At an IAS Term of the Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 27th day of September 2019

PRESENT: HON. PATRICK J. McGRATH
Justice of the Supreme Court

SUPREME COURT STATE OF NEW YORK
COUNTY OF RENSSELAER

BRENDA DAVIES and GREG DAVIES on behalf of themselves and all others similarly situated,

Plaintiff,

-against-

DECISION AND ORDER
INDEX NO. 2019-262993

S.A. DUNN & COMPANY, LLC,

Defendant.

APPEARANCES: MICHAELS & SMOLAK, PC
LIDDLE & DUBIN, PC
Attorneys for the Plaintiff

BEVERIDGE & DIAMOND, PC
Attorneys for the Defendant

McGRATH, PATRICK J., J.S.C.

Plaintiffs Brenda Davies and Greg Davies bring this putative class action, on behalf of themselves and all others similarly situated, against Defendant S.A. Dunn & Company, LLC, alleging common law claims for nuisance, negligence, and gross negligence. Presently before the Court is defendant's motion to dismiss. CPLR 3211(a)(7). The following facts are taken from the complaint, unless otherwise indicated:

Defendant operates a construction and demolition debris landfill in the City of Rensselaer, New York. Plaintiffs Brenda Davies and Greg Davies reside in Rensselaer, and allege that defendant's landfill releases noxious odors onto their property.

Materials deposited into defendant's landfill include demolition debris including gypsum wallboard (i.e. sheetrock or drywall). The materials deposited into Defendant's landfill decompose and generate landfill gas, an odorous and offensive byproduct of decomposition which generally consists of hydrogen sulfide, methane, carbon dioxide, and various other compounds. Landfill gas from construction and demolition debris landfills can be especially "odiferous" given the high content of hydrogen sulfide, which is known to have a "rotten-egg" smell. Plaintiffs allege that a properly operated, maintained, and managed landfill will collect, capture and destroy landfill gas in order to prevent it from escaping into the ambient air as fugitive emissions, but that defendant has failed to manage its fugitive emissions and to otherwise prevent odors from the landfill from invading the homes and property of plaintiffs and the class.

The complaint alleges that more than 150 households have contacted Plaintiffs' counsel documenting the odors they attribute to the Defendant's landfill. Further, that defendant has a documented pattern of failing to control its emissions, demonstrated as follows:

a) Numerous resident complaints to state and local authorities including but not limited to the New York Department of Environmental Conservation (DEC);

b) Between January and April 2017, the DEC cited Defendant with 3 Notices of Violation for accepting improper waste.;

c) In August 2018, Defendant was served with five Notices of Violation based on DEC inspections for its failure operate the landfill so as to minimize the generation the leachate.: accepting and storing ; and

d) In August 2018, the DEC and Defendant entered a consent decree requiring Defendant, to pay a $100,000 penalty and undertake a $225,000 environmental benefit project in response to Defendant's repeated violations including but not limited to, construction and use of the two access points on Partition Street adjacent to the landfill; accepting and storing 205,000 cubic yards of mined the East Albany Capital, LLC property, which is not located within the mine's life of mine boundary; discharging stormwater from the mine onto the Partition Street Extension; and emissions of dust on various on at least four occasions in early April 2018;

e) DEC enforcement measures are ongoing, and DEC has required Defendant to undertake various odor mitigation measures which have not been sufficient to remedy the problem.

Legal Standard

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction and the court must determine only whether the plaintiff has any cause for relief under any cognizable legal theory. Uzzle v. Nunzie Court Homeowners Ass',. Inc., 55 AD3d 723 (2d Dept. 2008). Thus, a pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied

from its statements by fair and reasonable intendment. Brinkley v. Casablancas, 80 AD2d 428 (1st Dept. 1981). Conversely, allegations that state only legal opinions or conclusions, rather than factual statements, are not afforded any weight. Asgahar v. Tringali Realty, Inc., 18 AD3d 408 (2d Dept. 2005).

