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SHORT FORM ORDER

INDEX No. 14-10675

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

CORRECTED: ***Original decision omitted the top two (2) lines on page 6.***

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 8-29-14
ADJ. DATE 12-16-14
Mot. Seq. # 001-MotD

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HELENE FORST, JACK FORST, FRED BUTTI, MICHAEL FORST, AMY FORST, BARRY WAYNE, LARRY PENNY, BETH MORAN, DAVID GRESHAM, SABRINA PAGANI, THOMAS A. PIACENTINE, FOUAD CHARTOUNI, RICHARD DOTY, JOHN MCGUIRK, NANCY MCGUIRK, REBECCA SINGER, STEPHEN BRADBURY, ROBERT BARRON, SUSAN HOLGATE, EDOUARD DEJOUX and other members of the class similarly situated with the named Plaintiffs,

Plaintiffs,

- against -

LONG ISLAND POWER AUTHORITY (LIPA) and PUBLIC SERVICE ELECTRIC AND GAS COMPANY (PSEGLI),

Defendants.

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Upon the following papers numbered 1 to 52 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 41; Replying Affidavits and supporting papers 42 - 46; Other affirmation, 43 - 48; memoranda of law, 49 - 50; 51; 52; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Long Island Power Authority and Public Service Electric and Gas Company to dismiss the complaint against them is determined as follows.

In 2013, defendant Long Island Power Authority (LIPA) decided to upgrade its transmission and distribution systems to meet the projected growth in demand for electricity and to reinforce the reliability of the electrical system by construction of the East Hampton to Amagansett transmission line and

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expansion of the Amagansett substation project. Defendant Public Service Electric and Gas Company (PSEGLI) has been assigned responsibility for the operation of the electrical system by LIPA. As a part of the project, 267 wood utility poles, covering 6.2 miles, were to be placed along the existing transmission lines. AKRF, Inc. was retained by defendant LIPA to prepare an Environmental Assessment Form (EAF), which is dated October 2, 2013. On September 25, 2013, a memorandum dated September 25, 2013 was sent from Michael Deering, Vice President of Environmental Affairs, to Nicholas Lizanich, Vice President of Transmission and Distribution Operations, requesting approval of the Environmental Assessment and the issuance of a negative declaration for the proposed project. In a document dated September 25, 2013, LIPA issued a negative declaration, stating that pursuant to the requirements of the State Environmental Quality Review Act (SEQRA), the proposed action will not have a significant environmental impact and that a draft Environmental Impact Statement (EIS) will not be prepared.

This action was commenced on behalf of certain residents in the Town of East Hampton who reside in close proximity to the utility poles. The complaint alleges that the poles and lines have caused serious injury and will continue to cause serious injury to plaintiffs. Specifically, the complaint alleges that the poles have been treated with a wood preservative containing pentachlorophenol (penta), which leaches into the soil surrounding the poles, and that it is a dangerous poison that causes serious injury to humans when its fumes are inhaled. It also alleges that the transmission lines transmit harmful and dangerous electric magnetic fields (EMFs), that the poles and lines have damaged the vegetation and scenic quality of East Hampton, and that they have significantly lowered the value of residential properties near the power lines. The amended complaint contains causes of action for physical taking, private nuisance, negligence, trespass, design defect, duty to warn, negligent infliction of emotional distress, fraud, and violation of environmental conservation law.

Defendants now move to dismiss the complaint, arguing that the action is an untimely and impermissible collateral attack on a final administrative determination. They also argue the first eight causes of action should be dismissed for failure to state a cause of action and upon defenses based on documentary evidence. Furthermore, defendants argue the Court lacks subject matter jurisdiction over them with respect to the first eight causes of action because plaintiffs failed to comply with the notice of claim requirements. In support of their motion, defendants submit, among other things, copies of the environment assessment form prepared by AKRF, Inc., the negative declaration, and the work permits issued to LIPA.

Plaintiffs oppose the motion, arguing that they properly pleaded claims for taking, trespass and nuisance. Plaintiffs also argue that defendant LIPA failed to properly publish the negative declaration and provide notice to them regarding the use of penta on the electric poles. The Court notes that the sur reply filed by plaintiffs was not considered in the determination of this motion (*see* CPLR 2214; ***McMullin v Walker***, 68 AD3d 943, 892 NYS2d 128 [2d Dept 2009]; ***Boockvor v Fischer***, 56 AD3d 405, 866 NYS2d 767 [2d Dept 2008]).

