At the Central Compliance Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 15th day of April, 2004.

P R E S E N T:
HON. ALLEN HURKIN-TORRES,
Justice

- X

LEON DENNIS and MARY DENNIS,

Plaintiffs,

- against -

Index No. 16213/96

DECISION AND ORDER

THE CITY OF NEW YORK,

Defendant.

- X

THE CITY OF NEW YORK,

Third-Party Plaintiff,

- against -

NAB CONSTRUCTION CORPORATION, KARL KOCH ERECTING CO., INC., and NAB CONSTRUCTION CORPORATION/KARL KOCH ERECTING CO., INC., A JOINT VENTURE,

Third-Party Defendant.

- X

The following papers numbered 1 to 1 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause, Affidavits (Affirmations)& Exhibits Annexed	1
Answering Affidavit (Affirmation)	2-3
Reply Affidavit (Affirmation)	4
Affidavit (Affirmations)	
Pleadings-Exhibits	
Stipulations-Minutes	
Filed Papers	

Plaintiff moves, *inter alia*, for an order striking defendants' answers on the ground that they failed to preserve certain evidence.

The motion, insofar as it seeks to strike defendants' answers, is denied. The remaining branches of the motion seeking discovery and an extension of time to file the note of issue are reserved and shall be determined at a conference to be held at 9:30 A.M. on April 29, 2004.

In seeking to strike defendants' answers, plaintiff alleges:

> That defendant failed to preserve the bunji cord that struck plaintiff in his eye and thereby precludes testing of the bunji cord to determine whether the bunji cord broke, released or was otherwise defective. Plaintiffs are prevented from determining the age of the cord, the condition of the cord, the manufacturer of the cord, the trade name of the cord, the safety specification associated with the particular bunji cord and whether said bunji cord was appropriate for the task in question.

Beyond these two conclusory sentences, however, plaintiff fails to provide any background concerning the nature of his claim and does not even provide a copy of the pleadings. This being so, the motion fails to provide a sufficient factual predicate to warrant granting the requested relief and should be denied on this basis alone. In any event, to the extent that the facts can be adequately gleaned from the papers submitted in opposition to the motion, it appears that denial of the motion is still warranted.

The facts as set forth in defendants' opposition papers indicate that plaintiff's accident occurred while plaintiff and his coworkers (employees of third-party defendant NAB Construction Corporation/Karl Koch Erecting Co., Inc. [NAB/Koch]) were throwing drop cloths off of the Williamsburg Bridge onto a flatbed truck located on the street below. While plaintiff was lifting one of the drop cloths a bungee cord that was wrapped around it came loose and struck him in the eye.

Plaintiff thereafter commenced this action against defendant City of New York (City) alleging claims premised upon common-law negligence and Labor Law §§ 200 and 241(6). The Appellate Division has since affirmed the dismissal of the common-law negligence and Labor Law § 200 claims against the City on the ground that it did not supervise or control NAB/Koch's work (*Dennis v City of New York*, 304 AD2d 611). As such, plaintiff's only remaining claim is premised upon section 241(6) and is based upon the failure to provide eye protection (*id.*)

Turning to the law, the "drastic remedy" of striking an answer pursuant to CPLR 3126 is unwarranted absent a "clear showing that the failure to comply with discovery demands was willful, contumacious or in bad faith" (*Fellin v Sahgal*, 268 AD2d 456; *see Poulas v U-Haul Intl.*, 288 AD2d 202; *Patterson v Greater N.Y. Corp. of Seventh Day Adventists*, 284 AD2d 382). Similarly, under the

common-law doctrine of spoliation, where a party destroys essential physical evidence and the party seeking that physical evidence is "prejudicially bereft of appropriate means to confront a claim with incisive evidence," the spoliator may be sanctioned by the striking of its pleading (*Foncette v LA Express*, 295 AD2d 471, 472 [internal quotation marks omitted], quoting *New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 653; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174; *see also Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assoc.*, 286 AD2d 320).

In this case, plaintiff's only direct action is against the City and plaintiff has made no showing that the City had any duty to preserve the cord. In this regard, the cord belonged to NAB/Koch, which was an independent contractor, and the City exercised no supervision or control over NAB/Koch. However, even if NAB/Koch's conduct could be imputed to the City, striking of the answer would still be inappropriate.

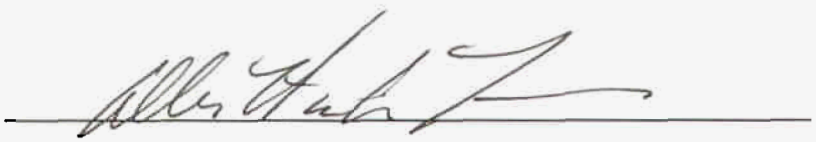
NAB/Koch has demonstrated that it was not joined as a third-party defendant in this action until two years after the accident and that plaintiff did not demand production of the bungee cord until three years after the accident. Plaintiff, in reply, submits that the accident report provided NAB/Koch with notice of the need to preserve the bungee cord. I disagree. The report simply notes that the bungee cord "let go" and hit plaintiff in the eye, and

nothing in the report indicates that the bungee cord was defective. Moreover, plaintiff has failed to demonstrate that he requested that NAB/Koch preserve the cord or that he gave notice of his intent to pursue an action against the City (*see Monteiro v R.D. Werner Co.*, 301 AD2d 636, 637; *Ripepe v Crown Equipment Corp.*, 293 AD2d 462, 464; *Curran v Auto Lab Service Ctr.*, 280 AD2d 636, 637-638). In the absence of such notice, NAB/Koch's failure to preserve the bungee cord cannot be deemed contumacious or willful for purposes of CPLR 3126, or negligent for purposes of a common-law spoliation claim (*see id.*; *see also Metlife Auto & Home & Co.*, ___ NY3d ___, 2004 NY Slip Op 01145, 2004 WL 330073; *Greater New York Mut. Ins. Co. v Curbeon*, 300 AD2d 182; *cf. Kirkland*, 236 AD2d at 173-174).

Finally, assuming NAB/Koch had notice of the need to preserve the bungee cord, plaintiff has failed to demonstrate that he has been prejudiced by the failure to do so. Notably, plaintiff's only remaining claim is premised upon the failure to provide eye protection. Whether eye protection was needed for the work plaintiff was performing appears unrelated to whether the accident occurred because of a defect with the bungee cord or because the cord was improperly wrapped around the tarp. Plaintiff is thus not bereft of evidence necessary to prove his case (*see Ifraimov v Phoenix Industrial Gas, LLC*, ___ AD3d ___, 772 NYS2d 78, 79).

Moreover, it would appear that the City and NAB/Koch are equally prejudiced by the loss of the bungee cord (*id.*).

E N T E R :



Hon. Allen Hurkin-Torres J.S.C.