The plaintiff has no burden to produce documentary evidence supporting the allegations in the complaint in order to oppose a motion to dismiss under CPLR3211(a)(7). Stuart Realty Co. v. Rye Country Store, Inc., 296 AD2d 455 (2d Dept. 2002). However, if documentary evidence introduced in the record "flatly contradicts" any allegations in the complaint, such allegations will not be taken as true. Asgahar v. Tringali Realty, Inc., 18 AD3d 408 (2d Dept. 2005). Also, the plaintiff can introduce documentary evidence to show that the allegations in the complaint are supportable with further proof. CPLR 3211(c); 3211(e); Rovello v. Orofino Realty Co., 40 NY2d 633 (1976).

To succeed at this juncture, therefore, a defendant must demonstrate either that all factual allegations when taken as true cannot make out any legal claim for relief, or that evidence in the record flatly contradicts all factual allegations that would make out a legal claim for relief.

Negligence

Defendant moves to dismiss the ordinary negligence cause of action, arguing that defendant does not owe plaintiffs a duty of care and that plaintiffs' alleged diminution in property values is a purely economic harm that is not recoverable under a theory of negligence.

Under long-established principles of common law, a plaintiff asserting a negligence claim under New York law must allege "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." Lerner v. Fleet Bank, N.A., 459 F.3d 273, 286 (2d Cir. 2006) (internal quotation marks omitted). In general, the "duty" in question is a duty to exercise reasonable care; in other words, to avoid acting in a way that will give rise to a foreseeable, but avoidable, risk of harm to others. *See* Korean Air Lines Co. v. McLean, 118 F.Supp.3d 471, 486 (EDNY 2015).

In D'Amico v. Waste Mgmt. of N.Y., LLC, 2019 U.S. Dist. LEXIS 50323, at *15 (WDNY Mar. 25, 2019), plaintiffs alleged that the defendant's landfill released "odorous emissions ... onto the property of plaintiff and the class on occasions too numerous to recount individually." The odors were described in the complaint as "offensive" and that they interfered with Plaintiffs and the putative class members' use and enjoyment of their property. Plaintiff claimed that "[d]efendant's emissions are especially injurious to the Class as compared with the public at large, given the impacts to their homes." Finally, that these emissions have caused a diminution in the value of plaintiff's and the putative class members' property. The complaint in *D'Amico* sounded in ordinary negligence, gross negligence, and public nuisance.

After a lengthy analysis of 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96

NY2d 280, 290 (2001) (which the instant defendants also rely on) as well as Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233 (NDNY 2017), the Court held that defendant owed plaintiffs—as adjacent landowners—a duty to operate its landfill in a reasonable manner. D'Amico v. Waste Mgmt. of N.Y., LLC, *supra at* ("Plaintiff and the putative class members in this case have a reasonable expectation that the operator of an adjacent landfill will take reasonable measures to prevent the unreasonable contamination of the immediate air space permeating their properties.") *citing* Fitzgibbons v. City of Oswego, No. 5:10-CV-1038 FJS/ATB, 2011 U.S. Dist. LEXIS 143772 (NDNY 2011) (denying motion to dismiss negligence claim where the adjacent landowner alleged that the defendant "owed him a duty of care with regard to its operation of the [l]andfill"). The D'Amico court further concluded that the plaintiff had "plausibly stated a claim for ordinary negligence based upon Defendant's alleged breach of its duty by causing the airspace on and surrounding Plaintiff's property to be contaminated, resulting in a diminution in property values."

Additionally, the Court in *D'Amico* recognized that in 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2001), the Court of Appeals held that defendant landowners do not owe a duty to their neighbors to avoid purely economic losses. However, that New York courts have recognized "stigma damages" as a valid category of damages in environmental cases because the diminished property values result from an actual or imminent invasion of a landowner's property by a defendant's polluting conduct. Id. at *13, *citing* 87th St. Owners Corp. v. Carnegie Hill-87th St. Corp., 251 F. Supp. 2d 1215, 1223 (SDNY 2002) *quoting* Commerce Holding Corp. v. Bd. of Assessors of the Town of Babylon, 88 NY2d 724, 732 (1996). The *D'Amico* court noted that "stigma damages, while economic in nature, are distinguishable from 'purely economic harm' that arises from the loss of intangible financial interests unaccompanied by any tangible intrusion onto the property."

