[* 1]

SCANNED ON 10/11/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Moller

-v-

The City of New York

INDEX NO. 108756/04

MOTION DATE

MOTION SEQ. NO. 05

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 11 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/3/07

Lou

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------x

WALTER MOLLER and PATRICIA MOLLER,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE AMERICAN MUSEUM OF NATURAL HISTORY and NEW YORK CRANE & EQUIPMENT CORPORATION,

Defendants.

Index No.: 108756/04

Decision and Order

Motion Seq: 005

----------x

NEW YORK CRANE & EQUIPMENT CORP., s/h/a NEW YORK CRANE & EQUIPMENT CORPORATION,

Defendant/Third-Party Plaintiff,

-against-

WILLIAMS SPECIALIZED SERVICES, INC. and WILLIAMS SPECIALIZED, INC.,

Third-Party Defendants.

Third-Party
Index No.: 590282/05

----------x

THE CITY OF NEW YORK, THE AMERICAN MUSEUM OF NATURAL HISTORY,

Second Third-Party Plaintiffs,

-against-

ALLEN WILLIAMS,

Second Third-Party Defendant.

Second Third-Party
Index No.: 591115/05

----------x

Hon. Louis York, J.:

Defendants/second third-party plaintiffs the City of New York (the City) and the American Museum of Natural History (the Museum) (collectively, the City defendants)

move for an order granting the City defendants: 1) a default judgment (CPLR 3125) against third-party defendants Williams Specialized Services, Inc. and Williams Specialized, Inc. (collectively, Williams Specialized), based upon Williams Specialized's purported failure to timely answer the City defendants' supplemental cross claim; 2) summary judgment (CPLR 3212) and indemnification in favor of the City defendants and the striking of Willlams Specialized's answer, based on its purported spoliation of two slings, *infra*, or, alternatively, an order precluding Williams Specialized from offering any evidence concerning these slings; 3) leave to serve an amended complaint (CPLR 3025 [b]) upon second third-party defendant Allen Williams, asserting an additional cause of action for spoliation of evidence, i.e., the slings; and 4) summary judgment (CPLR 3212) and indemnification in favor of the City defendants and against Allen Williams, based on his alleged spoliation of the slings, or, alternatively, an order precludlng Allen Willlams from offering any evidence concerning the slings.

Williams Specialized and Allen Williams (collectively, the Williams defendants) oppose this motion and cross-move, respectively, for an order granting: a) Williams Specialized summary judgment in its favor as to all of the City defendants' cross claims, based on the exclusivlty provisions of the Workers Compensation Law (WCL); b) Williams Specialized summary judgment dismissing the City defendants' supplemental cross claim for spoliation of evidence; and c) Allen Williams summary judgment dismissing the second third-party complaint in its entirety, premised on the exclusivity provisions of the WCL.

Background

In the main action (*Moller v The City of New York, et al.,* Index No.: 108756/04),

plaintiffs Walter Moller (plaintiff) and Patricia Moller seek to recover for personal injuries sustained by plaintiff on January 18, 2004. On that date, plaintiff was in the employ of Williams Specialized. Williams Specialized had been hired by the Museum to install two promotional dinosaurs and their supporting bases in the Museum's plaza as part of a holiday display and to remove and transport them to a warehouse at the conclusion of the display. During the removal process, as one of the bases was being loaded onto a flatbed truck by crane, the base fell and struck plaintiff. The base had been attached (slung) to the crane by two slings and apparently when one of these slings tore, the base fell. The slings were owned by Williams Specialized, and its employees had slung the base to the crane.

On or about September 26, 2005, the City defendants asserted three cross claims against Williams Specialized; common-law and contractual indemnification, contribution, and breach of contract.[1] On or about May 9, 2006, the City defendants served Williams Specialized with a supplemental cross claim asserting an additional cause of action for spoliation of evidence (Cross claim, annexed as Exh. E to Motion).

