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 11th day of June 2020

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. EF2019-262993

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 public nuisance and negligence.[1] Presently before the Court is

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[1] In a Decision and Order dated September 27, 2019 (hereinafter "Decision I"), this Court dismissed plaintiff's causes of action for gross negligence, punitive damages and nuisance without prejudice and determined that the cause of action for ordinary negligence was sufficiently pled by plaintiffs in their original complaint, therefore denying defendant's motion to dismiss with respect to the ordinary negligence cause of action. That Decision and Order, which provided the factual and procedural history of the case, is incorporated by reference herein. The Court will only refer to the facts as necessary. Further, defendant filed a Notice of Appeal with the Appellate Division, Third Department on February 10, 2020 regarding the

defendant's motion for partial dismissal of plaintiff's amended complaint (hereinafter "Amended Complaint") as it relates to the public nuisance cause of action. CPLR § 3211(a)(7). Plaintiff opposes the motion and defendant has submitted a Reply.

In Decision I, this Court determined that plaintiffs failed to state a cause of action for nuisance,[2] noting that the original complaint ("Complaint I") failed to set forth specific allegations that "the injury to their real property is different both in kind and degree from that of the community as a whole." Decision I, p.7. This Court relied on the decisions and comparison of facts from D'Amico v. Waste Mgmt. of N.Y., LLC, 2019 U.S. Dist. LEXIS 50323 (WDNY, March 25, 2019) (hereinafter "D'Amico I") and D'Amico v. Waste Mgmt. of N.Y., LLC, 2019 U.S. Dist. LEXIS 153296 (WDNY, September 9, 2019) (hereinafter "D'Amico II"), as those two cases stemmed from a class action complaint by homeowners and renters concerning the odorous emissions from defendant's landfill onto their properties. The plaintiffs and the class complained in D'Amico I that the odorous emissions from defendant's landfill onto their properties interfered with the use and enjoyment of their properties and caused a diminution in the value of those properties. D'Amico I, at *15. The cause of action for public nuisance in the complaint in D'Amico I was dismissed because it lacked any allegation of interference with a public right, and only alleged interference with rights to use and enjoyment of private property. Id. at *9-10. In D'Amico II, plaintiffs and the class complained through an amended complaint 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." D'Amico II at *11-12. The D'Amico II Court was "underwhelmed by Plaintiff's efforts to rectify the pleading deficiencies outlined in its March 25, 2019, Decision and Order." D'Amico II at *12. 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." Id.

This Court determined in Decision I that plaintiffs' Complaint I suffered from "the same pleading deficiencies considered in D'Amico II" as plaintiffs alleged that the "defendants have interfered with a public right, specifically, the right to uncontaminated and unpolluted air." Decision I, p.7. This Court further stated that "while the alleged depreciation in plaintiffs' property values, if proven, would constitute special injury resulting from the odor . . . 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" (internal citations omitted). Id. This Court dismissed plaintiff's cause of action for public nuisance without prejudice, stating that 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." Id. at 8.

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denial of their motion to dismiss related to the negligence cause of action. The appeal is pending at the time of this decision.

[2] This Court previously found that plaintiffs allege a cause of action for public nuisance.

On January 23, 2020, plaintiffs filed an Amended Complaint which alleges that residents of more than 150 households have contacted plaintiffs' counsel documenting the odors they attribute to the defendant's landfill. Plaintiffs further allege that the odors from defendant's landfill have caused a negative impact to its neighbors on both public and private property since the odors have been transported onto public spaces and non-residential property, both within and without the class area. Plaintiffs allege that the emissions "impact and interfere with the rights (including the right to breathe uncontaminated, unpolluted air) of individuals who work, recreate, and/or travel in the vicinity of the landfill."

