MASSACHUSETTS Lawyers Weekly

Neighbors can sue for trespass over 'noxious' odors

'Molecular' theory of liability is recognized

By: Eric T. Berkman June 18, 2020

Homeowners living near a gelatin manufacturing plant could bring a trespass action over noxious odors that allegedly interfered with the use and enjoyment of their property, a Superior Court judge has ruled.

The defendant, Rousselot Peabody, Inc., argued that only a "tangible" invasion of land — and not the wafting of offensive smells — can constitute an actionable trespass.

But Judge Kenneth W. Salinger, sitting in the Business Litigation Session, disagreed.

"Since Massachusetts treats the nonpermissive invasion of land by physical things or substances as a trespass, and molecules that produce a foul odor are physical things, there appears to be no reason why Massachusetts law does not similarly treat a release of noxious gas or other microscopic things as a trespass," Salinger wrote, denying the defendant's motion to dismiss for failure to state a claim.

Salinger further found the plaintiffs could sustain a private nuisance action against Rousselot even though they did not use the phrase "private nuisance" in their complaint, while rejecting Rousselot's argument that its wastewater discharge permit issued by the Department of Environmental Protection insulated it from the plaintiffs' claims.

The 13-page decision is *Baranofsky, et al. v. Rousselot Peabody, Inc.*, Lawyers Weekly No. 09-062-20.

That smell

Laura L. Sheets of Detroit, the plaintiffs' out-of-state lead counsel, said the decision was a "correct interpretation of Massachusetts law."

"Since there was no Massachusetts appellate authority holding that a trespass requires an invasion of a tangible and visible object, we are pleased that Judge Salinger decided to follow the modern trend in other jurisdictions that have held that an invasion of odors can, in fact, constitute a trespass," Sheets said. "The plaintiffs in this case and members of their proposed class would confirm that the noxious and very perceptible odors from the Rousselot facility physically trespass onto their properties."

Rousselot's lead counsel, Steven J. Rosenwasser of Atlanta, declined to comment on the record, but Boston land use and environmental attorney Michael W. Parker said he was concerned about what he characterized as an expansion of the definition of trespass.

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>
> ***— Michael W. Parker, Boston***

"I'm not aware of any decisions that recognize migration of air as a trespass," Parker said. "I recognize that the standard to survive a motion to dismiss is low, but I think the judge went too far in allowing it here."

Parker pointed out that everything travels by air, creating endless possibilities for abuse.

"What if you don't like your neighbor and they stoke up the barbecue for 4th of July," he said. "Is that a trespass?"

Meanwhile, Parker said, if someone was to bring a private nuisance action over, say, the operations of a power plant that delivers electricity to a million people, a judge would weigh the countervailing interests and — instead of granting an injunction to close down the plant — would most likely issue some measure of compensatory damages instead. But if the case could be brought as a trespass action, a plaintiff might actually be able to obtain a cease-and-desist order.

"I could see an environmental or conservation group using a trespass claim as a bigger hammer than a public or private nuisance claim," he said. "They could try and get the plant or activity shut down completely."

Brockton attorney Kenneth J. Goldberg, who handles both real estate and tort cases, said that in a Rule 12(b)(6) motion to dismiss like the one here, Salinger would have been "hard pressed" to dismiss the trespass claim absent binding appellate authority to the contrary.

Goldberg said the law could be trending to allow such claims, and in light of a pandemic in which an invisible virus causes sickness to thousands of people in the state, one can see the logic behind such a trend.

> ***"There is a subtle difference between trespass and nuisance, and if this case ever gets that far, an appellate court may not agree that odors, with nothing else, interfere with the plaintiffs' exclusive possession of their land, as opposed to their use and enjoyment."***
>
> ***— Kenneth J. Goldberg, Brockton***

"There is, however, a subtle difference between trespass and nuisance, and if this case ever gets that far, an appellate court may not agree that odors, with nothing else, interfere with the plaintiffs' exclusive possession of their land, as opposed to their use and enjoyment," Goldberg continued. "Ultimately, this may be significant in terms of the remedy afforded to the plaintiffs."