Default

The City defendants seek the entry of a default judgment against Williams Specialized based on Williams Specialized's putative failure to timely serve an answer to the City defendants' supplemental cross claim. Apparently, Williams Specialized only served its answer after the instant motion was filed. Williams Specialized

[1]Previously, the City defendants' ability to maintain their cross claims was called into question. This issue was fully resolved by an order of this court dated June 20, 2007, inter alia, "permit[ting] the previously interposed cross-claims to be maintained by the City of New York and the American Museum of Natural History . . . [and] allow[ing] the cross-claims to remain viable."

counters, in relevant part, that its answer to the supplemental cross claim was neither rejected or returned; if Williams Specialized did, in fact, fail to timely answer, it was the result of law office failure, which should be excused; it has meritorious defenses to both the City defendants' cross claims and their supplemental cross claim; it has not abandoned this action, but rather, has actively litigated this action, including through prior motion practice; and the City defendants have failed to demonstrate that they have suffered any cognizable prejudice.

Given the court's well settled preference for resolving disputes on the merits (*Theatre Row Phase II Assoc. v H&I, Inc.*, 27 AD3d 216 [1st Dept 2006]) and the facts and circumstances attendant hereto, including Williams Specialized's arguably colorable defenses, an apparently inadvertent failure to answer, a demonstrated commitment to litigating this action and the absence of any demonstrated prejudice to the City defendants, this court denies that branch of the City defendants' motion that seeks entry of a default judgment against Williams Specialized.

Spoliation

As noted, *supra*, the City defendants seek an award of summary judgment in their favor, indemnification, the striking of Williams Specialized's answer or, alternatively, an order precluding Williams Specialized from offering any evidence concerning the slings. The City defendants' request for this relief is premised both on their assertion of an independent cause of action for spoliation, viz., their supplemental cross claim, as well as an application for the imposition of those sanctions traditionally imposed in instances of spoliation.

The City defendants contend that the spoliation of the slings has prevented them

from determining whether plaintiff's accident was caused by a defective sling, or can be attributed to other causes, e.g., errors by Allen Williams in operating the crane. In addition, the City defendants contend that the spoliation of the slings has limited their ability to prosecute their claims against the Williams defendants and has prevented them from asserting product liability claims against the manufacturer and distributor of the slings.

Williams Specialized counters that: sanctions for spoliation are unwarranted because Williams did not intentionally dispose of the sling; rather, it was discarded "for safety reasons" and in the ordinary course of business in the days following plaintiff's accident; the City defendants have exhibited a consistent pattern of delay in seeking the production of the slings and related discovery and any request for sanctions for spoliation are barred by the doctrines of waiver and laches; and the Williams defendants and the City defendants have both been equally affected by the unavailability of the slings and, therefore, the City has not been prejudiced to any greater degree than Williams Specialized. And, as it relates to the supplemental cross claim, the Williams defendants argue that New York does not recognize spoliation as an independent cause of action.

> "Traditionally, spoliation has been defined as the 'intentional destruction, mutilation, alteration, or concealment of evidence, [usually] a document' (Black's Law Dictionary 1409 [7th ed 1999]). As employed in case law, however, spoliation is a much broader term, one that has been applied to intentional conduct ranging from the deliberate destruction of evidence with fraudulent intent to innocent practices and occurrences in the ordinary course of business or events. Moreover, despite its denotation of intentionality, the term has been applied in case law to unintentional conduct . . ."

MetLife Auto & Home v Joe Basil Chevrolet, Inc., 303 AD2d 30, 34 (4th Dept 2002) *affd* 1 NY3d 478 (2004).

Sanctions, including the dismissal of the action or preclusion of testimony, may be imposed where a party disposes of key items of evidence before its adversary had an opportunity to inspect them. *see New York Central Mutual Fire Insurance Co. v Turnerson's Electric, Inc.*, 280 AD2d 652, (2nd Dept 2001).

Sanctions may be imposed even if the evidence was lost or destroyed before the spoliator was a party to the action, as long the spoliator was on notice that the evidence at issue might be needed in future litigation. *MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3D 478, 483 (2004) citing *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 (2nd Dept 1998).

In *Ortega v City of New York*[2] (11 Misc 3d 848 [Sup Ct, Kings County], *affd* 35 AD3d 422 [2006]), the court addressed the distinction to be drawn between those instances where spoliation occurs at the hands of an entity that is not a party to the action, i.e., a third party, and those instances where spoliation occurs at the hands of an entity that is a party to the action. *See also Fairclough v Hugo*, 207 AD2d 707 (1st Dept 1994).