Plaintiffs allege that defendant's emissions impact area residents beyond the impacts to the class as property owners, which include:

a) Countless area residents have reported experiencing the odors and the resulting interference with their public rights at public locations beyond private property. This includes streets, schools, parks, at least one cemetery, shopping centers, and other public places;

b) Specifically, area residents report that they either do not go outside to shop, dine, walk, hike, or run, or that when they do, they are forced to endure Defendant's odorous emissions;

c) Numerous area residents note that visitors, family, and guests have been forced to endure the odors when in proximity to the landfill;

d) Rensselaer resident Wendy Johnson told CBS 6 news that defendant's odors are pervasive throughout the city, but were especially bad at her son's school;

e) The DEC recently required Defendant to place a barrier between its facility and the Rensselaer Central Schools because of the impacts of its emissions on those schools. Officials noted that although a soon to be constructed berm may shield students from visible and audible distractions, "it may not provide sufficient protection concerning air quality.":

f) Regarding Defendant, Officials from the Rensselaer City School District, City of Rensselaer, and Rensselaer County have sent a letter to New York State Department of Environmental Conservation Commissioner Basil Seggos, stating "We believe that our students and community members need to know, without a doubt, what is in the air we are breathing."

g) In general, the impacts to residential properties are only part of the scope of Defendant's harm to the community. The impact to the local air quality and particularly to the city's schools is an enormous community concern.

Plaintiffs further allege that defendant's emissions impact class members and their property rights by:

a) The endurance of repeated, foul, noxious odors by the class members and their families;

b) The inability to use the outdoor portions of their home, including decks and yards, or having such use be rendered entirely unenjoyable;

c) The need to keep windows and/or doors closed when weather conditions would not otherwise so require, in order to prevent the odors from rendering the inside of the home unbearable;

d) Shame, embarrassment, and reluctance regarding (and/or abstention from) hosting company;

e) The reduction in both the current usable value of property and the marketable value of the property.

Plaintiffs further allege that emissions have reduced the value of the homes of the plaintiff and the class, and that the pecuniary loss to plaintiff and the class are not suffered by individuals who work, recreate, and/or travel in the vicinity of the landfill, or by those who live in the class area but are not members of the class.

Defendant asserts that plaintiffs failed to allege any new facts from Complaint I to plead special injury or interference with a public right in order to bring their claim for public nuisance. Defendant argues that the allegations added to the Amended Complaint do not show that plaintiffs' property-based harm differs in kind from the harm experienced by any other owners and renters making up the nine-square-mile community surrounding the defendant's landfill. Defendant further argues that the alleged injuries of diminution of property value and interference with use and enjoyment are instead shared by the "whole community, or a very wide area within it" and thus are not distinct. Defendant claims that plaintiffs still focus on harm to owners and renters and plaintiffs offer no facts indicating that non-residents have been impacted by the odors. Defendant further argues that plaintiffs' allegations that people who do not own property and are impacted by the odors are conclusory in nature, have no factual support and thus do not adequately allege interference with a common right. Defendant argues that plaintiffs' conclusory references to people working, recreating, or traveling in the proposed class area and being affected by odors lack any factual support, and that any factual allegations provided in their Amended Complaint are specific to residents. Defendant claims that the only allegation suggesting that non-residents notice an odor is the statement that "area residents note" that visitors, family, and guests experience odors when "in proximity to" the landfill. Defendant further argues that the allegations of odors occurring at the Rensselaer City School, constructed next to the landfill, necessarily describe effects to community residents and not the community at large.

Defendant also focuses on the decision in 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 NY2d 280 (2001) (hereinafter "532 Madison"), in which the Court of Appeals ruled that an injury is not special where it is suffered by the "whole community, or a very wide area within it." 532 Madison at 292-293, *quoting* Prosser, *Private Action for Public Nuisance*, 52 Va L Rev 997, 1007, 1015 (1966). The Court found that New York City's closure of a public street in midtown Manhattan due to a building collapse interfered with a public right, however the