Under CPLR 3211 (a)(1), a dismissal may be granted only if the documentary evidence submitted by the movant "conclusively establishes a defense to the asserted claims as a matter of law" (***Held v Kaufman***, 91 NY2d 425, 671 NYS2d 429 [1998]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court must afford the complaint a liberal construction, accept all facts

as alleged in the complaint to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Melnicke v Brecher***, 65 AD3d 1020, 886 NYS2d 406 [2d Dept 2009]; ***Fishberger v Voss***, 51 AD3d 627, 858 NYS2d 257 [2d Dept 2008]). If from the four corners of the complaint factual allegations are discerned which taken together manifest any cause of action cognizable at law, the motion will fail, regardless of whether the plaintiff will ultimately prevail on the merits (*see* ***Danna v Malco Realty, Inc.***, 51 AD3d 621, 857 NYS2d 688 [2d Dept 2008]; ***Bovino v Village of Wappingers Falls***, 215 AD2d 619, 628 NYS2d 508 [2d Dept 1995]).

The Court notes that as the amended complaint supersedes the original complaint (*see* ***Poly Mfg. Corp. v Dragonides***, 109 AD3d 532, 970 NYS2d 589 [2d Dept 2013]; ***Elegante Leasing, Ltd. v Cross Trans Svc, Inc.***, 11 AD3d 650, 782 NYS2d 919 [2d Dept 2004]), and the subsequent correspondence to the Court from counsel for both parties indicates their agreement that the amended complaint should be the topic of this motion, the Court will consider the dismissal motion as addressed to the amended complaint (*see* ***Sobel v Ansanelli***, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]; ***Union State Bank v Weiss***, 65 AD3d 584, 884 NYS2d 136 [2d Dept 2009]; ***Sage Realty Corp. v Proskauer Rose***, 251 AD2d 35, 675 NYS2d 14 [1st Dept 1998]).

Initially, the Court finds that contrary to defendants' contention that the first eight causes of action must be dismissed as to LIPA because plaintiffs failed to serve LIPA with a notice of claim, the requirement is not applicable in this case. The law has long recognized an exception to the notice of claim requirement where the primary purpose of the action is to enjoin a continuing wrong by a municipality, rather than to obtain money damages (*see* ***Picciano v Nassau County Civil Serv. Commn.***, 290 AD2d 164, 736 NYS2d 55 [2d Dept 2001]; ***Robertson v Town of Carmel***, 276 AD2d 543, 714 NYS2d 442 [2d Dept 2000]). Here, the first eight causes of action seek essentially equitable relief and the demand for money damages is incidental (*see* ***American Pen Corp. v City of New York***, 266 AD2d 87, 698 NYS2d 472 [1st Dept 1999]; ***Fontata v Hempstead***, 18 AD2d 1084, 239 NYS2d 512 [2d Dept 1963]).

The first cause of action in the complaint, which is entitled "physical taking of property," does not allege a physical taking, but rather a regulatory taking. Under a takings claim, the contention is that the state has taken property for a governmental purpose or that it has gone "too far" in exercising its police power to regulate property and thus deprive the owner of all economically beneficial use (***Town of Orangetown v Magee***, 88 NY2d 41, 643 NYS2d 21 [1996]). While the typical taking occurs when the government acts to physically intrude upon private property, governmental regulations which limit owners' rights to possess, use or dispose of property may also amount to a "taking" of the affected property (***Manocherian v Lenox Hill Hosp.***, 84 NY2d 385, 618 NYS2d 857 [1994]).

Here, the complaint alleges that the placement of the poles by defendants greatly reduced the value of plaintiffs' property, rendering their property unmarketable. The Court rejects the contention by plaintiffs that the alleged lowered value of their property due to the close proximity of the transmission lines is sufficient to support a takings claim, and notes that the case cited in their opposition papers does not stand for that proposition. Accordingly, the first cause of action is dismissed.