---

[2]In *Ortega*, the plaintiffs had been injured when the vehicle in which they were riding burst into flames. The *Ortega* plaintiffs commenced an action for spoliation after the NYPD auto pound inadvertently sold the vehicle in violation of a court order to preserve that vehicle. Plaintiffs asserted "that because of the wrongful destruction of the vehicle they '[were] unable to inspect the vehicle or have an engineer determine what caused the vehicle to burst into flames' and as a result the City's actions have 'completely eliminated the capacity for the plaintiffs to successfully sue the responsible entities for negligence, breach o[f] warranties or strict products liability due to the accident.'" *Ortega v City of New York*, 11 Misc 3d 848, 851 (Sup Ct, Kings County), *affd* 35 AD3d 422 [2006]).

"One traditional method of dealing with spoliation of evidence in New York has been CPLR 3126 where sanctions, including dismissal, have been imposed for a party's failure to disclose relevant evidence." *MetLife Auto & Home*, 1 NY3d at 482-483. Recognition of an independent cause of action for spoliation is less of an imperative where sanctions for destruction of evidence may be imposed within the context of an ongoing action. *See Simet v Coleman Co., Inc.*, 8 AD3d 1038 (4th Dept 2004); *Pharr v Cortese*, 147 Misc 2d 1078 (Sup Ct, NY County 1990).

> "'Unlike a party to a civil action, a third party spoliator is not subject to . . . sanctions. Thus, when a third party destroys evidence, the party who is injured by the spoliation does not have the benefit of existing remedies. Such a result conflicts with our policy of providing a remedy for every wrong and compensating victims of tortious conduct' [citation omitted]".

Ortega, 11 Misc 3d at 894-895.

Notwithstanding such considerations, "[h]istorically, New York courts have not recognized an independent cause of action for spoliation against third parties" *(Id.* at 852), and courts "have limited the expansion of the tort's liability by requiring a plaintiff to establish that the spoliator had a legal or contractual duty to preserve the evidence." *Id.* at 892.[3]

In *MetLife Auto & Home*, (1 NY3d 478, *supra*), the Court of Appeals addressed

---

[3] In surveying the approach taken by other jurisdictions vis-a-vis spoliation as an independent tort, the *Ortega* court noted, in relevant part, that the Supreme Court of West Virginia had determined "that more than 26 jurisdictions had considered the tort and that most had not adopted it" (*Ortega v City of New York*, 11 Misc 3d at 858 quoting *Hannah v Heeter*, 213 W Va 704, 711 [2003]), and, that the Supreme Court of New Mexico had found that "'a majority of jurisdictions had rejected a separate cause of action for intentional spoliation of evidence and had chosen, instead, to rely exclusively on traditional remedies.'" *Id.* quoting *Torres v El Paso Electric Company*, 127 NM 729, 745 (1999).

the issue of "whether New York State should recognize a cause of action for third-party spoliation of evidence and impairment of a claim or defense as an independent tort." *Id.* at 478.[4]

In finding that plaintiff MetLife could not maintain a cause of action for spoliation against the insurance company that had spoliated the evidence at issue therein, the Court of Appeals found that the spoliator owned the evidence in question (a vehicle that had been destroyed inadvertently), and that there was "no duty, court order, contract or special relationship" that mandated the spoliator's preservation of the vehicle. *MetLife Auto & Home*, 1NY3d at 484. Moreover, "MetLife made no effort to preserve the evidence by court order or written agreement [and] [a]lthough MetLife verbally requested the preservation of the vehicle, it never placed that request in writing or volunteered to cover the costs associated with preservation." *Id.*

In an earlier round of motion practice, the City defendants sought an order compelling Williams Specialized to respond to two notices of discovery and inspection (collectively, the discovery demands) relating to the slings. By Decision and Order in January 2007, this court denied that motion to compel, finding that the City defendants failed without excuse to comply with court-imposed discovery deadlines and had thereby waived further discovery.

In that decision, this court noted that the City defendants were, in February 2006,

---

[4]The Court of Appeals did note that prior Appellate Division decisions had found support for a common-law action for spoliation of evidence where an employee's right to sue a third-party tortfeasor had been impaired by his/her employer. *See e.g. DiDomenico v C & S Aeromatik Supplies* , 252 AD2d 41, *supra* (UPS employee injured by caustic liquid sprayed from package he was handling had valid claim for spoliation against UPS where the shipper failed to preserve the package and timely provide requested shipping records, thereby preventing plaintiff from maintaining an action against the liquid's manufacturer).

belatedly seeking additional discovery relating to the slings, although the sought-after discovery concerned areas of inquiry that were made well known to the City far earlier in the action. The City was, or should have been, aware of the significance of the slings through, inter alia, plaintiff's notice of claim, the 50-H Hearing and plaintiff's bill of particulars, all served or held in 2004, as well as an EBT of a Williams Specialized employee held in March 2005.

