SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

JOSEPH MCENTEE, JR., LESLIE A. RUSS,
ROBERT HUDSON, DARYN GAST and DIANA GAST ,

Plaintiffs, DECISION AND ORDER

-against- Index No.51029/20

CRICKET VALLEY ENERGY CENTER, LLC;
CRICKET VALLEY ASSET MANAGEMENT SERVICES, LLC;
CRICKET VALLEY ENERGY HOLDINGS II, LLC;
CRICKET VALLEY ENERGY PARTNERS and
CRICKET VALLEY ENERGY HOLDINGS, LLC

Defendants.

The following papers were read on Plaintiffs' motion for an injunction and Defendants' cross-motion to dismiss.

ORDER TO SHOW CAUSE
AFFIRMATION IN SUPPORT
MEMORANDUM OF LAW IN SUPPORT
AFFIDAVIT IN SUPPORT
EXHIBITS 1 - 2
AFFIDAVIT IN SUPPORT
EXHIBIT 1
AFFIDAVIT IN SUPPORT

NOTICE OF CROSS-MOTION
AFFIDAVIT IN SUPPORT
EXHIBITS A - B
AFFIDAVIT IN SUPPORT
EXHIBITS A - B
AFFIDAVIT IN SUPPORT
EXHIBITS A - D
AFFIDAVIT IN SUPPORT
EXHIBITS A - B
AFFIDAVIT OF JULIANA PAONESSA

AFFIDAVIT OF MARK DUQUETTE
AFFIRMATION IN SUPPORT
EXHIBITS A - C
MEMORANDUM OF LAW IN SUPPORT

REPLY AFFIRMATION
EXHIBITS 1 - 4
MEMORANDUM OF LAW IN OPPOSITION
AFFIDAVIT IN OPPOSITION

REPLY MEMORANDUM OF LAW

Plaintiffs commenced this action seeking damages and to enjoin operation of the Cricket Valley Energy Center, LLC ("CVEC") electric generation facility in Dover, New York. Plaintiffs have asserted causes of action for nuisance, intentional infliction of emotional distress and fraud. They move by order to show cause to enjoin CVEC from operating during the pendency of this action. Defendants cross-move to dismiss pursuant to CPLR 3211(a)(3)(5)(7) and (8) alleging Plaintiffs lack standing, that Plaintiffs' claims are barred by collateral estoppel, that the complaint fails to state a cause of action and that the court lacks personal jurisdiction over the defendants.

In support of its motion to dismiss for lack of personal jurisdiction, Defendants have submitted an affidavit of their attorney and secretary Arnold Wallenstein. Mr. Wallenstein asserts that he is designated to receive service of process for all Defendants of filings made with the New York Secretary of State. He states that none of the defendants ever received by mail or otherwise copies of the complaint or amended complaint. He notes that the affidavits of service Plaintiffs filed indicate that service was made by leaving copies of the summons and complaint with an authorized agent of the office of the Secretary of State on March 20, 2020 at 11:37 p.m. Mr. Wallenstein asserts that it is unlikely that such office would have been open at that time or during a week that Governor Cuomo ordered non-essential government offices and businesses closed due to the onset of the COVID-19 pandemic. The foregoing allegations would ordinarily warrant the court to hold a traverse hearing on the issue of whether Defendants were properly served. However, on December 9, 2020, the same date Mr. Wallenstein executed his affidavit, Plaintiff s filed affidavits of service of an amended summons and amended complaint on Defendants by delivering them to the office of the Secretary of State on December 4, 2020 at 12:37 p.m. The court is cognizant that this service was purportedly made only six days prior to Defendants filing their cross-motion to dismiss. However, Defendants fail to address this subsequent service in their reply papers. Under such circumstances, the court declines to hold a traverse hearing on whether service was properly made on March 20, 2020. Defendants do not dispute being properly served with the amended summons and complaint and thus the issue appears to be moot. Based on the foregoing, it is

ORDERED that Defendants' motion to dismiss for lack of jurisdiction is denied without prejudice to make any appropriate application challenging the validity of the service allegedly made on December 4, 2020.

