges that more than 150 households have contacted Plaintiffs' counsel." (*Davies v S.A. Dunn & Co., LLC*, 2019 NY Slip Op. 34240[U], 2 [NY Sup Ct, Rensselaer County 2019].)

Negligence and Gross Negligence Causes of Action

This Court relied on *Madison* in denying Waste Management's initial motion to dismiss when it specifically rejected Waste Management's contention that the economic loss rule was an absolute bar to be applied in every case. This Court reasoned:

"It is critical to understanding 532 *Madison Ave* that one looks at the logic in the Court's denying recovery for plaintiffs suffering only economic loss. It was not, as defendant posits, because physical injury is always required. It was because these cases presented such far-reaching injuries that may be foreseeable, but which would be virtually uncalculatable; '[i]t would extend endlessly, like the rippling of the waters, far beyond the zone of danger.' (*Beck v FMC Corp.*, 53 AD2d 118, 121-22 [4th Dept 1976], *affd*, 42 NY2d 1027 [1977].) So, the Court in the 532 *Madison Ave* disaster decided:

'While an indeterminate group in the affected areas may have provable financial losses directly traceable to construction-related disasters, there is no satisfactory way geographically to distinguish among those who have suffered purely economic losses. Accordingly, limiting the scope of a landowner's duty to those who, as a result of such disasters, suffer personal injury or property damage affords a principled basis for reasonably apportioning liability.'

(532 *Madison Ave.*, *infra* at 281 [2001].) There is no indication, however, that this economic loss rule would necessarily apply in the instant case. (see *Baker v St.-Gobain Performance Plastics Corp.*, 232 F Supp 3d 233, 244-46 [NDNY 2017].) The common denominator in the decisions that found a duty and liability, when there were purely economic injuries, was that there was a means of 'fixing fair, manageable bounds of liability in such cases. (*Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d at 421, 541 N.Y.S.2d 335, 539 N.E.2d 91; see *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d at 139, 746 N.Y.S.2d 120, 773

N.E.2d 485).’ (*Landon v Kroll Lab. Specialists, Inc.*, 91 AD3d 79, 87 [2d Dept 2011], *affd*, 22 NY3d 1 [2013].)”

(*Metrose I.*)

This Court’s interpretation of the *Madison* decision was supported by the final two summarizing paragraphs set forth therein:

“As is readily apparent, an indeterminate group in the affected areas thus may have provable financial losses directly traceable to the two construction-related collapses, with no satisfactory way geographically to distinguish among those who have suffered purely economic losses (see also, *Matter of Kinsman Tr. Co.*, 388 F.2d 821, 825 n. 8). In such circumstances, limiting the scope of defendants’ duty to those who have, as a result of these events, suffered personal injury or property damage—as historically courts have done—affords a principled basis for reasonably apportioning liability.

We therefore conclude that plaintiffs’ negligence claims based on economic loss alone fall beyond the scope of the duty owed them by defendants and should be dismissed.”

(*532 Madison Ave. Gourmet Foods, Inc.*, *infra* at 291-92 [emphasis added].) This interpretation is further buttressed by the Court of Appeals’ clarifying explanation in *Pasternack v Lab. Corp. of Am. Holdings*:

“As this Court observed in *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 727 N.Y.S.2d 49, 750 N.E.2d 1097 (2001), courts ‘fix the duty point by balancing factors, including the reasonable expectations of [the] parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability’ (96 N.Y. 2d at 288, 727 N.Y.S.2d 49, 750 N.E.2d 1097 [internal quotation marks and citations omitted]).”

(27 NY3d 817, 825 [2016].) In “fixing the duty point”, the *Pasternack* Court refused to extend the defendant-lab’s duty to test biological samples accurately to also include following ministerial federal regulations and guidelines, because to do so would result in an unacceptable “proliferation of claims, [and] the likelihood of unlimited or insurer-like liability.” (*Id.* at 826, quoting *Madison* at 288.)

The Third Department in *Davies* was also presented with a class of hundreds of plaintiffs who alleged amorphous damages for loss of use and enjoyment of their property, and diminution of property values due to noxious fumes from the adjacent landfill. Following the *Madison* analysis and, presumed, finding the same “indeterminant group” as did the *Madison* Court, the *Davies* Court dismissed the negligence cause of action because “[t]o recover in negligence, a plaintiff must sustain either physical injury or property damage resulting from the defendant’s alleged negligent conduct. . . . Economic loss alone will not suffice.” (*Davies, infra* at 16, citing *Caronia v Philip Morris USA, Inc.*, 22 NY3d 439, 446-447 (2013), and *Madison*.) In its succinct holding, the *Davies* Court did not discuss the weighing of the unique factors to define the scope of duty per the test set forth in *Madison* and confirmed in *Pasternack* but one must assume that the Third Department applied that same analysis.