Given the above litany of the City defendants' inaction, it is clear that the City defendants made even less of an "effort" to preserve the evidence at issue herein, viz., the slings, than did the plaintiff in *MetLife Auto & Home* (1 NY3d 478, *supra*). Moreover, as parties to this action, the Williams defendants, unlike the plaintiff in *MetLife*, may be sanctioned, if so warranted. Given the facts and circumstances attendant hereto, this court declines to recognize the assertion of an independent cause of action for spoliation in this action.[5]

Accordingly, that branch of the City defendants' motion that seeks summary judgment, indemnification and/or an order preventing the Williams defendants from offering any testimony relating to the slings, that is premised on their assertion of an independent cause of action for spoliation, is denied.

However, that branch of the City defendants' motion seeking summary judgment,

---

[5]In a decision that predated the Court of Appeals decision in *MetLife Auto & Home* (1 NY3d 478, *supra*), the court in *Sterbenz v Attina* (205 F Supp 2d 65 [ED NY 2002]), noted that "[t]he New York Court of Appeals has yet to address the viability of a tort claim for spoliation of evidence. Nevertheless, nearly every lower state court in New York to examine the issue, as well as decisions of federal courts construing New York law, have 'follow[ed] the majority view and do not recognize spoliation of evidence as a cognizable tort action.' [internal citations omitted]."

indemnification, or, in the alternative, an order barring the Williams defendants from offering evidence concerning the slings, that is not based on the assertion of an independent cause of action for spoliation, remains extant.

"Sanctions for spoliation have been applied even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation. *DiDomenico,* 252 AD2d at 53, *see also Kirkland v New York City Housing Authority*, 236 AD2d 170, [1st Dept.1997])." *MetLife Auto & Home*, at 483. *see also Standard Fire Insurance Co v Federal Pacific Electric Co.*, 14 AD3d 213 (1st Dept 2004).

The Williams defendants also argue that the branch of the City defendants' motion that seeks sanctions for the spoliation of the slings is barred by the doctrines of waiver and laches. The issues of the City defendants' delay in seeking discovery relating to the slings and the effect that such delay had vis-a-vis further discovery relating to the slings has been discussed *supra*. As a result of their delay, the City defendants were found to have waived *further* discovery relating to the slings, and said delay was also considered in evaluating whether an independent claim for spoliation could be maintained in this action. However, the inaction of the City defendants, in and of itself, does not warrant that Williams Specialized should reap an "evidentiary windfall" as a result of its spoliation of the slings.

As noted *supra*, as a practical matter, because Williams Specialized improvidently disposed of the slings in the days immediately following plaintiff's accident, even timely efforts undertaken by the City defendants may have been of little efficacy in preserving

the slings themselves. Although greater alacrity on the part of the City defendants may have certainly yielded relevant information, e.g., the identification of the manufacturer of the slings, Williams Specialized's spoliation of the actual slings, key evidence in this litigation, should neither be countenanced nor rewarded. As noted by the Appellate Division, First Department, "destruction or loss of evidence should be rendered costly enough an enterprise that it will not be undertaken" *Kirkland v New York City Housing Authority*, 236 AD2d at 174.

And, although Williams Specialized claims that the slings were disposed of in the ordinary course of business, for safety reasons, it has offered no evidence of precisely when the slings were disposed of, who disposed of them, or any evidence of a protocol employed when disposing of equipment involved in an accident.

"A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them' thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice." [internal citations omitted]." *Kirschen v Marino*, 16 AD3d 555 (2nd Dept 2005).

Although defendant was derelict in failing to preserve the slings, there has been no evidence offered to demonstrate intentional or deliberate misconduct on the part of Williams Specialized. And, while the prejudice caused to the City defendants by the disposal of the slings may appear self-evident, the City defendants' failure to promptly utilize available discovery devices to obtain all relevant information about the slings, coupled with their inordinate delay in moving for additional discovery relating to the slings,

further exacerbated any prejudice caused to the City defendants. To what extent the City defendants' own acts and omissions contributed to the prejudice they suffered from the loss of the slings is difficult to quantify. However, under the facts and circumstances presented herein, neither the striking of Williams Specialized's pleadings nor an order barring them from offering any evidence concerning the slings is warranted. To the extent that the evidence at issue, viz., the slings, is, and has been, unavailable to the City defendants, and sanctions are warranted, the City defendants are free to seek an appropriate jury instruction, or any other appropriate relief, from the trial court. *See Quinn V City University of New York*, __ AD3d ___, 2007 WL 2669812 (1st Dept 2007).

