

**Jeraci v Cooper**

2017 NY Slip Op 33321(U)

September 26, 2017

Supreme Court, New York County

Docket Number: 71435/2014

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
JOSEPH JERACI AND NANETTE JERACI,

Plaintiffs,

-against-

Index No. 71435/2014  
Seq # 6 & 7  
**Decision & Order**

MICHAEL COOPER, GALA SAND AND GRAVEL INC.,  
and MONGAUP GAME PRESERVE, INC.,

Defendants.

-----X  
MICHAEL COOPER,

Third-Party Plaintiff,

-against-

SULLIVAN COUNTY ATV ASSOCIATION, INC.,

Third-Party Defendant.

-----X  
MONGAUP GAME PRESERVE, INC.,

Second Third-Party Plaintiff,

-against-

SULLIVAN COUNTY ATV ASSOCIATION, INC.,

Second Third-Party Defendant.

-----X

The following papers were read on a motion by Third-Party Defendant, Sullivan County ATV Association, Inc. ("SCATV"), for an order dismissing all claims asserted against it pursuant to CPLR 3211[a][7], CPLR 3211[c] and/or CPLR 3212; and on a motion

by Defendant/Third-Party Plaintiff, Michael Cooper ("Cooper") dismissing all claims asserted against him pursuant to CPLR 3212:

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Plaintiffs commenced this action on December 19, 2014, by filing a Summons and Complaint against Cooper, and Defendants, Gala Sand and Gravel, Inc. ("Gala"), and Mongaup Game Preserve ("Mongaup"). Cooper also filed a Third-Party Complaint against SCATV on January 29, 2016 alleging negligence, culpable conduct and breaches and violations of law. Mongaup then filed a Second Third-Party Complaint also against SCATV on February 15, 2016, alleging contribution, common law indemnity, and breach of oral agreement, but those claims by Mongaup against SCATV have since been discontinued. Plaintiff sought to file an Amended Complaint to add SCATV as a defendant, but this Court granted SCATV's motion to dismiss that Complaint as against SCATV. The Court also granted Gala's and Mongaup's motions to dismiss the complaint as against them. Therefore, the only claims remaining are Plaintiffs' claims against Cooper and Cooper's Third-Party claims against SCATV.

SCATV now files a motion to dismiss Cooper's Complaint against it and/or summary judgment. Cooper also files a motion for summary judgment to dismiss Plaintiffs' Complaint against him.

In support of its motion, SCATV relies upon, *inter alia*, the deposition transcript of Plaintiff, Cooper and Matt Cooper, Cooper's statement, IRS Exempt Organization search result, the excavator's operation manual, copies of the pleadings, an attorney's affirmation, and a memorandum of law. SCATV argues that Cooper's Complaint should be dismissed because his conduct falls within the Volunteer Protection Act, rendering his claims for contribution and/or indemnification moot as a matter of law. SCATV further argues that any failure by Cooper to assert the Volunteer Protection Act on his own behalf, does not preclude SCATV from asserting it to dismiss Cooper's Third-Party action.

In support of his motion, Cooper relies upon, *inter alia*, the deposition transcripts of Cooper, Matt Cooper, Plaintiff, Cooper's Errata sheet, the excavator's operations manual, SCATV's IRS 501(c)(3) search, photographs, Cooper's hand written statement, Cooper's affidavit, his attorney's affirmation and copies of the pleadings. Cooper argues that the facts clearly support the application of the Federal Volunteer Protection Act and that Cooper's conduct does not constitute reckless conduct, gross negligence or conduct evincing a conscious indifference to the rights and safety of others.

On March 31, 2012, both Cooper and Plaintiff, Joseph Jeraci ("Jeraci/Plaintiff"), were volunteering for SCATV, a 501(c)(3) charitable organization in Sullivan County, New York. Jeraci was assisting with the removal of trees and debris to clear the trails on property owned by Defendant/Second Third-Party Plaintiff, Mongaup, for SCATV's annual charity all-terrain vehicle ("ATV") ride. Cooper was operating an excavator for the same purpose, when he applied pressure to a tree with the excavator to dislodge a chainsaw that Jeraci was using, causing a branch on the tree to snap off and fly in Jeraci's direction,

injuring him. The excavator was owned by Gala, which gave SCATV permission to use the excavator to perform the clearing.

### Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issue of fact from the case (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Id.*).

The Federal Volunteer Protection Act (42 USC §§ 14501 *et seq.*) was enacted to “provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities” (*see Entler v Koch*, 85 AD3d 1098 [2d Dept 2011]). It provides, in pertinent part, that “no volunteer of a nonprofit organization...shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization...if...the volunteer was acting within the scope of the volunteer’s responsibilities in the nonprofit organization...at the time of the act or omission...[and] the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer” (*Id.*) *quoting* (42 USC § 14503[a]).

“To constitute gross negligence, a party’s conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others” (*see Dolphin Holdings*,

*Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901 [2d Dept 2014]). “Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence” (*Id.*). Further, “[a]n act is ‘wanton and reckless’ when done under circumstances showing ‘heedlessness and an utter disregard’ for the ‘rights and safety of others’” (see *Gruber v Craig*, 208 AD2d 900 [2df Dept 1994]).

Here, Cooper established his entitlement to judgment as a matter of law dismissing the Complaint against him by demonstrating that he was a volunteer of a nonprofit organization, and that the negligence alleged in the Complaint occurred while he was acting within the scope of his responsibilities in that organization. In opposition, Plaintiff failed to raise a triable issue of fact. There was no testimony or evidence to establish that Cooper’s conduct was willful or criminal misconduct, or that he acted with gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.

Plaintiffs assert that Cooper’s affidavit contains never before alleged facts, such as, when he applied the excavator to the tree, suddenly and without warning Jeraci ran over and grabbed the chain saw before he could tell him to stop and that prior to grabbing the tree with the excavator, Plaintiff moved away from the machine to an area to Cooper’s left, which he considered safe.

However, even if this Court was to rely only on the deposition testimony and disregard Cooper’s affidavit, the Court finds that Cooper’s behavior does not fall within the exception carved out in the Federal Volunteer Protection Act. There is evidence that Cooper was very knowledgeable about the operation of the excavator and at the time of

the accident, had operated excavators for forty years and continued to operate an excavator daily in his employment as a heavy construction operator. Cooper testified that he expected to just take pressure off of the tree and did not expect it to snap. Cooper also testified that at the time he was using the excavator, he thought that Plaintiff was in a safe area.

Therefore, the Court finds that Cooper's conduct is protected by the Federal Volunteer Protection Act and that his behavior did not fall within any exception, nor was the harm caused by the operation of a vehicle for which the State requires the operator or owner to possess an operator's license or maintain insurance. As a result of that finding, SCATV's motion is also granted.

Accordingly, it is

ORDERED that Cooper's motion, seeking dismissal of the Complaint, is granted; and it is further

ORDERED that SCATV's motion, seeking dismissal of the Complaint against it, is granted; and it is

ORDERED that the action and third-party action, are dismissed.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
September 26, 2017

  
HON. SAM D. WALKER, J.S.C.