

<b>A &amp; L Gift Shop v ASA Waterproofing Corp.</b>
2005 NY Slip Op 30482(U)
December 2, 2005
Supreme Court, New York County
Docket Number: 100405/02
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn  
Justice

PART 49m

A & L GIFT SHOP

INDEX NO.

100405/02

MOTION DATE

11/21/05

MOTION SEQ. NO.

001

MOTION CAL. NO.

\_\_\_\_\_

- v -

AS A Water Roofing Corp.,

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
DEC - 6 2005  
COUNTY CLERK  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE.....**

Dated: 12/2/05 [Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
A & L GIFT SHOP, BOK LEI PO TRADING, INC., :  
CHINATOWN GIFT CENTER, CHUNG WAH PHARMACY :  
CORP., D & V IMPORT, INC., EVERGREEN SHANGHAI : Index No. 100405/02  
RESTAURANT, FIRST ORIGINAL, INC., FU LONG :  
TRADING CO., GOLDEN LAKE GIFT SHOP, GOOD FIELD :  
TRADING CO., INC., HEALTH TOWN, INC., HONG CITY, :  
INC., HOUSE OF VEGETARIAN RESTAURANT, KAM TAT :  
TRADING, INC., LUCK SHING CORP., MICHELLE'S GIFT :  
CENTER, MOU CIEONG VISION CENTER, INC., NEW BIG :  
WONG RESTAURANT, NEW CROWN INC., NEW EASTERN :  
VILIA RESTAURANT, INC., WONG SONG ENTERPRISES, :  
INC., NEW WONTON GARDEN, ORIENT DELIGHT TOURS :  
& TRAVEL, INC., SHANGHAI GOURMET, SWEET-N-TART :  
RESTAURANT, TEN REN TEA and GINSENG CO., INC., :  
WAH KUE & CO., WEIGE KISSTIE INC., :

Plaintiffs, :

- against - :

ASA WATERPROOFING CORP., KAIFAT ALI, :  
GALAXY GENERAL CONTRACTING CORP. and :  
SUN WANSAM REALTY CORP., :

Defendants. :

-----X

Herman Cahn, J.

Defendant Sun Wansam Realty Corp. moves for partial summary judgment, dismissing the claims for economic loss. In the alternative, movant seeks to preclude Plaintiffs from offering evidence in support of their claim of economic loss, due to their failure to comply with this court's Preliminary Conference Order.

A basic issue in this action is whether a plaintiff can bring claims for solely economic loss, without suffering injury to person or property.

***Background:***

This action arises out of an incident that occurred at 60 Mott Street, New York, NY on August 3, 2000. Defendant ASA Waterproofing Corp.'s employees, while cleaning the facade of Defendant Sun Wansam Realty Corp.'s building, released an acidic compound. Plaintiffs, who are business owners on Mott Street, allege that such compound resulted in a toxic cloud and a spill on the sidewalk on Mott Street. Plaintiffs allege that Mott Street was consequently closed for the balance of the day and that they suffered damage to their Mott Street properties. Plaintiffs seek to recover compensatory damages and exemplary damages for property damage and for loss of business and profits due to the street closing.

Only two Plaintiffs, Luck Shing Electronics Corp. and Wong Song Enterprises, Inc., allege property damage.

The complaint contains two causes of action; one sounding in negligence and the other based on violations of the NYC Administrative Code,<sup>1</sup> which violations Plaintiffs allege also constitute a public and private nuisance.

Only defendant Sun Wansam answered and appeared in this action. This defendant served a demand for a bill of particulars on January 25, 2002. A bill of particulars was served on March 10, 2003. Subsequently, at a January 21, 2005 preliminary conference, this court ordered Plaintiffs to serve a Supplemental Bill of Particulars, detailing their respective claims and providing gross receipts for the week before the incident and for the day of the

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<sup>1</sup> Plaintiffs allege that the City of New York Environmental Control Board charged Defendant with violating sections 24-609 (b) and 27-1009 (a) of the Administrative Code. Section 24-609 lays out the notification requirements upon release of certain hazardous substances, while section 27-1009 (a) requires contractors to incorporate safety measures to safeguard persons and property.

incident, as well as records proving actual losses and insurance claims. Defendant alleges that Plaintiffs did not comply with this order and did not serve a supplemental bill of particulars. Additionally, Defendant alleges that the only evidence that Plaintiffs provided in support of their claim of lost business were sales tax returns for six of the twenty-eight plaintiffs, and the depositions of two of the plaintiffs. Plaintiffs answer that the reason they have not fully complied with the discovery order is because of a language barrier between attorney and client, and pledge to complete discovery.