The allegations in the instant complaint with respect to ordinary negligence are the same as those alleged in *D'Amico*, and the same result should follow. Therefore, the motion to dismiss the ordinary negligence claim is denied.

However, the *D'Amico* court dismissed the gross negligence claims, noting that the complaint failed to set forth facts that alleged "an extreme departure from the standards of ordinary care" or the absence of "even slight care or slight diligence." Id., *citing* Bayerische Landesbank, NY. Branch, 692 F.3d 42, 61-62 (2d Cir. 2012) and Maliv. British Airways, 2018 U.S. Dist. LEXIS 112994 (quotation marks omitted). The Court noted that "simply appending conclusory words or phrases, such as 'knowingly' or 'intentionally' to allegations of ordinary negligence does not satisfy the aggravated nature of a gross negligence claim." *D'Amico*, *citing* Bayerische Landesbank, NY. Branch, 692 F.3d at 62 ("Simply adding the conclusory word 'reckless' to Aladdin's trading does not transform an ill-advised investment decision into something approaching intentional misconduct"); Kinsey v. Cendant Corp., No. 04 Civ.0582 RWS, 2005 U.S. Dist. LEXIS 16397 (SDNY 2005) (holding that allegations "sufficient to demonstrate ordinary negligence" do not necessarily allege a gross negligence claim without factual allegations sufficient to "meet the heightened standard necessary to state a claim for gross negligence"); Sutton Park Dev. Corp. Trading Co. Inc., 297 AD2d at 431 ("Notably missing from this complaint are any factual averments alleging conduct of such aggravated

character.").

In this case, the complaint alleges that defendant "intentionally, recklessly, willfully, wantonly, maliciously, grossly and negligently failed to properly construct, repair, maintain and/or operate its landfill, and caused the invasion of Plaintiffs' property by noxious odors on frequent, intermittent and ongoing reoccurring occasions." Further, that defendant's "gross negligence was malicious and made with a wanton or reckless disregard for the property of Plaintiffs, which entitles Plaintiffs to an award of compensatory, exemplary, and punitive relief." This Court finds that the complaint fails to set forth facts that allege an extreme departure from the standards of ordinary care or factual averments alleging conduct of such aggravated character. Accordingly, the cause of action for gross negligence is dismissed, without prejudice.

Plaintiffs' claim for punitive damages is also dismissed, without prejudice. As noted by the defendant, punitive damages are an extreme remedy available only to punish actions driven by malicious intent or other morally culpable conduct. *See* Sharapata v. Town of Islip, 56 N.Y.2d 332, 335 (1982). Plaintiffs allege no facts to support their demand.

Nuisance

The complaint alleges that the noxious odors invading Plaintiffs' property are "indecent and offensive to the senses, and obstruct the free use of their property so as to substantially and unreasonably interfere with the comfortable enjoyment of life and property"; that "Defendant has intentionally and negligently caused an unreasonable invasion of Plaintiffs' interest in the use and enjoyment of their property"; and that "apart from the property damage incurred by Plaintiff and the Class, Defendant's emissions have substantially interfered with rights common to the general public, including the right to uncontaminated and/or unpolluted air."

Initially, the defendant notes that the complaint does not identify whether plaintiffs are alleging a public or private nuisance, however, after a review of plaintiffs' opposition papers, it is clear that the complaint sounds in public nuisance.

Defendant asserts that Plaintiffs lack standing to bring their public nuisance claim because they have not alleged an injury different from others. Defendant argues that the complaint focuses entirely on the plaintiffs' own property rights, not a right of the community. Further, that plaintiffs' alleged right to uncontaminated and/or unpolluted air is a "restatement of a legal standard, which is insufficient to state a claim." Finally, that plaintiff fails to allege any facts as to how defendant interfered with this right.

The affirmation of plaintiffs' counsel in opposition to the motion to dismiss argues that plaintiffs have suffered special injury based on diminution of property values, which constitutes a special injury beyond that suffered by the community at large. Further, that the "community at large" includes people that hold no property interest, such as people who pass through the class area on roads and those who visit the class area for work, shopping, dining, or recreation.

