

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

D18318  
W/hu

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Argued - February 1, 2008

PETER B. SKELOS, J.P.  
STEVEN W. FISHER  
JOSEPH COVELLO  
RANDALL T. ENG, JJ.

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2006-10914

DECISION & ORDER

Princeton Insurance Company, as subrogee of My Roula, Inc., T/A Mike's Place, plaintiff-respondent, v Jenny Exhaust Systems, Inc., appellant, Kidde Fire Systems, et al., defendants-respondents, et al., defendants.

(Index No. 1280/04)

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White Fleischner & Fino, LLP, New York, N.Y. (Lisa M. Viscardi and Nancy Davis Lyness of counsel), for appellant.

Kopff, Nardelli & Dopf LLP, New York, N.Y. (Martin B. Adams of counsel), for plaintiff-respondent.

Leahey & Johnson, P.C., New York, N.Y. (Peter James Johnson, Jr., Peter James Johnson, James P. Tenney, and Joanne Filiberti of counsel), for defendants-respondents.

In a subrogation action to recover damages for injury to property, the defendant Jenny Exhaust Systems, Inc., appeals from an order of the Supreme Court, Queens County (Schulman, J.), entered October 10, 2006, which denied, as premature, its motion for leave to renew its prior motion to strike the complaint and all cross claims insofar as asserted against it pursuant to CPLR 3126 based on spoliation of evidence, which had also been denied as premature in an order of the same court entered August 9, 2005.

ORDERED that the order entered October 10, 2006, is affirmed, with one bill of costs.

March 4, 2008

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PRINCETON INSURANCE COMPANY, as subrogee of MY ROULA, INC.,  
T/A MIKE'S PLACE v JENNY EXHAUST SYSTEMS, INC.

This subrogation action arises out of a fire that occurred on March 4, 2001, at a restaurant in Staten Island. The plaintiff insurer claims, inter alia, that exhaust maintenance work performed by the defendant Jenny Exhaust Systems, Inc. (hereinafter Jenny), caused or contributed to the fire.

Prior to the completion of disclosure, Jenny moved pursuant to CPLR 3126 to strike the complaint insofar as asserted against it on the ground of spoliation of evidence. By order entered August 9, 2005, the Supreme Court denied the motion “without prejudice to defendants, if they be so advised, seeking sanctions upon proper papers following the completion of disclosure or at the trial of this matter.” Although Jenny appealed from the order entered August 9, 2005, that appeal was dismissed by this Court for lack of prosecution.

Prior to the completion of discovery, but after receiving photographs of the scene of the fire, Jenny moved for leave to renew the motion to strike the complaint. The Supreme Court, after noting that the “defendants were specifically granted leave to raise the spoliation issue *after* completion of disclosure or at the trial of this matter” (emphasis added), denied the motion as premature. We affirm.

At the outset, inasmuch as Jenny attempts to bring up for review certain matters that were, or could have been, raised on its earlier appeal from the order entered August 9, 2005, such matters are not properly before us (*see Bray v Cox*, 38 NY2d 350; *Reshevsky v United Water N.Y., Inc.*, 46 AD3d 532), and we decline to reach them in the exercise of our discretion (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 756).

With respect to issues that could not have been raised on the prior appeal, in light of the express terms of the order entered August 9, 2005, the Supreme Court properly denied as premature Jenny’s motion for leave to renew. Rather than accepting the court’s invitation to renew its motion only upon completion of discovery, Jenny elected instead to move before even producing a witness for a deposition. Moreover, Jenny failed to demonstrate a reasonable justification for its failure to have proffered, in support of its original motion, the alleged new facts presented in support of its motion for leave to renew (*see CPLR 2221[e][3]*; *Madison v Tahir*, 45 AD3d 744). Accordingly, the motion was properly denied in any event.

The parties’ remaining contentions either are without merit or need not be reached in light of our determination.

SKELOS, J.P., FISHER, COVELLO and ENG, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court

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