Given the facts herein, that branch of the City defendants' motion that seeks summary judgement, indemnification or the striking of Williams Specialized's answer is denied without prejudice to an application by the City defendants to the trial court for appropriate sanctions, e.g., a missing evidence charge (1A PJI3d 1:77 [2007]).

Leave to Amend

The City defendants move, pursuant to CPLR 3025 (b), to amend their second third-party complaint against Allen Williams to include a claim for spoliation (Proposed Amended Second Third-Party Complaint, annexed as Exh. O to Motion).

CPLR 3025 (b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." Under this section, leave to amend pleadings is freely given absent prejudice or surprise resulting directly

from delay. *Edenwald Contracting Co. v City of New York,* 60 NY2d 957 (1983). Delay alone does not warrant a denial of a motion for leave to amend pleadings unless coupled with significant prejudice. *Id.* at 959. In the interest of judicial economy, the court is obligated to review the merits of a proposed amendment. *Murray v City of New York*, 43 NY2d 400 (1977); *Sidor v Zuhoski*, 257 AD2d 564 (2nd Dept 1999).

As discussed *supra*, under the facts and circumstances attendant hereto, this court has declined to recognize an independent cause of action for spoliation in this action. Similarly, if, in fact, sanctions were warranted against Allen Williams, as he is a party to this action, sanctions, if any, could be imposed without any further amendment to the pleadings. However, the City defendants have failed to offer any supporting evidence for the assertion that Allen Williams participated in, or otherwise caused the spoliation of the slings. The parties agree that the slings were owned by Williams Specialized, that following plaintiff's accident the slings were placed by a Williams Specialized employee onto a Williams Specialized truck, that the slings were transported to a Williams Specialized site and were disposed of at that site. It appears that the City defendants seek to hold Allen Williams liable for spoliation based solely on his presence at the accident site and his purported failure to safeguard the slings. Those cases cited by the City defendants in support of their position are inapposite to the facts herein.

That branch of the City defendants' motion that seeks leave to serve an amended complaint against Allen Williams that includes a claim for spoliation is denied.

Timeliness of Cross Motion

Pursuant to a prior order of this court, summary judgment motions in these actions

were to be filed within 90 days after plaintiffs filed their note of Issue. Because the instant cross motions were filed after this deadline, the City defendants contend that the instant cross motions must be denied as untimely.

However, "even though [the Williams defendants] cross-moved after the court's imposed deadline for summary judgment motions, [they] made [their cross motions] in response to [the City] defendants' still pending, timely summary judgment motions." *Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 (1st Dept 2005). Accordingly, this court shall consider the respective cross-motions on their merits.

Workers' Compensation

Williams Specialized contends that City defendants' claims for indemnification, contribution and breach of contract are barred by the exclusivity provisions of the WCL, because on the date of the accident there was no written agreement in effect by which it expressly agreed to indemnify and/or contribute for such claims.

Williams Specialized further contends that rather than have Williams Specialized enter into a written contract that expressly contained an indemnification provision, the Museum's request for the disassembly work performed on the date of the accident was contained in a memo dated January 5, 2004; the work itself was performed on January 18, 2004, after which Williams Specialized issued an invoice for the work to the Museum; and only after the accident occurred, did the Museum issued a purchase order (No. 32862) on February 4, 2004. Williams Specialized further contends that it assembled and disassembled the dinosaur display each holiday season for approximately four years prior to the accident, and that it separately negotiated the terms of each job. It reiterates that it

never executed the purchase order or otherwise agreed to obtain insurance that explicitly listed the Museum as an additional insured for the work performed on the date of plaintiff's accident, and that, in any event, the purchase order does not contain any clause that the terms contained therein were to be applied retroactively.

And, Williams Specialized argues, notwithstanding any reference to the Museum Insurance Package and its requirement that the Museum be named as an additional insured in the purchase orders, there is no evidence that Williams Specialized expressly agreed to add the Museum as an additional insured or to indemnify the Museum.