Public nuisance is "a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons." Copart Indus. v. Consolidated Edison Co., 41 NY2d 564, 568 (1977); In re MTBE Products Liability Litigation, 175 F. Supp. 2d 593, 621 n.51 (SDNY 2001); *accord* R2d Torts 821B. "To prevail on a public nuisance claim under New York law, a plaintiff must show that the defendant's conduct amounts to a substantial interference with the exercise of a common right of the public, thereby endangering or injuring the property, health, safety or comfort of a considerable number of persons." In re MTBE Products Liab. Litig., 725 F.3d 65, 121 (2d Cir. 2013) (internal quotations and citation omitted).

A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority. Copart Indus. v. Consolidated Edison Co., *supra* at 568. "A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large. This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public." 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., *supra* at 292; Restatement [Second] of Torts 821C, comment a; Prosser, Private Action for Public Nuisance, 52 Va L Rev 997,1007 (1966). Thus, "where the claimed injury is common to the entire community, a private right of action is barred. The claimed injury must be different in kind from the entire community, not simply different in degree." Booth v. Hanson Aggregates New York, Inc., 16 AD3d 1137, 1138 (4th Dept. 2005).

The complaint in *D'Amico, supra* was subject to two motions to dismiss. The Court's first decision ("D'Amico I") dismissed the nuisance cause of action because it lacked any allegation of interference with a public right, and only alleged interference with rights to use and enjoyment of private property. D'Amico v. Waste Mgmt. of N.Y., LLC, 2019 U.S. Dist. LEXIS 50323, *9-10. The Court noted that a "liberal construction of the Amended Complaint might conceivably permit an inference that the Landfill's noxious emissions have substantially interfered with the public's right to uncontaminated and unpolluted air." However, "the mere possibility that there has been a substantial interference with the public's right to clean air does not satisfy federal pleading standards; if a plaintiff has not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." Id. at 10-11. The dismissal was without prejudice.

Plaintiff brought a second amended complaint, which was again subject to a motion to dismiss. In the second amended complaint, plaintiff alleged that "[a]part from the property damage incurred by Plaintiff and the Class, Defendant's emissions have substantially interfered with rights common to the general public, including the right to uncontaminated and/or unpolluted air," which is the very same allegation contained in the instant complaint. Plaintiff argued that he alleged facts demonstrating that the putative class members had suffered a "special injury" beyond the harm sustained by the public at large, and that because Defendant's alleged nuisance activities impact individuals in the community outside those who compose the putative class, the diminution in property values sustained by the putative class members constitutes an injury distinct from that suffered by the general public.

In "D'Amico II", the Court was "underwhelmed by Plaintiff's efforts to rectify the pleading deficiencies outlined in its March 25, 2019, Decision and Order." D'Amico v. Waste Mgmt. of N.Y., 2019 U.S. Dist. LEXIS 153296, *12 (WDNY, September 9, 2019). Specifically, the court held that plaintiff failed to "set forth facts plausibly alleging that his claim satisfies the standard for a public nuisance by substantially interfering with rights held in common by the public" and that the complaint "failed to plausibly allege a special injury that is distinct from any harm suffered by the public at large." The court noted that at oral argument on the motion, plaintiff's counsel claimed that the emissions "also impact other individuals who work, recreate, or travel in the vicinity of the Landfill, but Defendant's counsel cogently observed that no such facts were alleged in the [second amended complaint]. In other words, Plaintiff has alleged no facts plausibly suggesting that the relevant community extends beyond the putative class at issue." Id. at *13.

The court acknowledged that "[d]iminished property values may constitute a special injury under New York law." However, the plaintiff only alleged in a conclusory manner that Defendant's operation of the Landfill has substantially interfered with the public's right to uncontaminated air and that the putative class has suffered diminished property values as a result. The complaint lacked any facts to plausibly support a conclusion that the alleged pecuniary loss "does not affect the entire community under consideration." Id. at *14-15. The Court refused to dismiss the cause of action with prejudice, as urged by the defendant, noting that "if Plaintiff can plausibly allege that the members of the putative class do not constitute all members of the public who come in contact with the nuisance — as suggested by Plaintiff's counsel during oral argument— Plaintiff may yet be able to assert a public nuisance cause of action." Id. at *19 (internal citations omitted).

