

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

D27618
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_____AD3d_____

Argued - April 22, 2010

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
PLUMMER E. LOTT, JJ.

2009-04617

DECISION & ORDER

Cezary Sienkiewicz, plaintiff, v 370/CPW Owners Corp., et al., defendants third-party plaintiffs, second third-party plaintiffs-respondents, et al., defendant, Drew Construcion Co., Inc., et al., third-party defendants, Ryobi Technologies, Inc., et al., second third-party defendants-appellants.

(Index No. 2462/05)

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains, N.Y. (Rosario Vignali of counsel), for second third-party defendants-appellants.

Margaret G. Klein, New York, N.Y. (Herzfeld & Rubin, P.C. [David B. Hamm and Linda M. Brown], of counsel), for second third-party plaintiffs-respondents.

In an action, inter alia, to recover damages for personal injuries, the second third-party defendants Ryobi Technologies, Inc., Ryobi Ltd., and One World Technologies, Inc., appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Ambrosio, J.), dated March 30, 2009, as denied that branch of their motion which was for summary judgment dismissing the second third-party complaint due to spoliation of evidence.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The Supreme Court providently exercised its discretion in denying the branch of the appellants' motion which was for summary judgment dismissing the second third-party complaint due to spoliation of evidence. "Generally, striking a pleading is reserved for instances of willful or

contumacious conduct . . . and the prejudice resulting from spoliation must be considered in determining whether such drastic action is necessary as a matter of elementary fairness” (*Dean v Usine Campagna*, 44 AD3d 603, 605; *De Los Santos v Polanco*, 21 AD3d 397, 398). In cases alleging design defects, such as this second third-party action, the loss of the specific instrumentality that allegedly caused the plaintiff’s injuries is not automatically prejudicial to the manufacturer thereof because defects will be exhibited by other products of the same design (*see Lichtenstein v Fantastic Mdse. Corp.*, 46 AD3d 762; *Rios v Johnson V.B.C.*, 17 AD3d 654; *Lawson v Aspen Ford, Inc.*, 15 AD3d 628; *Klein v Ford Motor Co.*, 303 AD2d 376). Here, the appellants failed to show that the negligent loss or destruction of the table saw involved in the plaintiff’s accident severely prejudiced their ability to defend the second third-party action (*see Awon v Harran Transp. Co., Inc.*, 69 AD3d 889).

RIVERA, J.P., FLORIO, ANGIOLILLO and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court