

**STATE OF NEW YORK
SUPREME COURT****COUNTY OF ALBANY**

**JENNIFER DUNCAN on behalf of herself
and all others similarly situated,****Plaintiff,****-against-****DECISION AND ORDER****Index No.: 904768-19
RJI No.: 01-19-133105****CAPITAL REGION LANDFILLS, INC.,****Defendant.**

(Supreme Court, Albany County All Purpose Term)**Appearances:****BEVERIDGE & DIAMOND, PC****Attorneys for Defendant****(Michael G. Murphy, Esq., John H. Paul, Esq., Megan R. Brillaut, Esq., Katelyn E. Ciolino, Esq.,
and Katrina M. Krebs, Esq., of Counsel)****477 Madison Avenue., 15th Floor****New York, New York 10022****LAW OFFICES OF MICHAELS & SMOLAK, P.C.****Attorneys for Plaintiff****(Jan M. Smolak, Esq., of Counsel)****17 East Genesee Street, Suite 401****Auburn, New York 13021-4112**

Roger D. McDonough, J.:

This matter is a potential class-action suit involving, *inter alia*, claims of environmental nuisance. Defendant moved to dismiss the complaint and strike the demand for punitive damages. Plaintiff responded by amending her complaint. Defendant opted to proceed with the pending motion and direct it against the amended complaint. Plaintiff opposes the dismissal motion. Additionally, plaintiff seeks *pro hac vice* admission for Attorneys Steven D. Liddle and Nicholas A. Coulson. Defendant opposes the admissions. Both motions are fully submitted.

Oral argument of the respective motions was to be held on March 26, 2020. Court closures necessitated the cancellation of the oral argument. The Court held a telephone conference with the parties on April 30, 2020 to discuss, *inter alia*, proceeding with a decision solely on submissions. Defendant was the sole party to request oral argument in the motion papers. Counsel for defendant reiterated this request in the telephone conference. Plaintiff's counsel asked the Court to proceed on submissions only. Based on: (1) the continuing limitations of in-person hearings and oral arguments; (2) the interests of judicial economy; (3) the sufficiency of the submissions as to the factual record and the legal arguments; and (4) the absence of any novel legal theories, newly enacted statutes or other matters of first judicial impression; the Court will exercise its discretion to decline the request for oral argument (*see*, 22 NYCRR 202.8(d)).

Background

Defendant operates the Colonie Landfill ("Landfill"). The Landfill is an over 200-acre solid waste landfill located at 1319 Loudon Road in Cohoes, New York. Plaintiff is a resident of Waterford, New York. She contends that her property has been, and continues to be, physically invaded by noxious odors originating from the Landfill. Plaintiff's proposed class is comprised of "[a]ll owners and renters of residential property within two (2) miles of the landfill's property boundary." Her amended complaint raises Class Allegations and sets forth the following causes of action: (1) Nuisance; and (2) Negligence and Gross Negligence. Additionally, the amended complaint seeks injunctive relief and punitive damages. The instant motion practice ensued.

CPLR § 3211(a)(7) Standard

In assessing defendant's motion, the Court must accept plaintiff's allegations as true (*see, Davis v Boenheim*, 24 NY3d 262, 268 [2014]). The Court also must give plaintiff the benefit of every possible inference (*see, Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 316 [2002]). The issue of whether plaintiff can ultimately establish her allegations is not a factor in deciding a CPLR § 3211(a)(7) motion (*see, EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Rather, the Court must afford plaintiff's pleading a liberal construction and determine whether the alleged facts fit within any cognizable legal theory (*Graven v Children's Home R.T.F., Inc.*, 152 AD3d 1152, 1153 [3rd Dept. 2017]). The Court's review herein is constrained to solely examining the amended complaints and considering the parties' legal arguments (*see, Carr v Wegmans Food Markets, Inc.*, 182 AD3d 667 [3rd Dept. 2020]). Still, plaintiff's pleading may not "consist of bare legal conclusions or factual claims that are . . . inherently incredible" (*Hyman v Schwartz*, 127 AD3d 1281, 1283 [3rd Dept. 2015]).

Discussion¹

Public² Nuisance Cause of Action

Plaintiff has adequately set forth a cause of action sounding in public nuisance. Specifically, plaintiff has sufficiently set forth how her property has decreased in value and how her use and enjoyment of the land has been harmed (*see, Fresh Air for the Eastside, Inc. v Waste Management of New York, L.L.C.*, 405 F. Supp. 3d 408, 442 [W.D.N.Y 2019]). Plaintiff has thereby sufficiently set forth how her injury is different from the community at large as opposed to the community in proximity to the Landfill (*see, Id.* at 443-444). Accordingly, the Court finds that the extreme result of a CPLR § 3211(a)(7) dismissal is unwarranted here.

Negligence Cause of Action

Plaintiff has adequately set forth a cause of action sounding in ordinary negligence. Specifically, plaintiff has adequately set forth: (1) defendant's duty to neighboring residential landowners; (2) defendant's breach of said duty by virtue of the operation of the Landfill; and (3)

¹ Plaintiff has withdrawn her claims for gross negligence and punitive damages.

² Plaintiff has indicated that she is only advancing a claim for public nuisance.

legally cognizable injuries allegedly suffered by the plaintiff (*see, Id.*, at 447-448). Accordingly, the Court again finds that the extreme result of a CPLR § 3211(a)(7) dismissal is unwarranted here.