***Discussion:***

***Negligence***

Plaintiffs assert that Defendants' negligence caused or allowed a toxic spill on Mott Street, which caused the closure of Mott Street to pedestrians and vehicles, resulting in the loss of income and profits.

In the circumstances underlying this action, an alleged tortfeasor's liability for negligence extends only to those plaintiffs who suffer personal injury or property damage, not to those who suffer only economic loss (*532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 N.Y.2d 280, 291, *rearg denied* 96 N.Y.2d 938 [2001]; *Roundabout Theater Company, Inc. v. Tishman & Construction*, 302 A.D.2d 272 [1<sup>st</sup> Dept. 2003]). The rule bars plaintiffs who suffer only economic losses regardless of how proximate the plaintiff's property is to the defendant's property, from recovery (*Roundabout Theater Company, Inc.*, *supra*, 302 A.D.2d at 272). Where streets are closed resulting in economic loss, no arbitrary line will be drawn to allow "storefront merchant-neighbors who suffered lost income" to recover, while excluding others, such as suppliers unable to reach the blocked-off street (*532 Madison Avenue*, *supra*, at 291).

Here, only two Plaintiffs allege property damage, in addition to economic loss. Therefore, despite their proximity to Defendants' property, all Plaintiffs but those two have failed to state a cause of action for negligence, and the negligence cause of action is stricken as to them.

### **Public Nuisance**

Plaintiffs also assert that the release of the toxic substance into the surrounding area of Mott Street constitutes a public nuisance for which they may recover for economic loss.

A public nuisance "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all . . . in a manner such as to offend public morals, interfere with use by the public of a public space or endanger or injure the property, health safety or comfort of a considerable number of persons" (*Copart Indus. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568, *rearg denied* 42 N.Y.2d 1102 [1977]). An "unlawful obstruction of a public street" may constitute a public nuisance (*532 Madison, supra*, at 292 -293). However, a private person must suffer a "special injury" beyond that of the community at large to maintain a cause of action in public nuisance (*id.*). The injury must be special in kind, not merely in degree (*id.* at 293-294; *See also* Restatement 2<sup>nd</sup> of Torts § 821C, comment h). The community at large of a closed street consists of every person who lives or does business on that street. (*id.* at 294).

Here, Plaintiffs assert that they suffered special damages for their economic loss. Plaintiffs wrongly identify the community at large as the entire Chinatown community. Rather, the community at large consists of those persons doing business or living on Mott Street. Therefore, it is not relevant whether persons in other parts of Chinatown suffered similar economic damages. Additionally, while Plaintiffs may have suffered greater damages in degree

than other persons who do business on Mott Street, they suffered the same damages in kind. For example, hot dog vendors and taxi drivers on Mott Street suffered the same kind of injury as the Plaintiffs, as “each was impacted in the ability to conduct business, resulting in financial loss” (532 *Madison, supra*, at 293). Additionally, the injury is no different than the damages suffered by those Mott Street tenants unable to reach their residences (*id.*). Therefore, all Plaintiffs suffered damages common to the community at large and cannot maintain a cause of action for public nuisance to recover for economic loss.<sup>2</sup>

**Private Nuisance:**

Plaintiffs also assert that the release of the substance on Mott Street constitutes a private nuisance for which they may recover for economic loss.

A private nuisance consists of conduct which results in interference with one or relatively few persons’ private use and enjoyment of land (*Copart Indus., supra*, 41 N.Y.2d at 564). The conduct must either 1) be intentional and unreasonable, 2) amount to negligence, or 3) amount to absolute liability for abnormally dangerous conditions (*id.* at 569).

The cause of action for private nuisance does not lie because Plaintiffs have not alleged that Defendants’ conduct amounted to any of the above categories. Plaintiffs do not allege that Defendants’ conduct was intentional.<sup>3</sup> Further, as stated above, those Plaintiffs

<sup>2</sup> While a plaintiff who suffers property damage can recover under a theory of negligence for economic loss as well, as explained above, Plaintiffs have cited the court to no authority suggesting that this extends to nuisance. Therefore, even those Plaintiffs claiming property damage cannot recover for economic loss under nuisance theory, as that economic loss is common to the community at large (532 *Madison, supra*, at 293).