The instant complaint suffers from the same pleading deficiencies considered in D'Amico II. Like that complaint, the instant complaint alleges that the defendants have interfered with a public right, specifically, the right to uncontaminated and unpolluted air. While the plaintiffs' attorney references in his memorandum of law that people who did not own property can be exposed to noxious fumes, no such allegation with factual support is contained in the complaint or other documentary evidence.[1] Moreover, while the alleged depreciation in plaintiffs' property values, if proven, would constitute special injury resulting from the odor (*see* Scheg v. Agway, Inc., 229 AD2d 963 (4th Dept. 1996); Allen Avionics, Inc. v. Universal Broadcasting Corp., 118 AD2d 527, 528 (2d Dept. 1986), affd sub. nom Sun-Brite Car Wash v. Board of Zoning and Appeals of Town of North Hempstead, 69 NY2d 406 (1987)), plaintiffs must also allege that the injury to their real property is different both in kind and degree from that of the community as a whole. *See* Black v. George Weston Bakeries, Inc., No. 07-CV-0853, 2008 U.S. Dist. LEXIS 92031, 2008 WL 4911791, at *7 (WDNY Nov. 13, 2008) ("Pleading a diminution in value of one's home and property qualifies as special damages for purposes of establishing standing in a public nuisance suit."); Iannucci v. City

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[1] As noted *infra,* in opposition to a 3211 motion, the plaintiff can introduce documentary evidence to show that the allegations in the complaint are supportable with further proof. CPLR 3211(c); 3211(e); Rovello v. Orofino Realty Co., 40 NY2d 633 (1976). However, plaintiffs have merely provided the affirmation of counsel, which does not meet these requirements.

of N.Y., No. 02-CV-6135, 2006 U.S. Dist. LEXIS 21117 (EDNY 2006) ("While the entire community is injured in that its access to public streets and sidewalks is restricted due to defendants' illegal parking, plaintiff has sustained 'special injuries' in that his driveways and parking lots are blocked and the value of his properties has decreased as a result of the parking."). The complaint does not allege facts that the harm suffered by plaintiffs as a result of the odors was any different from that experienced by other members of the community. The nuisance cause of action is therefore dismissed without prejudice.

Injunctive Relief

The complaint seeks "injunctive relief not inconsistent with Defendant's federally and state enforced [sic] and Air Permits." Defendant notes that the New York State Legislature has delegated the permitting and regulation of landfills to New York State Department of Environmental Conservation ("NYSDEC"). ECL 27-0703; *see also* ECL 3-0301. NYSDEC is charged with promulgating rules and regulations that govern landfill operations and related conditions, including "air pollution" and "obnoxious odors," with the potential to affect public health, safety, and welfare. ECL 27-0703(2)(a); *see generally* 6 NYCRR Parts 360 ("Solid Waste Management Facilities"), 363 ("Landfills"). NYSDEC is further directed to issue, modify, or revoke permits for solid waste management facilities; investigate landfills; issue compliance orders; seek penalties; and enjoin violations of its regulations. See ECL art. 71; 6 NYCRR 360.7, 360.9, 363-10.1. The scope of NYSDEC's jurisdiction over the defendant landfill is embodied in S.A. Dunn's solid waste management permit. Defendant argues that plaintiffs are seeking to usurp the primary jurisdiction of NYSDEC over waste management and disposal in New York. Defendant argues this relief would supplant NYSDEC's authority to enforce its regulations and the Dunn Landfill's solid waste management permit and, if needed, to require S.A. Dunn to undertake mitigative measures related to control of landfill gas and related odors. Defendant argues that this Court should defer to NYSDEC's special expertise in this area and dismiss this demand for injunctive relief.