Class Action Allegations

Plaintiff's amended complaint contains sufficient allegations to survive a CPLR § 3211(a)(7) motion. Specifically, plaintiff has adequately alleged all of the CPLR § 901(a) prerequisites to class certification (Rubman v Ounchowski 163 AD3d 1471, 1473 [4th Dept. 2018]). The numerosity requirement has been satisfied by plaintiff's allegation concerning a potential class of 158 households and the thousands of potentially impacted occupants of residential property. The commonality requirement has been satisfied with plaintiff's allegations of common factual and legal issues of potential negligence causes of action among the potential class. The plaintiff has also adequately established that her claims arise from the same course of conduct and are based on the same litigation theories as the other potential class members (*see, Id.*). Further, plaintiff's allegations adequately demonstrate her ability to fairly and adequately protect the interests of the potential class members. Defendant's arguments for dismissal are better addressed in the context of the procedures envisioned in CPLR § 902 and related statutes (*see, Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 796 [2nd Dept. 2015]).

Injunctive Relief

As an initial matter, the Court notes that there is no pending motion for any form of injunctive relief. Rather, the amended complaint's "Prayer for Relief" section merely includes a request for injunctive relief along with the other requested damages and relief. Accordingly, none of the crucial issues involving awards of injunctive relief have been presented or expounded upon for the Court. Based primarily on the current procedural status of this matter, the Court finds insufficient basis to strike the amended complaint's request for injunctive relief.

Pro Hac Vice Admissions

The Court has reviewed the parties' detailed submissions and legal arguments as to the admissions. Based on plaintiff's proposed counsels' submissions and good standing in their

home jurisdiction of the State of Michigan, the Court finds absolutely no basis why the requested relief should not be granted. Accordingly, the Court will execute plaintiff's proposed Orders.

The parties' remaining arguments and requests for relief have been reviewed and found to be lacking in merit and/or unnecessary to reach at this procedural status of the litigation.

Based upon the foregoing it is hereby

ORDERED that defendant's request for oral argument is hereby denied; and it is further

ORDERED that defendant's motion to dismiss is hereby granted as to the claims for gross negligence, private nuisance and punitive damages; and it is further

ORDERED that defendant's motion to dismiss is otherwise denied; and it is further

ORDERED that plaintiff's motion for *pro hac vice admissions* is hereby granted in its entirety and the Court will execute plaintiff's proposed Orders as to both counsel; and it is further

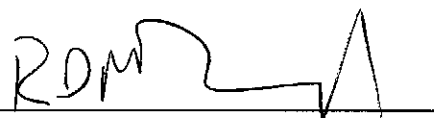
ORDERED that the parties are directed to confer and thereafter, within (30) thirty days of this Decision and Order, submit a proposed Discovery Scheduling Order for the Court's review.

This shall constitute the Decision and Order of the Court. This Decision and Order and the proposed Orders of Admission will be forwarded to the Albany County Clerk by the Court at an appropriate time. A copy of the Decision and Order is being forwarded to counsel for both parties. The signing of this Decision and Order and delivery of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel for the plaintiff is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the Decision and Order, except to the extent that entry cannot occur until the Governor's Executive Order restricting filing to essential matters is lifted or until further Order of this Court, whichever

is prior in time. As this is an E-FILED case, there are no original papers considered for the Court to transmit to the County Clerk.

ENTER.

Dated: Albany, New York
June 16, 2020



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered³:

Defendant's Motion to Dismiss

1. Defendant's Notice of Motion, dated September 20, 2019;
2. Affirmation of Michael G. Murphy, Esq., dated September 20, 2019, with annexed exhibits;
3. Defendant's Memorandum of Law with Appendix, dated September 20, 2019
4. Correspondence from Michael G. Murphy, Esq., regarding defendant's treatment of amended complaint, dated October 25, 2019, with annexed exhibit;
5. Supplemental Affirmation of Michael G. Murphy, Esq., dated October 31, 2019, with annexed exhibit;
6. Plaintiff's Memorandum of Law, dated December 10, 2019, with annexed exhibit;
7. Defendant's Reply Memorandum of Law with Appendix, dated January 17, 2020.

Plaintiff's Motion for Pro Hac Vice Admission of Counsel

1. Plaintiff's Notice of Motion, dated October 11, 2019;
2. Affidavit of Jan M. Smolak, Esq., sworn to October 11, 2019;
3. Affidavit of Nicholas A. Coulson, Esq., sworn to October 10, 2019, with annexed exhibit;
4. Affidavit of Steven D. Liddle, Esq., sworn to October 11, 2019, with annexed exhibit;
5. Affirmation of Michael G. Murphy, Esq., dated October 31, 2019, with annexed exhibits;
6. Defendant's Memorandum of Law, dated October 31, 2019;
7. Plaintiff's Reply, dated November 6, 2019;
8. Declaration of Nicholas A. Coulson, Esq., sworn to November 6, 2019;
9. Declaration of Steven D. Liddle, Esq., sworn to November 6, 2019.

³ Plaintiff provided the Court with several pieces of correspondence and case law after the return date. As plaintiff did not request permission to do so, or secure consent from defense counsel, the Court has not considered any of said submissions.