

**Jeraci v Cooper**

2017 NY Slip Op 33322(U)

April 11, 2017

Supreme Court, Westchester 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 # 2 & 4  
**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 Defendant/Third-Party Defendant and Second Third-Party Defendant, Sullivan County ATV Association, Inc. ("SCATV"), seeking an order pursuant to C.P.L.R. 3211 (a)(2), (a)(5) and C.P.L.R. 1009, dismissing

Plaintiffs, Joseph Jeraci and Nanette Jeraci's Amended Complaint against it; and on a cross-motion by Plaintiffs seeking an extension of time to serve the Complaint on SCATV:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Exhibits A-I	1-11
Memorandum of Law in Support	12
Notice of Cross-Motion/Affirmation/Exhibits A-D	13-18
Reply Affirmation/Exhibit I	19-20

On March 31, 2012, both Michael Cooper ("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 Game Preserve ("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, causing a branch on the tree to snap off and fly in Jeraci's direction, injuring him. The excavator was owned by Gala Sand and Gravel, Inc. ("Gala") and loaned to Cooper to perform the clearing.

Plaintiffs commenced this action on December 19, 2014, by filing a Summons and Complaint against Cooper, Gala and Mongaup alleging negligence and a loss of consortium and a medical expenses claim by Nanette Jeraci. Gala served and filed an Answer with affirmative defenses and a cross claim on or about January 15, 2015. Cooper served and filed an Answer with affirmative defenses and a cross-claim on or about March 25, 2015 and Gala served and filed an Answer with affirmative defenses, a cross-claim and a counter claim, on or about June 8, 2015. Cooper then 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. SCATV served and filed Answers with affirmative defenses and a cross-claim, to both Third-Party Complaints on or about April 29, 2016. Then on May 23, 2016, Plaintiffs served and filed an Amended Complaint adding SCATV as a defendant. Cooper and Gala filed Amended Answers to the Amended Complaint.

The parties have commenced discovery and SCATV now files the instant motion seeking to dismiss Plaintiffs' Amended Complaint filed against it and Plaintiffs cross-move to extend their time to serve the Amended Complaint on SCATV. Gala also filed a motion for summary judgment seeking dismissal of Plaintiffs' Complaint against it and Mongaup filed a motion for summary judgment seeking dismissal of Plaintiffs' Complaint against it and partial summary judgment against SCATV. Mongaup has since filed a Stipulation of Discontinuance of the Second Third Party Action, discontinuing with prejudice all claims against SCATV and withdrawing that part of its motion seeking partial summary judgment against SCATV. The parties' summary judgment motions are addressed in a separate Decision and Order.

#### Discussion

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(2) the court has not jurisdiction of the subject matter of the cause of action;  
or

(5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;

N.Y. Civ. Prac. L. & R. 3211(a)(2) & (a)(5).

In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5), a defendant must demonstrate that the time within which to commence the action has expired." *Plain v. Vassar Bros. Hosp.*, 115 A.D.3d 922, 923, 982 N.Y.S.2d 558, 559 (2d Dep't 2014). SCATV asserts that the applicable statute of limitations expired on April 1, 2015 and therefore, Plaintiffs' action against it should be dismissed.

SCATV also asserts that this Court lacks subject matter jurisdiction because Plaintiffs filed the Amended Complaint without leave of court or a stipulation executed by all parties, more than twenty days after the service of SCATV's Answers to the Third-Party Complaints brought by Cooper and Mongaup. "A judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived" *Morrison v. Budget Rent A Car Systems, Inc.*, 230 A.D.2d 253, 657 N.Y.S.2d 721 (2d Dep't 1997).

Based upon a review of the evidence presented, the Court now grants the motion to dismiss based on the statute of limitations and denies Plaintiffs' motion to extend the time to serve. Here, Plaintiffs' Complaint and Amended Complaint allege personal injuries due to an incident that occurred on March 31, 2012. Therefore, the applicable statute of limitations is three years and expired on or about March 31, 2015. Plaintiffs filed their Amended Complaint on May 23, 2016, after the expiration of the statute of limitations. Therefore, SCATV has demonstrated that the time within which to commence the action has expired and the burden now shifts to Plaintiffs to present sufficient evidence that the relation-back doctrine applies to this case. *Alvarado v. Beth Israel Medical Center*, 60 A.D.3d 981, 876 N.Y.S.2d 147 (2d Dep't 2009).

“In order for a claim asserted against a new defendant to relate back to the date a claim was asserted against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale, assertion of those claims against him or her, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against him or her as well” *Id.*

The Court finds that the relation-back doctrine does not apply in this case because the parties are not united in interest and Plaintiff did not make a mistake as to the identity of the proper party. “Parties are united in interest only where ‘the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other’” *Gatto v. Smith-Eisenberg*, 280 A.D.2d 640, 641, 721 N.Y.S.2d 374, 375 (2d Dep’t 2001) (*Desiderio v. Rubin*, 234 A.D.2d 581, 583, 652 N.Y.S.2d 68). “Further, parties’ interests are united only where one is vicariously liable for the acts of the other” *Id.* SCATV and the Third-Party Defendants have difference defenses and a judgment against one would not affect the other. *Xavier v. RY Management Co., Inc.*, 45 A.D.3d 677, 846 N.Y.S.2d 227 (2d Dep’t 2007).

The relation-back doctrine also does not apply here because Plaintiffs did not establish that they made a mistake as to the identity of SCATV. ‘Notice to the new defendant within the applicable limitations period is the “linchpin” of the relation-back

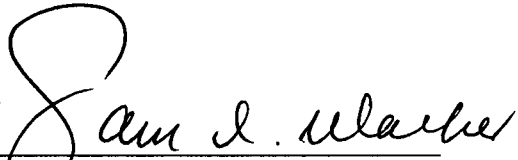
doctrine, and thus the third prong of the test focuses, inter alia, on “whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that [entity] at all ‘and that the matter has been laid to rest as far as [it] is concerned’” *Shapiro v. Good Samaritan Regional Hosp. Medical Center*, 42 A.D.3d 443, 840 N.Y.S.2d 94 (2d Dep’t 2007). Further, “where the party suing “intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the [party suing] should not be given a second opportunity to assert that claim after the limitations period has expired” *Losner v. Cashline, L. P.*, 303 A.D.2d 647, 648, 757 N.Y.S.2d 91, 94 (2d Dep’t 2003).

Therefore, “CPLR 1009, which permits a plaintiff to amend his complaint without leave of the court to assert against a third-party defendant any claim the plaintiff has against him within 20 days of service of the answer to the third-party complaint upon the plaintiff’s attorney, does not relieve a plaintiff from the operation of the Statute of Limitations otherwise applicable to the claims asserted” *Zaveta v. Portelli*, 127 A.D.2d 760, 512 N.Y.S.2d 152, 153 (2d Dep’t 1987). “Nor is the plaintiff [] aided by the relation-back doctrine of CPLR 203(e), since the third-party claim was not interposed prior to the expiration of the applicable Statute of Limitations” *Id.*

Accordingly, SCATV’s motion to dismiss the Amended Complaint, dismissing all claims against SCATV with prejudice, is granted and Plaintiffs’ cross motion seeking an extension of time to serve its Amended Complaint, is denied.

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

Dated: White Plains, New York  
April 11, 2017

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