Williams Specialized also argues that, even assuming that this court were to find that the parties expressly agreed by written contract, prior to the date of plaintiff's accident, that Williams Specialized would procure insurance naming the Museum as an additional insured, the City defendants' claims for indemnification, contribution and breach of contract are barred by the doctrines of waiver and laches; the Museum waived this provision because it allowed Williams Specialized to perform the work without such insurance, and/or that such a claim is now barred by the doctrine of laches.

The City defendants contend that Williams Specialized was contractually bound to adhere to those requirements detailed in both the Museum Regulations and the Museum Insurance Package, but, in fact, that Williams Specialized breached the contract.

Specifically, the City defendants contend that Williams Specialized violated those portions of the Museum Regulations relating to safety, including but not limited to: using unsuitable and/or defective slings, utilizing dangerous slinging methods, and by

maintaining an unsafe workplace,[6] and that Williams Specialized also failed to obtain adequate insurance coverage and insurance naming the Museum as an additional insured, both in violation of the Museum Insurance Package.[7]

The City defendants argue that a review of the "contractual history" between Williams Specialized and the Museum supports their position that Williams Specialized had contracted to comply with the requirements of both Museum Regulations and the Museum Insurance Package, thereby expressly agreeing to procure insurance naming the Museum as an additional insured and providing indemnification. As such, the City defendants assert that their claims are not barred by the exclusivity provisions of the WCL.

The City defendants contend that the individual purchase orders do not "stand alone," but incorporate by reference the Williams Specialized Scope of Work dated January 10, 2000, the Museum Regulations/Standards for Contractors, as well as the Museum Insurance Package. The City defendants further argue that when Williams Specialized performed the dinosaur assembly and disassembly work each year, it was pursuant to a purchase order with the Museum that incorporated the Museum Regulations for Contractors and the Museum Insurance Package. Significantly, they City defendants

---

[6] As it relates to Williams Specialized's putative failure to maintain a safe workplace, the City defendants refer to those items detailed in plaintiff's bill of particulars dated January 21, 2005, and verified on January 21, 2005, that contains a "laundry list" of Industrial Code violations (12 NYCRR 23).

[7] In relevant part, the Museum Insurance Package required contractors to maintain insurance' including "Contractual Liability (Hold Harmless)" coverage and required the contractor to maintain and pay for a separate "owner's protective policy to protect the owner from his contingent liabilities for damages because of bodily injury . . . which may arise from the contractor's negligence."

note that the January 5, 2004 Museum request for Williams Specialized's services asked that the work be performed "as usual."

In the absence of a grave injury,[8] Workers' Compensation Law § 11 "'bars a third-party action for contribution or indemnification against an employer when its employee is injured in a work-related accident, unless the employer entered into a written contract 'prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.'" *Guijarro v V.R.H. Construction Corp.*, 290 AD2d 485, 486 (2nd Dept 2002). Causes of action for contractual indemnification and breach of contract for failure to obtain insurance are not barred by the provisions of the WCL when the relevant written contract contains such an indemnification clause. *See Murphy v Longview Owners, Inc.*, 13 AD3d 346 (2nd Dept 2004).

It is well established that "the existence of a binding contract is not dependent on the subjective intent of either [party]. In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain. [internal citations omitted]." *Brown Bros. Electrical Contractors v Beam Construction Corp.*, 41 NY2d 397, 399-400 (1977).

---

[8]In the instant action, there has been no suggestion, nor any evidence presented, that Moller suffered a grave injury as defined by the WCL.

As noted by the Court of Appeals, "while it is the responsibility of the court to interpret written instruments, where a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises." *Id.* at 400. In this action, Williams Specialized has failed to meet its burden of establishing the absence of any triable issue of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851[1985]) as to whether on the date of plaintiff's accident there was a written contract in effect by which Williams Specialized agreed to indemnify the Museum.

Accordingly, that branch of Williams Specialized's motion that seeks summary judgment in its favor as to all of the City defendants' cross claims based on the exclusivity provisions of the WCL is denied.

Allen Williams asserts that all of the City defendants' cross claims against him are also precluded by the exclusivity provisions of WCL §§ 11, 29 (6). These provisions provide, in relevant part, that "[a]n employee cannot sue his employer or a fellow employee for an accidental injury, which arose out of and in the course of the employment." Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, WCL § 29, at 196.