The primary jurisdiction doctrine enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, especially where the agency's specialized experience and technical expertise is involved. *See* Sohn v Calderon, 78 NY2d 755 (1991); Massaro v Jaina Network Systems, Inc., 106 AD3d 701 (2d Dept. 2013); Wong v Gouverneur Gardens Hous. Corp., 308 AD2d 301 (1st Dept. 2003). In Capital Tel. Co. v Pattersonville Tel. Co., 56 NY2d 11 (1982) the Court of Appeals held that the doctrine of primary jurisdiction "is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency. Though the agency's jurisdiction is not exclusive, the court postpones its action until it has received the agency's views." Id. at 22 (internal citations omitted).

"D'Amico I" rejected defendant's similar argument of primary jurisdiction. The Court first noted that Plaintiff's lawsuit was based on common law causes of action commonly adjudicated by

courts that would not require extensive interpretation of agency regulations. Second, while it was NYSDEC's responsibility to "carry out the environmental policy of the state", that agency was " not responsible for vindicating private property rights or providing remedies for landowner disputes." The Court also took into consideration the "type of injunctive relief" contemplated by the action. At oral argument, plaintiff's attorney stated that his clients wanted the landfill odors to stop polluting plaintiffs and the putative class members' properties, but declined to give a more specific answer until the case proceeded past discovery. The Court noted any injunctive relief that might interfere with Defendant's compliance with federal requirements could face preclusion, however, the mere possibility that a common law standard may require different injunctive relief than that currently prescribed by federal law "does not by itself place this issue within the NYSDEC's exclusive domain." The Court was "unpersuaded that there is a substantial danger of inconsistent rulings between this Court and the NYSDEC." "Whether or not Defendant is in compliance with its regulatory responsibilities is not necessarily dispositive of whether Plaintiff and the putative class members are suffering property damage or are otherwise being deprived of their right to the use and enjoyment of their property."

This Court finds that the same result should follow here. The instant case is based on common law causes of action commonly adjudicated by courts, and will not require extensive interpretation of agency regulations. There is no pending administrative action that may conflict with relief sought by Plaintiffs. Finally, "[p]laintiff[s] seek[] damages here, and 'courts generally do not defer jurisdiction where plaintiffs seek damages for injuries to their property or person.'" D'Amico I, *supra*, at *49, *quoting* Avery Dennison Corp., 2012 U.S. Dist. LEXIS 27264, 2012 WL 677971, at *10 and In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 175 F. Supp. 2d 593, 618 (SDNY 2001). Accordingly, this Court declines to apply the doctrine of primary jurisdiction to stay or strike the request for injunctive relief.

Class Allegations

Defendant argues that the Plaintiffs have not alleged a prima facie basis for class action relief. Defendant contends that individualized issues with respect to each plaintiff would overwhelm any common issues pertaining to the proposed class. Specifically, that the proposed class claims will require the Court to analyze complicated and individualized issues of fact with respect to whether each putative class member perceived or experienced odors; whether those odors were offensive and/or persistent; whether the odors each person was exposed to came from the Dunn Landfill as opposed to other potential odor sources in the area; whether and the degree to which each person's use and enjoyment of property was affected by Dunn Landfill odors; and whether and the degree to which each person's property value has decreased at all, much less as a result of alleged odors. Determination of putative class members' property value diminution claims would require information as to when the property was purchased, the purchase price, what the levels/impact of odors may have been at the time the property was purchased, and any localized or intervening impacts.

Defendant also argues that the Complaint fails to sufficiently allege that the named Plaintiffs' claims and defenses are typical of the putative class. Defendant points to the disparity in class

members' respective distances and directions from the Dunn Landfill, topographical features between their respective residences and the Dunn Landfill, the type and timing of odors allegedly experienced, and property-specific factors relevant to valuation.

Finally, defendant argues that the proposed class definition ("[a]ll owners/occupants and renters of residential property residing within one and one half (1.5) miles of the [L]andfill's property boundary,") is overbroad and improperly encompasses individuals who are not aggrieved by defendant's alleged conduct. Specifically, that the proposed class is not limited to "owners" and "renters," who might be presumed to have a possessory interest in property. Instead, Plaintiffs seek to advance their claims on behalf of mere "occupants."