The doctrine of collateral estoppel bars a party from litigating an issue where: (1) the identical issue was decided in a prior action and is decisive in the present action; and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue. Westchester Cty. Corr. Officers Benev. Assoc., Inc. v. County of Westchester, 65 AD3d 1226 (2nd Dept 2009). Defendants invoke the doctrine of collateral estoppel based on the February 2020 decision and order of this court (Acker, J.) dismissing an Article 78 proceeding Plaintiff Joseph McEntee, Jr. commenced against the New York State Department of Environmental Conservation ("DEC") and Cricket Valley Energy Center, LLC. In that proceeding Petitioner sought an order of mandamus compelling the DEC to re-open the environmental review process and re-examine permits and approvals issued to operate the power plant. Petitioner alleged that Respondents violated the State Environmental Quality Review Act after the DEC denied Petitioner's request to require a supplemental environmental impact statement for the power plant. Petitioner sought a permanent injunction prohibiting operation of the plant until the additional reviews were conducted. The court dismissed the proceeding as barred by the applicable four-month statute of limitations and for failure to state a claim for a writ of mandamus because the determination of whether to require a supplemental environmental impact statement was discretionary. The court further found the proceeding moot because the plant was already fully operational.

The issues raised in this action are not identical to those raised in the Article 78 proceeding. In this action, Plaintiffs have asserted tort claims based on allegations that Defendants made misrepresentations in applying for permits and about known health hazards that would result from the operations of the power plant. Although Plaintiffs seek injunctive relief in this action as did the petitioners in the Article 78 proceeding, the grounds underlying the applications differ. The Article 78 proceeding challenged an administrative determination refusing to require a supplemental environmental impact statement. Plaintiffs' tort claims are not based on alleged procedural irregularities of an administrative agency and would not have been properly raised in an Article 78 proceeding. Based on the foregoing, it is

ORDERED that Defendants' motion to dismiss the action based on the doctrine of collateral estoppel is denied.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), this court must afford the claims a liberal construction, accept all facts alleged as true and accord the claimant the benefit of every possible favorable inference. See Leon v. Martinez, 84 NY2d 83, 87 (1994). The court's function is to determine only whether the facts as alleged fit within any cognizable legal theory. Id. Whether the complaint can survive a motion for summary judgment or the claims will ultimately be proven plays no role in the determination of a CPLR 3211 motion to dismiss. Litvinoff v. Wright, 150 AD3d 714, 715-16 (2nd Dept 2017).

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; and (5) caused by another's conduct in acting or failure to act. Massaro v. Jaina Network Sys., Inc., 106 AD3d 701, 703 (2nd Dept 2013). Except for the issue of whether a plaintiff

has the requisite property interest, the remaining elements generally present issues of fact unless the evidence is undisputed. See Broxmeyer v. United Capital Corp., 79 AD3d 780, 782-83 (2nd Dept 2010). What constitutes a reasonable use of one's property depends on the circumstances of each case. Benjamin v. Nelstad Materials Corp., 214 AD2d 632, 633 (2nd Dept 1995).

Plaintiffs' amended complaint asserts that in November 2019 Defendants began testing the power plant. It alleges that the testing occurred in the evening and during weekend hours and was characterized by explosive and roaring sounds that have continued since. It asserts that in a final Environmental Impact Statement Defendants represented that the project would comply with the most restrictive nighttime sound level limit of 50 dBA in the Town of Dover zoning code as measured on the northern, southern and eastern property lines which abut the nearest residential receptors. The amended complaint alleges that Plaintiff McEntee has measured the volume of noise punctuating his residence which is adjacent to Defendants' operation, and that it has reached decibels as high as 93 dBA. Plaintiffs allege that this noise volume is substantial, unreasonable and has impaired their ability to use and enjoy their property. Viewing all inferences in Plaintiffs' favor as the court must in adjudicating a motion to dismiss under CPLR 3211(a)(7), the foregoing is sufficient to state a private nuisance claim. While Defendants dispute the accuracy of Plaintiffs' claims about noise levels emanating from the power plant, the court may not resolve factual disputes within the context of a motion to dismiss.

The court, however, reaches a different conclusion about Plaintiff's nuisance claim based on alleged pollutants emanating from the power plant. The record as a whole demonstrates that the DEC conducted a full review of the power plant for its potential environmental impacts under the State Environmental Quality Review Act and issued a final environmental impact statement in July 2012. The DEC's findings concluded that, with respect to greenhouse gasses, "[t]he CVE Project is an example of a low-carbon intensity electric generation facility that will meet recently enacted carbon dioxide (CO2) standards." It then issued an Air State Facility permit, a Title IV Acid Rain permit, a Water Quality Certificate and a Fresh Water Wetlands permit. Petitioners failed to challenge the issuance of these permits either administratively or through an Article 78 proceeding. In 2016 the Public Service Commission granted a Certificate of Environmental Compatibility and Public Need to construct a 14.6 mile, 345 KV transmission facility associated with the plant. Again, no challenge was brought to the issuance of this certificate. In asserting their nuisance claim based upon the alleged emission of environmental pollutants, Plaintiffs do not allege that the plant is operating in violation of state law. Moreover, Plaintiffs do not allege that the plant's operation has caused a present health impact. Instead, Plaintiffs merely assert, upon information and belief, that the emissions create a heightened risk of future health impacts. Considering the foregoing in its totality, Plaintiffs have failed to state an actionable nuisance claim based on the plant emissions. Permitting such a speculative claim to go forward would completely undermine the finality of New York's regulatory process. Moreover, speculative claims of future adverse health impacts fail to demonstrate the type of present substantial interference necessary to sustain a nuisance claim. Wherefore, it is

