STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

BLAKE BASSETT, ROBERT BASSETT,
SANDY LUPO and JOHN LUPO

Plaintiffs,

-against-

PECKHAM MATERIALS CORP. and
PALLETTE STONE CORPORATION,

Defendants.

DECISION AND ORDER
Index No.: EF2020633
RJI No.: 45-1-2020-0742

PRESENT: HON. DIANNE N. FREESTONE
Supreme Court Justice

APPEARANCES:

David A. Engel, Esq.
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Attorney for Plaintiffs
Albany, New York

Donald J. Hillmann, Esq.
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Michael A. Brandi, Esq.
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Attorney for Defendant Pallette Stone Corporation
Saratoga Springs, New York

Plaintiffs commenced the within action on February 20, 2020 by electronically filing a summons and verified complaint with the Saratoga County Clerk's Office.[1] By Decision and

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[1] It is worth noting that, on or about September 3, 2020, this matter was reassigned from the Hon. Thomas D. Nolan, Jr. to this Court pursuant to the directives of the Administrative Judge.

Order dated October 19, 2020, the Court granted defendant Peckham Materials Corp.'s (hereinafter referred to as "Peckham") motion to amend its answer. In accordance with the Court's Decision and Order, Peckham served notice of entry and electronically filed its amended answer. Plaintiffs were afforded 30 days to serve a reply to the counterclaim. In lieu of serving a reply to the counterclaim, on November 17, 2020, plaintiffs elected to file a pre-answer motion to dismiss pursuant to CPLR 3211(a)(7). By correspondence dated December 4, 2020, defendant Pallettte Stone Corporation (hereinafter referred to as "Pallette") advised the Court that it was taking no position regarding plaintiffs' motion. On December 7, 2020, Peckham opposed plaintiffs' motion to dismiss by attorney's affirmation. On December 10, 2020, plaintiffs submitted an attorney's affirmation in reply. On December 14, 2020, the Court conferenced the matter and held oral argument on the motion.

Plaintiffs are residents and/or owners of approximately 14 acres of rural land located in the Town of Greenfield, Saratoga County, New York. Peckham's property is comprised of a mining operation that is adjacent to and abuts plaintiffs' property. In 2019, Peckham entered into a lease agreement with Pallette to operate the subject quarry. Plaintiffs' complaint alleges causes of action sounding in strict liability, negligence, private nuisance, trespass and permanent injunction. Peckham's amended answer contains a counterclaim against plaintiffs for private nuisance.

Plaintiffs contend that Peckham's counterclaim fails to state a claim for private nuisance. Plaintiffs maintain that Peckham's counterclaim fails to contain any factual allegations "regarding ... plaintiffs use of property causing the alleged nuisance." Plaintiff further maintains that, since Peckham has failed to allege that plaintiffs actual use of their property constitutes a nuisance, its counterclaim is fatally deficient and must be dismissed pursuant to CPLR 3211(a)(7). In opposition, Peckham asserts that its counterclaim is facially sufficient to support a claim for private

nuisance in that it sufficiently alleges each of the required elements.

CPLR 3211(a)(7) provides, in relevant part, that "[a] party may move for judgment dismissing one or more causes of action asserted against [him or her] on the ground that the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a claim, [this Court] must afford the [pleading] a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory" (Johnson v Bruen, 187 AD3d 1294 [3d Dept 2020]; Johnson v Woodruff, 188 AD3d 1425 [3d Dept 2020]; Town of Tupper Lake v Sootbusters, LLC, 147 AD3d 1268, 1269 [3d Dept 2017]). Likewise, when assessing a pre-answer motion for failure to state a cause of action, [this Court must] accept [the] allegations in the [pleading] as true and accord the [claimant] every favorable inference" (Duffy v Baldwin, 183 AD3d 1053, 1054 [3d Dept 2020], quoting Mid–Hudson Val. Fed. Credit Union v Quartararo & Lois PLLC, 155 AD3d at 1219).