<sup>3</sup> It should be noted that Plaintiffs do allege that Defendant’s conduct constitutes an “absolute nuisance.” Absolute nuisance or “nuisance per se” requires intentional and unreasonable conduct (*McKenna v. Allied Chemical and Dye Corporation 923-924*, 8 A.D.2d 463 [4<sup>th</sup> Dept. 1959]). However, Plaintiffs allege absolute nuisance based not on intentional and unreasonable conduct, but rather, incorrectly based on a violation of the Administrative Code.

claiming only economic loss cannot maintain a cause of action in negligence. In addition, those Plaintiffs claiming only economic loss cannot maintain a cause of action for strict liability for abnormally dangerous conduct because they do not allege property damage, which is an element of that cause of action (*532 Madison, supra*, at 292 n 2; *see Spano v. Perini Corp.*, 25 N.Y.2d 11, 18 [1969]). Therefore, those Plaintiffs who allege only economic loss cannot maintain a cause of action for Private nuisance.

In any case, the cause of action for nuisance to recover for economic loss does not lie because more than “a relatively few persons” were affected by the closing of the street (*Copart Indus., supra*, 41 N.Y.2d at 564). As stated above, the economic loss was common to the community at large. Besides the twenty-eight Plaintiffs, all taxi drivers or suppliers delivering to that street were also affected. Thus, more than “a relatively few persons” were affected with economic loss. Therefore, even those Plaintiffs that claim property damages cannot maintain a cause of action for Private nuisance to recover for economic loss.<sup>4</sup>

#### **Violation of the Administrative Code**

Plaintiffs claim that Defendants’ violations of the Administrative Code entitle Plaintiffs to recover damages for economic loss. Plaintiffs base this claim on theories of absolute nuisance and negligence per se. A violation of the Administrative Code, while not amounting to negligence per se, is evidence of negligence (*Elliot v. City of New York*, 95 N.Y.2d 730, 734-735 [2001]).

Neither Section 24-609 (b) nor Section 27-1009 (a) of the Administrative Code changes the law with regard to claimants only alleging economic loss. In other words, those

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<sup>4</sup> See Note 2.



sections of the Administrative Code, while perhaps constituting evidence of negligence, do not create any new duty to those persons alleging only economic loss. Therefore, even with the alleged violations of the Administrative Code, Plaintiffs still cannot maintain a cause of action for negligence. Similarly, those sections of the Administrative Code do not change the elements necessary to maintain a cause of action for absolute nuisance. Thus, as Plaintiffs do not allege that Defendants' conduct was intentional, Plaintiffs cannot maintain a cause of action for absolute nuisance.

**Preclusion**

Defendant, in the alternative, moves for preclusion of evidence in support of all claims of economic loss. As this court dismisses all claims by those Plaintiffs who alleged only economic loss, the issue of preclusion is relevant only to those two Plaintiffs that allege property damages in addition to economic loss. The motion to preclude is granted as to the two plaintiffs who allege property damage, unless they fully comply with the discovery demands previously served on their attorneys within ten days of the service of a copy of this decision, on their counsel.

Accordingly, it is

ORDERED that the branch of the motion seeking summary judgment is granted as to all plaintiffs except as to Luck Shing Electronics Corporation and Wong Song Enterprises, Inc.; and it is further

ORDERED that the branch of the motion seeking summary judgment as to Luck Shing Electronics Corporation and Wong Song Enterprises, Inc., is granted as to the cause of action seeking damages for nuisance; and it is further

ORDERED that the branch of the motion seeking preclusion is denied as to all defendants except Luck Shing Electronics Corporation and Wong Song Enterprises, Inc., as to whom it is granted unless said defendants comply with plaintiffs' discovery demands within ten days of service of a copy of this order on plaintiffs' attorney, with Notice of Entry; and it is further

ORDERED that the clerk shall enter judgment accordingly; and it is further

ORDERED that the balance of the action may continue.

Dated: December 2, 2005

ENTER:

  
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J.S.C.

**FILED**  
DEC - 6 2005  
-ICE