

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D16185
G/kmg

_____AD3d_____

Argued - June 4, 2007

ROBERT W. SCHMIDT, J.P.
GLORIA GOLDSTEIN
JOSEPH COVELLO
THOMAS A. DICKERSON, JJ.

2006-04363

DECISION & ORDER

Julio Hernandez, appellant, v City of New York, et al.,
respondents.

(Index No. 11743-97)

Rubert & Gross, P.C., New York, N.Y. (Soledad Rubert of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F.X. Hart,
Patrick Mantione, and Marta Ross of counsel), for respondents.

In an action, inter alia, to recover damages for assault and battery, the plaintiff appeals from an order of the Supreme Court, Queens County (Elliot, J.), dated July 15, 2005, which denied his motion, among other things, to strike the defendants' answer on the ground of spoliation of evidence.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly denied the plaintiff's motion, inter alia, to strike the defendants' answer as a sanction for the alleged spoliation of evidence. The subject clothing was not destroyed or lost, and the plaintiff has not been deprived of evidence necessary to make out a prima facie case (*see Denoyelles v Gallagher*, 40 AD3d 1027; *Iannucci v Rose*, 8 AD3d 437, 438).

SCHMIDT, J.P., GOLDSTEIN, COVELLO and DICKERSON, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court

September 11, 2007

HERNANDEZ v CITY OF NEW YORK