Boston land use litigator Donald R. Pinto Jr. found noteworthy Salinger's finding that the DEP wastewater discharge permit did not necessarily protect Rousselot on its own.

Though that finding allows the case to proceed to discovery, Pinto said, with evidence that the foul odor is inherent in the wastewater being discharged — and that Rousselot has complied with the permit while fulfilling its duty of reasonable care — the permit potentially could still serve as a complete defense.

"Real estate practitioners may not appreciate the unfettered power that government authorities have to authorize the creation or maintenance of a nuisance, even one that causes widespread annoyance or harm, simply by enacting legislation or issuing a permit for the offending activity," Pinto said.

For example, the Supreme Judicial Court dismissed nuisance and trespass claims arising from the operation of Logan Airport in its 1976 *Hub Theatres, Inc. v. Massport* decision, a case Salinger cited to in his ruling, Pinto said.

"There, the SJC held that the plaintiffs' only potential remedy was to bring a taking claim, which is about as cold as cold comfort gets," he said.

Something in the air

Rousselot operates a facility in Peabody where it manufactures animal protein-based gelatin products for use in the pharmaceutical, food, nutrition and technology industries.

The defendant's product derives from raw pig and cow remains that go through an industrial cooking process to produce a liquid solution from which the gelatin is extracted. It is then concentrated and thickened through a

vaporization process.

The operations apparently produce substantial quantities of wastewater, which is processed at the defendant's on-side treatment facility before being disposed into the local sewage system. Rousselot has a DEP permit to discharge the wastewater.

In April, several residents living within a mile of the plant filed a purported class action in Essex Superior Court alleging nuisance and trespass.

Specifically, the plaintiffs charged that the plant exudes noxious odors that have caused headaches, nausea and vomiting, while also claiming the smells are interfering with their use and enjoyment of their properties and diminishing their property values.

The case was transferred to Suffolk Superior Court, where Rousselot moved to dismiss, arguing that there was no physical invasion of the plaintiffs' properties that would constitute a trespass and that its DEP permit shielded it from liability.

Dust in the wind

Salinger rejected Rousselot's argument that only "tangible" invasions of land can constitute a trespass, pointing out the defendant's failure to provide any Massachusetts appellate authority to that effect.

Baranofsky, et al. v. Rousselot Peabody, Inc., Lawyers Weekly No. 09-062-20 (13 pages)

THE ISSUE: Could homeowners living near a gelatin manufacturing plant bring a trespass action over noxious odors that allegedly interfered with the use and enjoyment of their property?

DECISION: Yes (Suffolk Superior Court/BLS)

LAWYERS: Steven D. Liddle, Matthew Z. Robb and Laura L. Sheets, of Liddle & Dubin, Detroit; William P. Doyle III of Colonna & Doyle, Lynnfield (plaintiffs)

Steven J. Rosenwasser and John F. Farraher Jr., of Greenberg Traurig, Atlanta and Boston (defense)

"Someone may be liable for trespass if they 'negligently or otherwise released a

substance which might lodge anywhere that favorable winds might carry it,'" Salinger wrote, quoting the SJC's 1956 decision in *Sheppard Envelope Co. v. Arcade Malleable Iron Co.*

"One can reasonably infer from these allegations that Rousselot emits certain airborne molecules, those molecules enter Plaintiffs' property, and Plaintiffs perceive those molecules as a horrible smell when they come into contact with olfactory receptors in Plaintiffs' noses; that is how smell works."

Salinger similarly rejected the defendant's assertion that trespass requires a permanent encroachment or physical damage to property.

"For example, repeated overflights by airplanes at extremely low altitudes can constitute trespass even though each incursion is temporary and causes no permanent damage," he said.

He further found that the mere existence of the DEP permit did not bar the plaintiffs' nuisance claim but added that if Rousselot could show it fully complied with the permit and had done so in a "reasonable and careful manner to avoid injuring others," the defendant might have a complete defense to that claim.

Accordingly, Salinger concluded, the motion to dismiss should be denied.

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