Court concluded that the plaintiffs did not suffer a special injury because the entire community of residents, business owners, and professionals experienced similar economic loss during the closure period; thus the plaintiffs could not maintain a private action for public nuisance. 532 Madison at 292-294. Defendant points out that "notably absent from the Court's definition of community were people affected by the obstruction of the public street who were not in sustained contact with the area, such as passersby and tourists." *See* 532 Madison at 293-294. Defendant argues that, "[f]or purposes of the special injury analysis, the "community" is defined as a large number of people whose contact with an alleged nuisance is substantial and ongoing—it does not include people passing through an area. *See, e.g., 532 Madison*, 96 N.Y.2d at 294 (no special injury because everyone who maintained "a business, profession or residence" in the affected area experienced similar loss from the building collapse)." Defendant claims that the relevant community here consists of the proposed class of owners and renters residing in the nine-square-mile area around the defendant's landfill, and that based on the Court's ruling in 532 Madison, plaintiffs' allegation suggesting that individuals only temporarily in the proposed class area should be considered part of this community is neither supported by law nor facts in the Amended Complaint. Defendant asks this Court to dismiss plaintiffs' cause of action for public nuisance with prejudice.

Plaintiffs argue that so long as they have suffered an injury that is different in type and degree than other members of the public (which is not limited to those with a property interest), they possess claims for public nuisance. Plaintiffs argue that "the proper inquiry is not whether Plaintiffs have alleged an injury different in kind from other property owners" within the same physical vicinity, but "[r]ather, it is whether Plaintiffs have alleged an injury different in kind from the community at large." Cangemi v. United States, 939 F. Supp. 2d 188, 206 (EDNY 2013). Plaintiffs argue that they have suffered special injury based on diminution of property values, which constitutes a special injury beyond that suffered by the community at large since 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. Plaintiffs argue that defendant's motion is flawed in two respects: that defendant argues the "community at large" should consist of the same set of people – limited by geography and property interests – as the class, and because of that, the plaintiffs and the class have not suffered a special injury since it is the same injury suffered by the community at large. Plaintiffs argue this ignores the proper construction of the "community at large" concept, and further ignores this Court's focus in Decision I on the threshold issue of whether "people who did not own property can be exposed to noxious fumes". Plaintiffs claim that the community at large is not coextensive with the class. Plaintiffs further argue that "the mere fact that the putative class contains a significant number of injured individuals does not necessarily mean that Plaintiff is unable to allege a harm distinct in kind from 'the entire community exercising the same public right.'" D'Amico II at *18-20, *quoting* Leo v. General Elec. Co., 145 AD2d 291, 294 (2d Dept 1989).

Plaintiffs rely heavily on the decision in Fresh Air for the Eastside v. Waste Mgmt. of N.Y., L.L.C., 405 F Supp 3d 408 (WDNY, September 16, 2019) (hereinafter "Fresh Air"), which addressed a related putative class action to the D'Amico cases; another case concerning defendants' landfill and the release of odorous emissions onto the property of plaintiffs. The Court in Fresh Air addressed a motion to dismiss plaintiffs' amended complaint, which argued that plaintiffs' failed to

sufficiently allege a special injury beyond that suffered by the public at large. The plaintiffs in Fresh Air alleged that they suffer "special damages . . . beyond that suffered in kind and degree by the community at large. Those damages include: (1) the diminution of value of Plaintiffs' home and property; (2) that Plaintiffs are forced to remain inside their homes and forego use of their yards; (3) that Plaintiffs must keep doors and windows closed when weather conditions otherwise would not so require; (4) embarrassment and reluctance to invite guests to their homes; (5) exposure to the odors and Excess Fugitive Emissions in their own homes; and (6) that Plaintiffs experience headaches, eye irritation, nausea, coughing, choking breathing problems, and lost sleep." Id. at 442 (internal citations and quotations omitted). Plaintiffs in Fresh Air further alleged that "that the odors and the 'general stigma from the Landfill . . . ha[ve] permanently stigmatized the Community' and have given rise to fears of diminishing property values. These noxious emissions are also noticeable in public spaces, such as at business and recreational locations and a local elementary school." Id. at 420 (internal citations omitted).

The Court in Fresh Air found that while the alleged injuries suffered by plaintiffs was similar amongst each other, "this harm is distinct from the deprivation of the rights to clean air and the unimpaired enjoyment of public spaces suffered by the community at large." Id. at 443-44. The Court noted that the case hinged upon the "proper scope of the relevant 'community'" and that plaintiffs did "not include all individuals aggrieved by the nuisance conditions" and that plaintiffs' allegations included the infiltration of odorous emissions onto "Little League baseball fields, business and commercial locations, an elementary school property, and dining and walking spaces." Id. at 443-444. The Court in Fresh Air specifically distinguished its case from 532 Madison (which defendants in that case cited in support of their argument) in that, "'community,' as it must be defined under the facts alleged here, distinguishes this case from 532 Madison." Id. at 443. The Court went on to note that "it does not appear that Plaintiffs constitute "all members of the public who come in contact with the nuisance"" Id. at 444, *quoting* NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 498 (EDNY, July 21, 2003). The Court found that, "[c]ompared to individuals who do not own property or reside nearby and are merely affected by the Landfill's impact on public spaces, Plaintiffs' alleged injuries constitute a 'special injury.'" Id.

In its Reply, defendant argues that the Fresh Air Court misapplied state nuisance law and incorrectly held that plaintiffs' alleged special injury. Defendant argues that the Western District of New York made two errors: "the court defined the community as including anyone affected on a public space, which is at odds with the Court of Appeals' requirement that the community only include individuals with sustained contact with the alleged nuisance" and "the court concluded that the plaintiffs suffered a special injury because their harms were distinct from the interference with the public rights to clean air and the enjoyment of public spaces." Defendant cites again to 532 Madison, as well as Burns Jackson Miller Summit & Spitzer v. Lindner, 59 NY2d 314 (1983) (while an allegation of substantial interference with a public right was a "sufficient predicate" for a public nuisance claim, plaintiffs could not bring private action because the proposed class experienced the same economic injury as other businesses and professionals in New York City), arguing that "this is not sufficient to allege special harm; Plaintiffs cannot maintain a private action for public nuisance where their injuries are common to all or most of a community's owners and renters, regardless of the alleged interference with a public right."

Defendant then argues that this Court should look at Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233 (NDNY 2017) (hereinafter "Baker"), as the defendant argues the Court there "correctly applied New York's strict limits on the scope of special injuries under public nuisance." In Baker, the Court dismissed a nuisance claim brought by plaintiffs that depended on an allegedly contaminated municipal water system that had "approximately 1,300 service connections," representing 95% of the Town's population, and because injuries that included loss of use and enjoyment of property and diminution of property value were shared "among the thousands of residents" and were "common to the community (or a substantial portion of it)," the plaintiffs had not "suffered a unique wrong." Baker at 242, 248–249. However, the Baker court did not dismiss a nuisance claim brought by a separate group of private well owners that made up about five percent of the population and were required to install and continuously maintain equipment to remediate the contamination of their personal wells, and the Court deemed their alleged injury to lack "public character." Id. at 248-249.

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.

Nuisance

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).

In the instant matter, plaintiffs have alleged through their Amended Complaint, "an injury different in kind from the community at large." *See* Fresh Air at 443, *quoting* Cangemi v. United States, 939 F. Supp. 2d at 206. As the Court in Fresh Air noted, the analysis hinges on the proper scope of the relevant "community." Fresh Air at 443-444. This Court agrees with plaintiffs that defendant attempts to obscure the "community" with the class. Plaintiffs specifically allege the infiltration of odorous emissions onto the schools, a cemetery, shopping centers and parks; the community here includes those establishments, and is not just the owners and renters of property within the nine-mile radius from defendant's landfill. Plaintiffs specifically allege that the DEC "recently required Defendant to place a barrier between its facility and the Rensselaer Central Schools because of the impacts of its emissions on those schools. Officials noted that although a soon to be constructed berm may shield students from visible and audible distractions, 'it may not provide sufficient protection concerning air quality.'" Plaintiffs also specifically allege that "Officials from the Rensselaer City School District, City of Rensselaer, and Rensselaer County have sent a letter to New York State Department of Environmental Conservation Commissioner Basil Seggos, stating 'We believe that our students and community members need to know, without a doubt, what is in the air we are breathing.'" The allegations in the Amended Complaint, taken as true, "establish that Plaintiffs do not include all individuals aggrieved by the nuisance conditions." Fresh Air at 443.

Further, while the alleged injuries suffered by plaintiffs are similar amongst each other, "this harm is distinct from the deprivation of the rights to clean air and the unimpaired enjoyment of public spaces suffered by the community at large." Fresh Air at 443-444; *see* Iannucci v. City of New York, 2006 U.S. Dist. LEXIS 21117, 2006 WL 1026432, at *4 (EDNY, April 19, 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."). As this Court noted in Decision I, plaintiffs alleged depreciation in property values, if proven, would constitute a 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). The Amended Complaint, therefore, alleges facts that the harm suffered by plaintiffs as a result of the odors is different from that experienced by other members of the community.

Defendant's argument that the Fresh Air Court "defined the community as including anyone affected on a public space" is an over generalization of the Fresh Air Court's determination. The plaintiffs in Fresh Air made specific allegations concerning harm to the community from the odorous landfill emissions (e.g. Little League baseball fields, business and commercial locations, and an elementary school property), which was separate and apart from the special injury alleged by plaintiffs. Id. at 443-444. Further, defendant's argument that the Fresh Air decision is at odds with the Court of Appeals' requirement that the community only include individuals with sustained contact with the alleged nuisance, and not a passerby or tourists, can be distinguished as the Court in Fresh Air did so. Again, the analysis hinges upon the proper scope of the relevant "community." Fresh Air at 443. The community in 532 Madison was "every person who maintained a business, profession or residence in the heavily populated areas of Times Square and Madison Avenue" that were "exposed to similar economic loss during the closure periods." 532 Madison at 293. The community alleged here is not limited to property owners and renters as defendant argues, and is not just a passerby or a tourist as defendant claims plaintiffs' argue, but the community includes schools, a cemetery, shopping centers and parks. The Court also disagrees with defendant's argument that plaintiffs' allegations of odors occurring at the Rensselaer City School, constructed next to the landfill, necessarily describes effects to community residents and not the community at large. Defendant does not offer any additional information to support such an argument, for example, that the students, parents, faculty and staff are all class members and residents of the City of Rensselaer. In fact, it is this point that further supports the Court's finding that plaintiffs' have properly pled a cause of action for public nuisance as plaintiffs have alleged facts that defendant's odorous emissions have impacted non-class members.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the public nuisance cause of action is **DENIED**.

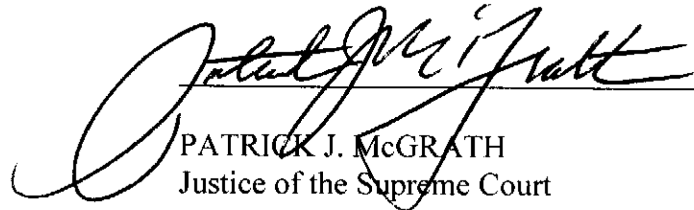
ORDERED, that this matter is adjourned to **July 13, 2020**, for a telephone conference at **11:00 a.m.**

This shall constitute the decision, order and judgment of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the County Clerk's Office. Counsel for the plaintiffs is not relieved from the applicable provisions of CPLR § 2220 and § 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry

of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

SO ORDERED AND ADJUDGED.
ENTER

DATED: Troy, New York
June 11, 2020



PATRICK J. McGRATH
Justice of the Supreme Court

Papers Considered:

1. NYSCEF Documents Nos. 38-43, 50-51.