Peckham's counterclaim alleges that it "is the owner of a lawfully permitted sand and gravel quarry ... located on approximately 181.47 acres in the Town of Greenfield, Saratoga County" and that its "[p]roperty has been used as a quarry since at least February 2002." Peckham alleges that the subject property "sits within the Earth material and Extraction Overlay District of the Town of Greenfield" and that the district has been zoned for permissible mining and extraction under Section 105-111of the Town of Greenfield's Zoning Law. Peckham alleges that, prior to acquiring their property, plaintiffs had actual and constructive notice that Peckham's property was being used as an active quarry. Peckham alleges that "since acquiring title Plaintiffs have engaged in actions to deliberately interfere with Peckham's lawful use and enjoyment of the Property." Peckham further alleges that "[p]laintiffs lodged multiple unfounded and specious complaints with

the New York State Department of Environmental Conservation ("DEC"), in a manner that was substantial and unreasonable, regarding the authorized and permitted mining activities on the [p]roperty." Peckham alleges that, in response to each such complaint, DEC was required to examine and investigate said complaints and defendants were required to comply therewith. Peckham asserts that the "continued and repeated visits from the authorities in response to [p]laintiffs multiple meritless complaints, forced Peckham to divert its attention, interrupt its work, and divert resources." Peckham further asserts that, "[p]laintiffs multiple complaints were designed to, and did, cause and create angst, delay and frustration to Peckham" and that "[n]one of the complaints resulted in any adverse regulatory action being taken against Peckham by the DEC. Peckham also asserts that "[p]laintiffs' complaints were unreasonable" and that "plaintiffs actions were undertaken for the purpose of placing Peckham in perpetual agitation so as to interfere with Peckham's lawful use and enjoyment of the [p]roperty."

" The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (DelVecchio v Collins, 178 AD3d 1336, 1337 [3d Dept 2019]; see LaJoy v Luck Bros., Inc., 34 AD3d 1015, 1016 [3d Dept 2006]). "[A] private nuisance claim does not require an actual intrusion upon property by the tortfeasor and may be 'established by proof of intentional action or inaction that substantially and unreasonably interferes with other people's use and enjoyment of their property'" (Pilatich v Town of New Baltimore, 133 AD3d 1143, 1145 [3d Dept 2015], quoting Nemeth v K-Tooling, 100 AD3d 1271, 1272 [3d Dept 2012]). "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 [3d Dept 2014][internal citations omitted]).

"Where, as here, the motion is premised upon claimant's failure to state a claim, the dispositive inquiry is whether it has a cause of action and not whether one has been stated, i.e., whether the facts as alleged fit within any cognizable legal theory" (IMS Engineers-Architects, P.C. v State, 51 AD3d 1355, 1356 [3d Dept 2008][internal citation and quotation marks omitted]; see CPLR 3211[a][7]). Recently, the Court in Allen v Powers (64 Misc3d 171 [Cohoes City Ct 2019]) found that allegations in a counterclaim that a party "repeatedly made frivolous complaints to city officials resulting in repeated intrusions by such officials into [the claimant's] home" was sufficient to plead a case for private nuisance (see Thomas B. Merritt, 30 New York Practice Series – New York Elements of an Action § 17:1). The Court concluded that:

> "[t]he question of nuisance will turn on the number of complaints, the frequency of the complaints, the redundancy of complaints, and the legitimacy of complaints. These facts will be needed to sustain a claim at trial or to survive a summary judgment motion. But for the current purpose, the allegations contained in the counterclaim suffice to plead a case in private nuisance."

Contrary to plaintiffs assertions herein, when liberally construing the allegations in the pleading, as this Court must, and accepting all of the alleged facts as true, and giving Peckham every favorable inference, the Court finds that Peckham has stated a cause of action for private nuisance (see generally DelVecchio v Collins, 178 AD3d at 1337 [3d Dept 2019]). As stated in the Court's prior Decision and Order dated October 19, 2020, if plaintiffs wish to test the merits of Peckham's counterclaim, plaintiffs may later move for summary judgment upon a proper showing. Accordingly, plaintiffs' motion to dismiss is denied, without costs.

The foregoing constitutes the Decision and Order of the Court. The Court is hereby uploading the original Decision and Order into the NYSCEF system for filing and entry by the County Clerk. Peckham's counsel is still responsible for serving notice of entry of this Decision

and Order in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Signed this 21st day of December 2020, at Saratoga Springs, New York.

Dianne N. Freestone
HON. DIANNE N. FREESTONE
Supreme Court Justice

ENTER

Craig A. Hayner
Entered Saratoga County Clerk

12/21/2020