With regard to the second cause of action, to recover damages for private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]). Discomfort and inconvenience caused by the disturbance of property are valid grounds for recovery in an action for nuisance (*see* ***Dixon v New York Trap Rock Corp.***, 293 NY 509, 58 NE2d 517 [1944]). To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property or to render its enjoyment specially uncomfortable or inconvenient (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.*** *supra*). As a private nuisance claim involves the right to use and enjoy the land in question, no actual intrusion onto the plaintiff's property is required, and no actual damage to the property itself need be shown (***Schillaci v Sarris***, 122 AD3d 1085, 1087, 997 NYS2d 504 [2d Dept 2014]). Here, plaintiffs have sufficiently stated a cause of action for a private nuisance, as the complaint alleges that the leaching of penta into the soil and air, and the proposed emissions of high levels of EMFs onto plaintiffs' properties, interfere with their use and enjoyment of the land.

To prevail on a cause of action alleging negligence, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages (*see* ***Malone v County of Suffolk***, 128 AD3d 651, 8 NYS3d 408 [2d Dept 2015]). Here, plaintiffs' allegations sufficiently allege that defendants owed plaintiffs a duty of care, and that they breached that duty and caused damages to plaintiffs when they installed the electric poles.

In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product regardless of privity, foreseeability or the exercise of due care (*see* ***Godoy v Abamaster of Miami, Inc.***, 302 AD2d 57, 754 NYS2d 301 [2d Dept 2003]). Here, plaintiffs have failed to sufficiently plead a cause of action for strict liability as defendants were not a manufacturer, wholesaler, distributor or retailer of the allegedly defective product. Thus, the causes of action for design defect and failure to warn are dismissed.

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission" (***Volunteer Fire Assn. of Tappan, Inc. v County of Rockland***, 101 AD3d 853, 956 NYS2d 102 [2d Dept 2012]; ***Carlson v Zimmerman***, 63 AD3d 772, 882 NYS2d 139 [2d Dept 2009]; ***Woodhull v Town of Riverhead***, 46 AD3d 802, 849 NYS2d 79 [2d Dept 2007]). Here, accepting the allegations set forth under the sixth cause of action as true, and affording plaintiffs the benefit of every favorable inference, plaintiffs adequately pleaded a cause of action to recover damages for trespass (*see* ***Hill v Murphy***, 63 AD3d 680, 881 NYS2d 133 [2d Dept 2009]). While defendants are correct that there is no validity to plaintiffs' trespass claims relating to vapor intrusion or contamination of groundwater, plaintiffs have a valid trespass claim based on the alleged contamination of the soil (*see* ***Ivory v International Bus. Machines Corp.***, 116 AD3d 121, 983 NYS2d 110 [3d Dept 2014]).

The seventh cause of action for negligent infliction of emotional distress is dismissed because the defendants' alleged conduct was not sufficiently outrageous to support such a claim (*see* ***Stein v 92nd St. YM-YWHA, Inc.***, 273 AD2d 181, 710 NYS2d 68 [1st Dept 2000]). Moreover, a claim of negligent infliction of emotional distress may not be entertained where, as in this case, it falls within the ambit of

other traditional tort claims asserted by plaintiffs (*see* ***Fischer v Maloney***, 43 NY2d 553, 402 NYS2d 991 [1978]; ***Butler v Delaware Otsego Corp.***, 203 AD2d 783, 610 NYS2d 664 [3d Dept 1994]).

To plead a valid cause of action sounding in fraud, the complaint must set forth all the elements of fraud, including the making of material representations by the defendant to the plaintiff (*see* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]). Here, the alleged misrepresentation involved defendants submissions in the Environmental Assessment Form, which stated that the subject project would not have a significant adverse impact on the environment, and misled the Town of East Hampton, a nonparty. The complaint, however, fails to allege material misrepresentations by defendants to plaintiffs. Thus, the cause of action sounding in fraud is dismissed.

Finally, as to the ninth cause of action for violation of the Environmental Conservation Law, plaintiffs' challenge of the SEQRA negative declaration of defendants must be brought pursuant to an Article 78 proceeding. Under the circumstances and pursuant to CPLR 103 (c), the Court converts this portion of the complaint to a hybrid Article 78 proceeding.