Allen Williams asserts that on the date of the accident, he was employed by Williams Specialized as a crane operator and also served as a company vice-president. The City defendants counter that on the date of the accident, Allen Williams was working as an independent contractor while operating the crane and not as an employee of Williams Specialized. As such, the City defendants contend that liability for negligence on

his part cannot be imputed to Williams Specialized, remains with him personally, and claims arising from his negligence, if any, are not barred by the provisions of WCL §§ 11, 29. In support of this contention, the City defendants note that in 2004, Williams Specialized paid Allen Williams as an independent contractor, that he did not work exclusively for Williams Specialized, but rather worked for other companies as well (Allen Williams EBT, annexed as Exh. K to Feldman Aff., at 41, 18-23) and his 2004 tax return discloses that he worked for at least 65 different companies during that year (Tax Return annexed as Exh. L to Feldman Aff.).

In addition, assuming, arguendo, that on the date of the accident, Allen Williams was, in fact, working as an independent contractor, and was performing his work in that capacity, his position as company vice-president, standing alone, does not automatically shield him from personal liability, as it remains a factual issue as to whether at the time of the accident, he was acting in the scope such employment.

Allen Williams, as movant, has failed to meet his burden of establishing the absence of any triable issue of fact as to his employment status on the date of the accident, including whether he was working that day as an employee of Williams Specialized or as an independent contractor and whether the work that he preformed that date was in furtherance of his duties as a company vice-president. (see, Workers' Compensation Law § 29 [6]; *see also, Naso v Lafata*, 4 NY2d 585, 589 (1958); *Jaglall v Supreme Petroleum Co. of N.J.*, 185 AD2d 971, 972 (2nd Dept 1992). Accordingly, that branch of Allen Williams' motion that seeks dismissal of the City defendants' cross claims based on the exclusivity provisions of the WCL is denied.

Allen Williams also contends that there is no evidence that he operated the crane in a negligent manner or otherwise caused plaintiff's injuries and that any claim otherwise is based on mere speculation.

In the papers that the Williams defendants submitted in opposition to the City defendants' motion and in support of their own cross motion, the Williams defendants offered, inter alia, the following relevant, but contradictory, information: "The evidence clearly demonstrates that plaintiff was injured when *the load shifted* and the sling broke and the base fell on him" (Zelko Aff., ¶ 44), and contrarily, that "*[t]he load did not shift* and the crane did not jerk [emphasis added]." *Id.*, ¶ 49.

As movant, Allen Williams bears the initial burden of proving his entitlement to summary judgment by establishing the absence of any triable issue of material fact . *Winegrad v New York University Medical Center*, 64 NY2d 851(1985). Rather than establishing the absence of any material issue of fact, the statements offered in support of Allen Williams's cross motion for summary judgment highlight that the issue of whether the load shifted or not and whether crane operator's error played any role therein remain material issues of fact. A movant's failure to sufficiently demonstrate its right to summary judgment by tendering sufficient evidence to eliminate any material issues of fact requires a denial of the motion regardless of the sufficiency of the opposing papers. *Id.*; *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 (1979).

It is hereby

ORDERED that the branch of the City defendants' motion that seeks the entry of a

default judgment against Williams Specialized Services, Inc. and Williams Specialized, Inc. is denied; and it is further

ORDERED that the branch of the City defendants' motion that seeks summary judgment and indemnification in favor of the City defendants and the striking of Williams Specialized's answer or, alternatively, an order precluding Williams Specialized from offering any evidence concerning the slings is denied without prejudice to a further application by the City defendants to the trial court; and it is further

ORDERED that the branch of the City defendants' motion seeking leave to serve an amended complaint is denied; and it is further

ORDERED that the branch of the City defendants' motion for summary judgment and indemnification in favor of the City defendants and against Allen Williams, or, alternatively, an order precluding Allen Williams from offering any evidence concerning the slings, is denied; and it is further

ORDERED that Williams Specialized's cross motion for summary judgment in its favor as to all of the City defendants' cross claims is denied; and it is further

ORDERED that the Allen Williams motion for summary judgment dismissing the second third-party complaint in its entirety is denied; and it is further

ORDERED that any request for relief not addressed specifically herein, has been reviewed, is without merit, and is denied.

Dated: New York, New York
October 3, 2007

Enter:

LOUIS B. YORK J.S.C.