Boomer v. Atlantic Cement Co.
New York Court of Appeals
26 N.Y.2d 219 (1970)

1 Bergan, J.

2 Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring landowners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

3 The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

4 But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it, as equitably as seems possible, or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

5 A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

6 Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

7 It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

8 A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant – one of many – in the Hudson River valley.

9 The cement making operations of defendant have been found by the court at Special Term to

have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

10 The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

11 The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

12 The problem of disparity in economic consequence was sharply in focus in *Whalen* v. *Union Bag & Paper Co.* (208 N. Y. 1). A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was a lower riparian owner. The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of "the slight advantage to plaintiff and the great loss that will be inflicted on defendant" an injunction should not be granted. "Such a balancing of injuries cannot be justified by the circumstances of this case", Judge Werner noted. He continued: "Although 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 for refusing an injunction".

13 Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not "unsubstantial", viz., $100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency *(McCarty* v. *Natural Carbonic Gas Co.,* 189 N. Y. 40; *Strobel* v. *Kerr Salt Co.,* 164 N. Y. 303; *Campbell* v. *Seaman, 63 N.* Y. 568).

14 There are cases where injunction has been denied. *McCann* v. *Chasm Power Co.* (211 N. Y. 301) is one of them. There, however, the damage shown by plaintiffs was not only unsubstantial, it was non-existent. Plaintiffs owned a rocky bank of the stream in which defendant had raised the level of the water. This had no economic or other adverse consequence to plaintiffs, and thus injunctive relief was denied. Similar is the basis for denial of injunction in *Forstmann,* v. *Joray Holding Co.* (244 N. Y. 22) where no benefit to plaintiffs could be seen from the injunction sought (p. 32). Thus if, within *Whalen* v. *Union Bag & Paper Co. (supra)* which authoritatively states the rule in New York, the damage to plaintiffs in these present cases from defendant's cement plant is "not unsubstantial", an injunction should follow.

15 Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time

of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

16 The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was $185,000. This basis of adjustment has not resulted in any stipulation by the parties.

17 This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.[1]

18 One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

19 If the injunction were to be granted unless within a short period — e.g., 18 months — the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

20 The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

21 Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

22 For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

23 On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

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[1] Respondent's investment in the plant is in excess of $45,000,000. There are over 300 people employed there.

24 The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

25 It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance.

26 The power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted. (See, e.g., the alternatives considered in *McCarty* v. *Natural Carbonic Gas Co., supra,* as well as *Strobel* v. *Kerr Salt Co., supra.)*

27 The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C. J. S., Nuisances, § 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance *(Kentucky-Ohio Gas Co.* v. *Bowling,* 264 Ky. 470, 477).

28 [A survey of analogous cases in other jurisdictions is omitted.]

34 Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the "servitude on land" of plaintiffs imposed by defendant's nuisance. (See *United States* v. *Causby,* 328 U. S. 256, where the term "servitude" addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

35 The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees.

36 This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

37 Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to re-examine this subject. It may again find the permanent damage already found; or make new findings.

38 The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

39 Jasen, J. (dissenting).

40 I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

41 It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. *(Whalen* v. *Union Bag & Paper Co.,* 208 N. Y. 1; *Campbell* v. *Seaman,* 63 N. Y. 568; see, also, *Kennedy* v. *Moog Servocontrols,* 21 N Y 2d 966.) To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

42 In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act (Public Health Law, §§ 1264-1299) declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution.

43 The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.

44 The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We have thus a nuisance which not only is damaging to the plaintiffs, but also is decidedly harmful to the general public.

45 I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

46 It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

47 This kind of inverse condemnation may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. *(Matter of New York City Housing Auth.* v. *Muller,* 270 N. Y. 333, 343; *Pocantico Water Works Co.* v. *Bird,* 130 N. Y. 249, 258.) The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

48 Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. (See *Fifth Ave. Coach Lines* v. *City of New York,* 11 N Y 2d 342, 347; *Walker* v. *City of Hutchinson,* 352 U. S. 112.) This is made clear by the State Constitution (art. I, § 7, subd. [a]) which provides that "[p]rivate property shall not be taken for *public use* without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private* use.

49 In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

50 I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

51 It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

52 I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.

53 Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

54 In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

55 Accordingly, the orders of the Appellate Division, insofar as they denied the injunction, should be reversed, and the actions remitted to Supreme Court, Albany County to grant an injunction to take effect 18 months hence, unless the nuisance is abated by improved techniques prior to said date.

56 Chief Judge Fuld and Judges Burke and Scilpi concur with Judge Bergan; Judge Jasen dissents in part and votes to reverse in a separate opinion; Judges Breitel and Gibson taking no part.