Furthermore, *Davies* is not on point. As in *Madison*, there were potentially hundreds of plaintiffs that defined the community affected by the landfill odors. In the instant case and as far as this Court can ascertain, Metrose is the only business claimed to be affected in the more than four years since this litigation was commenced.

In light of the above, this Court finds that *Davies* simply applied *Madison* and did not change or clarify the existing law as to negligence causes of action. The Court is also unpersuaded by defendant's argument that Metrose's bill of particulars added new facts that would change this Court's decision. Therefore, Waste Management's motion to renew as to the negligence cause of action must be denied.

Public and Private Nuisance Causes of Action

In Metrose I, this Court's determined that Metrose adequately pled causes of action sounding in both private and public nuisance and that it suffered a special injury. Accordingly, this Court's prior decision and order became law of the case unless *Davies* constituted new law or presented a material clarification of existing law, or new facts have been alleged since Metrose I. As to public nuisance, the *Davies* Court laid out the appropriate analysis as first defining the scope of the "community at large", following the directive in *Madison*, where the community at large was residents, business owners and merchants, the same group as the plaintiffs. Since the plaintiffs' alleged injuries were similar to those suffered by the community at large, they did not suffer special damages. (*Davies, infra* at 14.) In *Davies*, plaintiffs argued the community was the general public whose rights to breath clean and/or uncontaminated air were infringed upon, whereas plaintiffs suffered interference with the use and enjoyment of their properties and diminution in their property values. (*Davies* at 10-11.) The *Davies* defendant argued that the community was not so expansive and that all nearby property owners suffered the same injury. The Third Department, relying upon *Madison*, *Burns Jackson Miller Summit & Spitzer v Linder* (59 NY2d 314, 334 [1983]), and *Wheeler v Lebanon Val. Auto Racing Corp.* (303 AD2d 791, 793 [2003], *lv denied* 100 NY2d 507 [2003]),

rejected the plaintiffs' broad definition of community. Rather, the Court relied on long standing Court of Appeals decisions and held that in comparing damages, the scope of community should be limited to those impacted and not include the general public. (*Davies* at 13-15.) Here, unlike in *Davies* where the residents all suffered the same injury, Metrose was the only entity alleging the loss of its livelihood, which is more similar to the situation with the commercial fishermen in *Leo v General Elec. Co.* (145 AD2d 291, 294 [2nd Dept.1989]) whose injuries were found to be different from those of the recreational fishermen.

In *Davies*, the defendant only moved to dismiss the public nuisance cause of action, therefore, it did not state new law or clarify the law with respect to private nuisance, so this Court's decision in *Metrose I* is unaffected. Furthermore, since the causes of action set forth in the second amended complaint are the same as those in the amended complaint, with negligible changes, the law of the case in *Metrose I* precludes defendant from bringing a new motion to dismiss. Finally, this Court rejects defendant's argument that Metrose's claim for loss profits is equivalent to the diminished property value claim for all residents; Metrose purchased the lots for development with assured resale in a commercially reasonable time, and alleged, among other things, an inability to cover its development costs due to the inability to turn over the properties, refusal of the Town to allow Metrose to further develop the lots and experienced the stigma of the odors affecting its business reputation. These damages, if proved, are far different from those of homeowners who claims a general diminution of property value.

Accordingly, Waste Management's motion to renew and/or to dismiss is denied.

Dated: December 2, 2022



Hon. Debra A. Martin
Acting Supreme Court Justice

The following papers were read on defendant's motion:

1. Notice of Motion filed on July 20, 2022; Affirmation of Steven P. Nonkles, Esq, dated and filed July 20, 2022, with attached exhibits 1-10;
2. Defendant's Memorandum of Law filed on July 20, 2022;
3. Affirmation of Bridget O' Toole, Esq., in Opposition to Motion to Dismiss dated and filed August 31, 2022 with attached exhibits A-Y;
4. Plaintiff's Memorandum of Law filed on August 31, 2022;
5. Affidavit of Tabitha Casamento dated and filed on August 31, 2022; and
6. Defendant's Reply Memorandum filed on September 14, 2022