ORDERED that Defendants' motion to dismiss Plaintiffs' nuisance claim based on alleged

noise pollution is denied. It is further

ORDERED that Defendants' motion to dismiss Plaintiffs' nuisance claim based on plant emissions is granted. It is further

ORDERED that Defendants' motion to dismiss Plaintiffs' fraud cause of action is granted. The elements of such cause of action are a misrepresentation or a material omission of fact which was false and known to be false by the defendant made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or omission and injury. Pasternack v. Lab. Corp. of Am. Holdings, 27 NY3d 817 (2016). Plaintiffs' fraud claim is based on allegations that Defendants failed to provide information to local and federal authorities when seeking approvals to operate the plant. Plaintiffs fail to identify, and this court is unaware of, any law or regulation that would have required Defendants to provide publicly available studies to regulatory agencies after it obtained approvals to operate the plant. Therefore, Plaintiffs fail to allege that Defendants made a misrepresentation or false material omission of fact. Nor, do Plaintiffs' allegations allege that Defendants opted not to submit these materials for the purpose of inducing any specific action. Finally, Plaintiffs do not allege that Defendants had any obligation to provide such information to them. A plaintiff may not establish the reliance element of a fraud claim by showing that a third party relied on a defendant's false statement resulting in injury to a plaintiff. Id. Based on the foregoing, the court declines to address whether Plaintiffs' fraud claim is also barred by the applicable statute of limitations.

The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing severe emotional distress; (3) causation; and (4) severe emotional distress. Petkewicz v. Dutchess Cty. Dept. of Community & Family Services, 137 AD3d 990 (2nd Dept 2016). The conduct in question must transcend all bounds of decency and "be regarded as atrocious and utterly intolerable in a civilized community." Christenson v. Gutman, 249 AD2d 805, 808 (3rd Dept 1998).

Plaintiffs' intentional infliction of emotional distress claim is premised on allegations that Defendants' operation of the power plant could have adverse health impacts on Plaintiffs. Plaintiffs allege that "it is predictable that the operation of such plants as that owned and operated by Defendants shall cause serious health impacts on a portion of those exposed to its emissions." Plaintiffs further allege that Defendants have intentionally failed to alert Plaintiff to these health risks or advise them of steps they may take to avoid such health effects. Defendants are lawfully operating an electric power plant. While Plaintiffs allege that such operation will cause environmental pollution and have adverse health impacts on those who reside near the plant, such claims fail to constitute the extreme and outrageous conduct necessary to sustain an intentional infliction of emotional distress claim. As Defendants are operating within the law, Plaintiffs' factual allegations cannot sustain a claim that Defendants have transcended all bounds of decency and are engaging in utterly intolerable conduct. Electricity is a necessary utility of modern life. Its creation for residential and commercial use requires the operation of electrical power plants. Plaintiffs also fail to state a cause of action for the infliction of emotional distress because their claims of emotional

disturbance and future health risks are conclusory, speculative, and unsupported by medical evidence. See Glendara v. Walsh, 227 AD2d 377 (2nd Dept 1996). Wherefore, it is

ORDERED that Defendants' motion to dismiss Plaintiffs' cause of action for the intentional infliction of emotional distress is granted. It is further

ORDERED that Plaintiffs' motion for a preliminary injunction is denied. Plaintiffs' only remaining claim in this action is a private nuisance claim based on alleged noise pollution. As there are disputed issues of fact as to the noise level emanating from the power plant, Plaintiffs have not met their burden of demonstrating a likelihood of success on the merits. Nor have they demonstrated irreparable harm would result in the absence of an injunction. Plaintiffs do not allege any permanent harm would result from the alleged noise pollution. The court notes that Plaintiffs waited six months from the filing of the action to move for injunctive relief. It is further

ORDERED that Defendants shall file an answer within ten days after service of notice of entry of this order. See CPLR 3211(f).

The foregoing constitutes the decision and order of the Court. A preliminary conference of this action will be held virtually on March 17, 2021 at 12:15 p.m.

Dated: February 22, 2021
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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