



Liability and insurance considerations for an owner of vacant land - by John Comiskey

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Throughout New York, there is an abundance of vacant land owned by individuals and/or corporate entities. Depending upon the precise location within New York, a substantial amount of vacant land is utilized by the public for recreational activities such as hunting, fishing, hiking, bicycle riding, cross-country skiing, sledding, horseback riding, snowmobile operation, operation of all-terrain vehicles, and other activities. While some people do seek permission to pursue recreational activities on vacant land, often many participants in recreational activities on vacant land do so as trespassers and such individuals can and do get injured while engaging in recreational activities. Fortunately, for owners of vacant land in New York, General Obligations Law § 9-103, known as the "Recreational Use Statute," limits a landowner's liability for injuries arising from the list of activities enumerated in the statute. However, General Obligations Law § 9-103 carves out three specific instances in which a landowner's liability is not limited. Specifically, a person who is injured while on vacant land can recover against the landowner (1) where the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) for injury sustained where permission to pursue any of the enumerated activities was granted for consideration; or (3) for injury caused by acts of persons to whom permission was granted to pursue any of the enumerated activities "to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger."

Thus, if an area on vacant land contains a sinkhole and the landowner willfully or maliciously fails to guard or warn against such condition, the landowner will be subject to liability if someone is injured as a result of the sinkhole. However, the willful or malicious standard is a high-threshold that is not easy for an injured party to satisfy. Similarly, if a landowner charges a fee to someone to operate a snowmobile on his vacant land and the snowmobile operator crashes into a tree and is injured, the landowner will be subject to liability. Additionally, if a landowner grants permission to an individual to hunt on his vacant land and the landowner knows that trespassers regularly traverse the area where the hunting takes place, the landowner would be subject to liability if the hunter injures a trespasser in such area.

While an owner of vacant land generally does not owe a duty of care to trespasser and will not be responsible for injuries sustained by a trespasser, there are certain instances in which a trespasser may be able to recover against a landowner. In particular, if a landowner is aware that trespassers regularly traverse his property, a landowner must warn of any known dangers or hazards, which can be done by posting signs warning of such dangers or hazards, otherwise the landowner may be subject to liability for injuries sustained by trespassers. Additionally, if a landowner engages in willful and wanton conduct on vacant land, such as target practice with a gun or bow and arrow and a trespasser is injured, the landowner may be held liable for such injuries. Furthermore, a landowner can be liable if he is aware of a condition on his vacant land that he knows or has reason to know that is likely to attract a child trespasser (i.e., a creek that is visible from a roadway), the condition is of such a nature that the landowner knows or has reason to know involves a risk of bodily injury or death to a child (i.e., where the water flow is strong and/or deep and/or the creek contains rocks), a child does not discover the condition or realize the risk involved in encountering such condition, the utility of the landowner maintaining the condition and the burden of eliminating same are slight

compared to the risk posed to a child, and the landowner fails to use reasonable care to eliminate the danger or otherwise protect a child (such as erecting a fence around the entrance to the creek).

Regardless of whether liability is limited either by General Obligations Law § 9-103 or by virtue of the fact that the injured person is a trespasser to whom no duty is owed, it nonetheless would be prudent for an owner of vacant land to maintain insurance coverage for such property. If an owner of vacant land also owns a home on a separate parcel of land and has a standard homeowners' insurance policy covering the home, then such vacant land should be covered under the homeowners' policy for purposes of Section II (personal liability coverage). In particular, the standard homeowners' insurance policy form issued by the Insurance Services Office (which many homeowners' insurers writing policies in New York utilize) states that an "insured location" includes "vacant land, other than farm land, owned by or rented to an 'insured'." In *DeLisa v. Amica Mut. Ins. Co.*, 59 A.D.2d 380, 382, 399 N.Y.S.2d 909, 910 (3d Dep't. 1977), the Appellate Division, Third Department noted that "vacant land" as used in insurance policies has not been defined by New York courts and concluded that such words should be given their ordinary import and mean lands that are both unoccupied and unused by the landowner. Thus, unless the term "vacant land" is specifically defined by a homeowners' insurance policy (or other applicable insurance policy) in New York or the Court of Appeals or one of the three other departments of the Appellate Division hold otherwise, the term "vacant land" as defined by the Third Department in *DeLisa* will be the way the term is interpreted for purposes of applicable insurance policies in New York.

An owner of vacant land that does not own a home (or commercial property) or that owns a home (or commercial property) but does not have insurance should consider either purchasing homeowners'/commercial property insurance or purchasing an insurance policy that specifically insures vacant land to ensure protection for personal injury lawsuits, regardless of whether the limitation of liability under General Obligations Law § 9-103 is applicable or that may be based upon liability to trespassers, as insurance policies require an insurer to provide both defense and indemnity. Accordingly, it is recommended that owners of vacant land consult with an attorney familiar with negligence and insurance law or an insurance broker to ensure they have sufficient and appropriate insurance coverage for such land.

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