Plaintiffs oppose, arguing that dismissal at the pleading stage is inappropriate. *See* Maddicks v. Big City Props., LLC, 163 AD3d 501, 502-03 (1st Dept. 2018) *quoting* Bernstein v. Kelso & Co., 231 AD2d 314, 323 (1st Dept. 1997). Plaintiffs contend that striking class allegations at the pleading stage is only appropriate in the rare instance that the complaint demonstrates conclusively that as a matter of law, there is no basis for class action relief. Maddicks v. Big City Props., LLC, *supra citing* Downing v First Lenox Terrace Assoc., 107 AD3d 86, 91 (1st Dept. 2013), aff'd Borden v 400 E. 55th St. Assoc., L.P., 24 NY3d 382 (2014).

In Maddicks v. Big City Props., LLC, *supra,* the Court of Appeals noted that "[n]othing in the CPLR prevents a defendant from moving to dismiss a class action claim pursuant to CPLR 3211. However, a motion to dismiss should not be equated to a motion for class certification." Id. at *1. Further, that "the determination whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901", which requires that five factors (numerosity, commonality, typicality, adequacy of representation and superiority) are met. The Court noted that

> "[t]hrough CPLR 902 the legislature established a procedure for immediate threshold review of the question whether an action may proceed as a class action. Under that section, a plaintiff must move within 60 days after the window for responsive pleadings has closed for an order to determine whether an action brought as a class action may be so maintained. That motion practice allows a would-be class representative to demonstrate satisfaction of the CPLR 901 (a) prerequisites with evidence — as opposed to mere allegations — tested at a hearing. The prudent course charted here, namely, viewing the allegations of the complaint through the lens required by Leon, 84 NY2d 83 and leaving the class allegations for evaluation at the hearing stage envisioned by the legislature, leaves open the possibility that defendants will obtain the same result — termination of the class claims — at the appropriate time."

In this case, it does not appear conclusively from the complaint that, as a matter of law, there is no basis for class action relief. Plaintiffs have alleged a common means and method of damage, which may result in various degrees of harm. However, it simply cannot be concluded at this point that no amount of factual development could support the certification of the class in this case.

Additionally, while the class claim may require separate proof with respect to each plaintiff,

class certification is still permissible "[e]ven if ... it becomes clear that questions peculiar to each individual may remain or that there are varied damages suffered among class members..." Burdick v Tonoga, Inc., 2019 NY Slip Op 08461, *8 (3d Dept., November 21, 2019) (internal quotations omitted) *citing* Friar v Vanguard Holding Corp., 78 AD2d 83, 98 (1980) and Maddicks v Big City Props., LLC., 2019 NY Slip Op 07519, *2 (2019) and Borden v 400 E. 55th St. Assoc., L.P., 24 NY3d 382, 399 (2014_). Therefore, the motion to dismiss the class action is denied.

Therefore, in accordance with the foregoing, it is here

ORDERED that defendant's motion to dismiss the gross negligence, punitive damages, and nuisance causes of action is **GRANTED**; and it is further

ORDERED that the defendant's motion to dismiss plaintiff's cause of action for ordinary negligence is **DENIED**.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to the attorneys for the plaintiffs. All original supporting documentation is being returned to the Rensselaer County Court Clerk's Office for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Plaintiffs are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

DATED: Troy, New York
December 5, 2019

PATRICK J. McGRATH
Justice of the Supreme Court

Received
12/16/2019 10:12 AM
Frank J Merola
Rensselaer County Clerk

Papers Considered:

1. Notice of Motion, dated June 20, 2019; Affirmation of Michael Murphy, Esq., dated June 20, 2019, with annexed Exhibits 1-5; Memorandum of Law in Support of S.A. Dunn & Company, LLC's Motion to Dismiss the Class Action Complaint and Motion to Strike Demand for Punitive Damages, dated June 20, 2019.
2. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Class Action Complaint and Motion to Strike Demand for Punitive Damages, dated August 19, 2019.
3. Reply Memorandum of Law in Support of S.A. Dunn & Company, LLC's Motion to Dismiss the Class Action Complaint and Motion to Strike Demand for Punitive Damages, dated September 18, 2019.