A SEQRA challenge is generally brought as a "special proceeding" under Article 78 and is subject to a four-month statute of limitations after the determination to be reviewed becomes final and binding upon the petitioner" (see CPLR 217; ***Save Pine Bush, Inc. v City of Albany***, 70 NY2d 193, 518 NYS2d 943 [1987]). "For a determination to be final 'upon the petitioner' it must be clear that the petitioner seeking review has been aggrieved by it" (***Matter of Martin v Ronan***, 44 NY2d 374, 380, 405 NYS2d 671 [1978]). "A determination generally becomes binding when the aggrieved party is 'notified'" (***Matter of Vil. of Westbury v Department of Transp. of State of N.Y.***, 75 NY2d 62, 72, 550 NYS2d 604 [1989]). Further, the party seeking to assert the statute of limitations as a defense bears the burden to establish that its decision provided notice more than four months before the Article 78 proceeding was commenced (*see* ***Berkshire Nursing Ctr., Inc. v Novello***, 13 AD3d 327, 786 NYS2d 209 [2d Dept 2004]; *see also* ***Matter of Vil. of Westbury v Department of Transp. of State of N.Y.***, 75 NY2d 62, 550 NYS2d 604 [1989]; ***Matter of Chaban v Board of Educ. of City of N.Y.***, 201 AD2d 646, 608 NYS2d 229 [1994]).

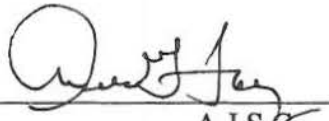
To determine which event triggered the running of the statute of limitations, the Court must first ascertain the administrative decision for which petitioner is actually seeking judicial review and then find the point when the decision became final and binding and thus had an impact upon petitioner (*see* ***Monteiro v Town of Colonie***, 158 AD2d 246, 558 NYS2d 730 [3d Dept 1990]; ***Haggerty v Planning Bd. of Town of Sand Lake***, 166 AD2d 791, 563 NYS2d 151 [3d Dept 1990]). Here, the statute of limitations began to run when the negative declaration was issued and filed (*see* ***Stop-The-Barge v Cahill***, 1 NY3d 218, 771 NYS2d 40 [2003]; ***Wertheim v Albertson Water Dist.***, 207 AD2d 896, 616 NYS2d 778 [2d Dept 1994]). However, a defendant seeking to establish a statute of limitations defense bears the burden of proving through documentary evidence that the action was commenced after the expiration of the statute of limitations period (*see* ***Matter of Richmond Med. Ctr. v Daines***, 101 AD3d 1434, 957 NYS2d 764 [3 Dept 2012]; ***Matter of Schwartz***, 44 AD3d 779, 843 NYS2d 403 [2d Dept 2007]; ***Hoosac Valley Farmers Exchange, Inc. v AG Assets, Inc.***, 168 AD2d 822, 563 NYS2d 954 [3d Dept 1990]). In support of the motion, counsel for defendants submits a document purporting to be the

negative declaration, which is dated September 25, 2013. Defendants, however, failed to submit sufficient proof, such as affidavits of individuals having actual knowledge of the date of such filing (*see* ***Ziemba v City of Troy***, 295 AD2d 693, 743 NYS2d 199 [3d Dept 2002]; ***Gagliardi v Board of Appeals of Village of Pawling***, 188 AD2d 923, 591 NYS2d 629 [3d Dept 1992]; ***Pickett v Town of Tusten Zoning Bd. of Appeals***, 169 AD2d 906, 564 NYS2d 625 [3d Dept 1991]), or documentary evidence with a date-stamp. Absent prima facie proof of such filing, the burden does not shift to the party opposing the limitations defense (*see* ***Swift v New York Medical College***, 25 Ad3d 686, 808 NYS2d 731 [2d Dept 2006]).

In addition, all actions subject to SEQRA initially require the preparation of an EAF, whose purpose is to aid an agency "in determining the environmental significance or nonsignificance of actions" (*see* 6 NYCRR 617.2 [m]; *see also* 617.6 [a][2],[3]). After reviewing the EAF, the lead agency may issue a negative declaration if it concludes that "there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (6 NYCRR 617.7 [a][2]). Here, while the negative declaration is dated September 25, 2013, the EAF is dated October 3, 2013. Furthermore, absent from the record is proof of coordinated review or that LIPA contacted other involved agencies during the SEQRA process. Accordingly, the branch of defendants' motion to dismiss the ninth cause of action as untimely is denied.

Defendants are directed to serve and file their answers to the petition within 10 days of service of a copy of this order with notice of entry. Any party may re-notice this matter for hearing upon appropriate notice pursuant to CPLR 7804 (f).

Dated: 1.22.2016



A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION