STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK
and the NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Plaintiffs, Cross-Defendants,

-and-

GREEN EDUCATION AND LEGAL FUND,
LIGHTS OUT NORLITE, BRADFORD BLAUHUT,
DEBORAH LINDLEY, MARK BELOKOPITSKY,
and KAREN ROBINSON,

Plaintiffs, Cross-Plaintiffs,

-against-

NORLITE, LLC,

Defendant.

DECISION AND ORDER
Index No.: 907689-22

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

Background

Plaintiffs the People of the State of New York ("State") and the New York State Department of Environmental Conservation ("DEC") (collectively "plaintiffs") commenced this action to protect the public health, welfare, and environment of New York, to enforce Article 19 of the Environmental Conservation Law ("ECL"), and to compel compliance with ECL Article 19 and its implementing rules and regulations at a facility owned and operated by defendant Norlite, LLC ("Norlite") in the City of Cohoes, Albany County, New York. Plaintiffs claim, among other things, that "Norlite has emitted fugitive dust containing air contaminants at concentrations significantly increasing the risk of adverse health effects in the surrounding communities." Plaintiffs further claim that "[t]he quantity, characteristic and/or duration of emissions of air contaminants migrating from the [f]acility are injurious to human life."

On December 20, 2022, Lights Out Norlite ("LON"), Green Education and Legal Fund ("GELF"), Bradford Blauhut, Deborah Lindley, Karen Robinson, and Mark Belokopitsky (collectively "intervenors") moved for an order, pursuant to CPLR § 1013, granting them leave to intervene as plaintiffs and cross-plaintiffs in the action. By Decision and Order, dated June 20, 2023, the Court granted intervenors' application for leave to intervene in this action.

According to intervenors' complaint, LON is an organization formed and operating under GELF, its fiscal sponsor, to raise awareness about the Norlite facility and to educate the surrounding community about the facility's associated dangers. There are over eighty individuals who are members of LON and a significant number of LON's members own property and reside less than or approximately one mile from the facility, including the individual intervenors, who allege that their "lives and properties have been and continue to be adversely impacted by persistent, noxious, offensive [f]ugitive [e]missions being released from [Norlite's] [f]acility." As is relevant here, intervenors' third cause of action seeks declaratory judgment against the DEC stating that permitting and allowing the Norlite facility to operate in a manner that results in fugitive dust emissions violates their rights to clean air and a healthful environment under Article I, § 19 of the New York State Constitution ("Green Amendment"). Within this stated cause of action, intervenors also request an injunction enjoining Norlite from operating the facility and directing its immediate closure, and specifically request an injunction in the complaint's prayer for relief, directing DEC to vacate or rescind Norlite's hazardous waste and air permits and not allow Norlite to resume operations.

Plaintiffs/cross-defendants now move, pursuant to CPLR 3211(a), to dismiss intervenors' third cause of action, for (1) "a defense founded upon documentary evidence," (2) lack of subject matter jurisdiction, and (3) failure to state a cause of action.[1]

Analysis

I. Lack of Subject Matter Jurisdiction

Pursuant to CPLR 3211(a)(2), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the [C]ourt has no jurisdiction of the

[1] While plaintiffs/cross-defendants move to dismiss pursuant to CPLR 3211(a)(1), the issue is not addressed in their supporting papers nor acknowledged in the intervenors' opposition. Considering such, the Court will not address the issue at this time.

subject matter of the cause of action." Article I, § 19 of the N.Y. Constitution provides that "[e]ach person shall have a right to clean air and water, and a healthful environment." The legislature expressed that the purpose of the Amendment is to "ensure that clean air and water are treated as fundamental rights for New Yorkers." (Sponsor's Mem., Senate Bill S528 [2021]; *see* Sponsor's Mem, Assembly Bill A01368 [2021]). CPLR 3001 provides that "[S]upreme [C]ourt may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "To constitute a justiciable controversy, there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Hernandez v. State*, 173 A.D.3d 105, 109-110 [3d Dep't 2019]).

While plaintiffs/cross-defendants seek to dismiss the entirety of intervenors' third cause of action, the documentation supporting the motion only addresses the portion of the cause of action which seeks injunctive relief. Although plaintiffs/cross-defendants do not specifically address the declaratory relief sought within intervenors' third cause of action, the Court finds that intervenors' allegation of a violation of the Green Amendment involves "a real dispute between adverse parties regarding substantial legal interests" establishing the Court's jurisdiction over the matter (*Hernandez v. State*, 173 A.D.3d 105, 110 [3d Dep't 2019]). "The Bill of Rights embodied in the Constitution[] of the State . . . is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual rights which are part of our democratic traditions and which no government may invade" (*People v. Barber*, 289 N.Y. 378, 385 [1943]; *see SHAD All v. Smith Haven Mall*, 488 N.E.2d 1211, 1214 [1985]). Intervenors seek declaratory judgment against the DEC stating that permitting and allowing the Norlite facility to operate in a manner that results in fugitive dust emissions violates their rights to clean air and a healthful environment under the

Green Amendment. Intervenors' allegation that DEC is acting in violation of the Green Amendment directly involves an essential right enumerated in New York's Bill of Rights, and by extension challenges DEC's statutory discretion (*see* ECL 70-0115[1]; ECL 71-0301; 6 N.Y.C.R.R. 373-1.6[a][1][6]; 6 N.Y.C.R.R. 373-1.6[c][2]; 6 N.Y.C.R.R. 621.3). Considering such, the Court finds that the parties' adversarial presentation of the issues, expressing competing interests between an agency's statutory discretion and an individual's Constitutional rights, "establishes the existence of a real dispute between adverse parties regarding substantial legal interests" (*Hernandez v. State*, 173 A.D.3d 105, 110 [3d Dep't 2019]).

In addition to seeking the declaratory judgment, intervenors' third cause of action also requests an injunction enjoining Norlite from operating its facility and directing its immediate closure. More specifically, intervenors request an injunction directing DEC to vacate or rescind Norlite's hazardous waste and air permits and not allow Norlite to resume operations. In support of its motion to dismiss, plaintiffs/cross-defendants argue that the Court lacks the authority to compel DEC to take specific enforcement action against Norlite. Plaintiffs/cross-defendants maintain that intervenors may only seek to compel state action to enforce a clear legal right where a public official has failed to perform a duty enjoined by law. Plaintiffs-cross defendants then assert that there is nothing within the language of the Green Amendment which overrides DEC's well-established enforcement discretion. Intervenors counter that it is within the Court's authority to compel a specific enforcement action from an agency to remedy a constitutional violation.

While plaintiffs/cross-defendants object to the Court's authority to compel DEC to take specific action, the Court finds that it is premature to resolve the scope of the relief sought at this juncture. Generally speaking, "'Supreme Court may consider a claim for injunctive relief against the State'" or a State agency (*Greece Ridge, LLC v. State*, 130 A.D.3d 1559, 1560 [4th

Dep't 2015], quoting *Zutt v. State*, 50 A.D.3d 1131, 1132 [2d Dep't 2008]; *see Kimmel v. State*, 29 N.Y.3d 386, 393 [2017]). Moreover, if the Court determines that a Constitutional violation exists, the Court has the authority to issue an injunction, where appropriate, to remedy that violation (*see Brown v. Plata*, 563 U.S. 493, 542 [2011]; *Matter of New York Charter Schools Ass'n, Inc. v. DiNapoli*, 13 N.Y.3d 120, 133 [2009]). Therefore, intervenors' request for injunctive relief to remedy an alleged violation of the New York Constitution is properly before this Court. Accordingly, to the extent that plaintiff-cross-defendants' motion to dismiss seeks to dismiss intervenor's third cause of action for lack of subject matter jurisdiction, the motion is denied.

II. Failure to State a Cause of Action

CPLR 3211(a)(7) provides that a party may move for judgment on a cause of action asserted against him "on the ground that . . . the pleading fails to state a cause of action." When reviewing a pre-answer motion to dismiss for failure to state a cause of action, a court "must liberally construe the pleading and 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 N.Y.3d 169, 175 [2021], quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]; *see Connaughton v. Chipotle Mexican Grill*, 29 N.Y.3d 137, 141 [2017]; *McQuade v. Aponte-Loss,* 195 A.D.3d 1219, 1220 [3d Dep't 2021]; *Gagnon v. Vil. of Cooperstown, New York,* 189 A.D.3d 1724, 1725 [3d Dep't 2020]). "The question is whether the complaint adequately alleged facts giving rise to a cause of action" (*Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 239 [2021]), "not whether [it] has stated one" (*Leon v. Martinez*, 84 N.Y.2d at 88; *see State v. Jeda Cap.-Lenox, LLC*, 176 A.D.3d 1443, 1445 [3d Dep't 2019]). Dismissal of a cause of action "is warranted if the plaintiff[s] fail[ ] to assert facts in

support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v. Chipotle Mexican Grill*, 29 N.Y.3d at 142).

Applying these principles and upon review of the record, the Court is not persuaded that dismissal of the intervenor's third cause of action is warranted at this juncture. Plaintiffs/cross-defendants do not specifically object to the declaratory relief sought within intervenor's third cause of action. Thus, the Court will focus its inquiry on whether the facts alleged in intervenor's third cause of action fits within any cognizable legal theory.

Intervenors' third cause of action against DEC is depicted within intervenor's complaint as a cause of action for a declaratory judgment. More specifically, intervenors seek a declaratory judgment that by permitting and allowing the Norlite facility to operate in a manner that results in fugitive dust emissions, DEC is violating their rights to clean air and a healthful environment under the Green Amendment. Declaratory judgment "is available in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (*New York Foreign Trade Zone Operators v. State Liq. Auth.*, 285 N.Y. 272, 276 [1941] [internal quotation mark and citation omitted]; *see Dun & Bradstreet v. City of New York*, 276 N.Y. 198, 206 [1937]). Considering that "[t]he power to grant or deny a declaratory judgment rests in the discretion of the Supreme Court" (*New York Foreign Trade Zone Operators v. State Liq. Auth.*, 285 N.Y. at 275), the Court finds that intervenors sufficiently plead a claim for declaratory judgment against DEC for the State's violation of the Constitutional right to clean air and a healthful environment.

Within their third cause of action, intervenors then state than anything less than shutting down Norlite's facility would cause a continued violation of plaintiff's Constitutional rights. Thus, in addition to the declaratory relief sought, within intervenors' third cause of action,

intervenors request an injunction enjoining Norlite from operating the facility and directing its immediate closure. Generally speaking, when a Constitutional violation has been established, Supreme Court has the authority to restrict an action that would result in a continuing violation of the Constitution (see e.g., *Matter of New York Charter Schools Ass'n, Inc. v. DiNapoli*, 13 N.Y.3d 120, 133 [2009]). Although this cause of action seeks both declaratory and injunctive relief, the question of the appropriate remedy if a Constitutional violation is demonstrated is not yet before this Court for review (*see Matter of Doe v. City of Schenectady*, 84 A.D.3d 1455, 1457 [3d Dept 2011]). Therefore, the Court will not address the parameters of the injunction sought by intervenors at this juncture. Based on the foregoing, the Court concludes that intervenor's third cause of action sufficiently states a cause of action sufficient to survive plaintiff/cross-defendant's motion to dismiss.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination. Accordingly, it is hereby

ORDERED, that plaintiffs/cross-defendants' motion to dismiss intervenor's third cause of action is denied for the reasons stated herein.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order.

SO ORDERED.

ENTER.

Dated: March 6, 2024
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Intervenor's Complaint, dated June 21, 2023;
2. Plaintiffs/Cross-Defendants Notice of Partial Motion to Dismiss, dated August 24, 2023; Memorandum of Law in Support of Motion, dated August 24, 2023;
3. Intervenor's Memorandum of Law in Opposition, dated September 28, 2023; *and*
4. Plaintiffs/Cross-Defendants Memorandum of Law in Reply, dated October 19, 2023.