

## ***Court Holds That Rendering Plant Is Not A Nuisance “By Itself”***

In the continuing case of *Ramik vs. Darling International, Inc.*, the United States District Court for the Eastern District of Michigan held that a rendering plant is not a “nuisance per se” (a “nuisance by itself”) under Michigan law and denied the City of Melvindale’s motion for a preliminary injunction that was brought three years into the case. Darling International, Inc. (Darling) operates a rendering plant in Melvindale, Michigan. Rendering involves the use of heat and pressure to reduce dead animals and unused animal parts from slaughtering houses into ingredients used in consumer, medical, and industrial processes. Two actions were brought against Darling. One was brought by certain residents of Melvindale and the other was brought by the City of Melvindale. Both the residents and the City alleged that Darling’s plant emits noxious odors and pollutants including air contaminants from animal by-products, which they characterized as the “Darling odor.” The City’s claims were not brought on behalf of its citizens, but on the City’s own behalf, alleging interference with the City’s use of its property and loss of tax revenue from declining property values.

The court ruled on the resident’s motion for judgment before trial on liability and the City’s motion for judgment before trial on liability and for an order against Darling. Judgment before trial may be granted when there is no genuine issue of material fact that is an essential element of the nonmoving party’s (i.e., Darling) case. The court must view all facts and reasonable inferences from them in a light that is most favorable to the nonmoving party.

### **The Residents’ Nuisance Per Se Claim**

The residents asserted that Darling’s emissions constitute a “nuisance per se,” which is defined as “an activity or condition which constitutes a nuisance at all times and under all

circumstances, without regard to the care with which it is conducted or maintained.” The court further explained that the activity complained of must be “an intrinsically unreasonable or dangerous activity, without regard for care or circumstances,” and if it “serves a beneficial public purpose and is capable of being performed in a manner so as not to pose any nuisance, then it cannot be considered a nuisance per se.” A nuisance per se is a question of law for the court, i.e., not a question of fact, therefore, it is well suited for consideration before trial.

The court first observed that the residents had attached to their motion copies of complaints that Darling’s plant emitted a bad odor, which would appear to be more of an argument that Darling’s activities constitute a nuisance *in fact* (as opposed to a nuisance per se), a claim that would not be appropriate for consideration at that stage in the case. The residents also argued that Michigan case law holds that a rendering plant such as Darling’s constitutes a nuisance per se – citing a 1927 case in which the Michigan Supreme Court held that decaying garbage in a “piggery” may constitute a nuisance per se. The court observed that no Michigan case had determined, however, that the sort of activities pursued by Darling constitute a nuisance per se. The residents also cited another Michigan Supreme Court case from 1926 for the proposition that slaughterhouses are regarded as a “prima facie” (“at first sight”) nuisance. The court stated, however, that a “prima facie” nuisance is form of nuisance *in fact*, not a nuisance per se. Therefore, the residents were unable to present any case law that provided a basis for the court to hold that Darling’s activities constitute a nuisance per se.

The residents finally argued that the violation of a zoning ordinance constitutes a nuisance per se because a Michigan statute provides that “a use carried on in violation of a local ordinance or regulation adopted pursuant to [the City and Village Zoning Act . . .] is a nuisance per se.” As evidence of violations, the residents cited complaints filed with, and notices of

violation issued by, the Wayne County Department of Environment, Air Management Division (WCAMD) and a “Stipulation for Entry of Final Order by Consent” (Consent Order) entered into with WCAMD.

Darling argued that many Michigan cases show that industries similar to Darling’s do not constitute a nuisance per se, and the court observed that the only case involving a rendering plant stated that, if operated in an area zoned for such a use, a rendering plant does not constitute a nuisance per se. Regarding the resident’s zoning ordinance violation argument, Darling argued that there was no legally-admissible evidence of the alleged violations. The court agreed that the complaints filed with, and notices of violations issued by, WCAMD were inadmissible under the Federal Rules of Evidence (FRE) because Darling entered nolo contendere (i.e., “no contest”) pleas in response to them. Further, the very terms of the Consent Order itself provided that Darling entered into it for settlement purposes only, that the Order did not constitute an admission of liability by Darling, and it wasn’t an admission that Darling had violated the law. The FRE also provide that settlements such as the Consent Order are not admissible to prove liability for a claim.

Because the there was no Michigan case law showing that Darling’s operation constituted a nuisance per se and there was no admissible evidence of a violation of state or municipal law, the court denied the residents’ motion for summary judgment on liability for operating a nuisance per se.

### **City’s Motion For A Preliminary Injunction**

Regarding the City’s motion for a preliminary injunction, the court first observed that it was “peculiar” for the City to seek a “preliminary” injunction three years into the litigation. The court explained that it must consider and balance four factors when ruling on a motion for a

preliminary injunction: (i) whether the moving party has a strong likelihood of success on the merits; (ii) whether the moving party would suffer irreparable injury without the injunction; (iii) whether issuing the injunction would cause substantial harm to others; and (iv) whether issuing the injunction would serve the public interest.

In considering the first factor, the court observed that, based on its previous discussion, the City did not have a strong likelihood of success on the merits on a nuisance per se claim. The court further observed that the City also did not have a strong likelihood of success on the merits of a nuisance in fact claim in light of facts asserted by Darling that there are other industries in the area that may account for all or a part of the odor complained of. The court stated that the mere possibility of success was not sufficient to grant a preliminary injunction.

Regarding the second factor, the court stated that the City must show that the harm that would result without the preliminary injunction must be irreparable, and not merely substantial. The court observed that the harm alleged to be suffered by the City, a decline in property values, is not irreparable because it can be compensated by monetary damages. Further, the City's three-year wait in requesting a preliminary injunction cut against its contention that the harm allegedly suffered is irreparable.

Considering the third factor, the court stated that it appeared that issuing the preliminary injunction would not cause substantial harm to non-parties to the litigation, but it certainly would cause substantial harm to Darling. The court also observed that one of the purposes of a preliminary injunction is to preserve the status quo for trial – i.e., to preserve the relative positions of the parties until the trial is held, which would not happen if the City was granted the injunction.

With respect to the fourth factor, the court stated that while it would be in the public interest to reduce the noxious odors coming from Darling's plant, it also would be "in the public interest to resist efforts at [obtaining a] preliminary injunction on the eve of trial after three years of litigation."

Therefore, in light of its consideration of the four factors, but primarily because the City would not suffer irreparable harm, the court denied the City's request for a preliminary injunction.

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