

Blumenthal v Zacklif't International, Inc.

2008 NY Slip Op 31679(U)

June 4, 2008

Supreme Court, Kings County

Docket Number: 0022331/2002

Judge: Martin M. Solomon

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At an IAS Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of June, 2008

P R E S E N T:

HON. MARTIN SOLOMON,

Justice.

-----X

PHELEP BLUMENTHAL, et ano.

Plaintiff(s),

- against -

Index No. 22331/02

ZACKLIFT INTERNATIONAL, INC., et al.

Defendant(s).

-----X

The following papers numbered 1 to 20 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1 - 9
Opposing Affidavits (Affirmations)_____	10 - 18
Reply Affidavits (Affirmations)_____	19 - 20
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, third-party plaintiff Zacklift International, Inc. (Zacklift), moves for an order, pursuant to CPLR 3126, 3212 and 3211, striking the answer of third-party defendant Autorama Enterprises of the Bronx, Inc. (Autorama) and granting it summary judgment on its third-party complaint seeking indemnification. In its affidavit, defendant Equipment Sales and Service, Inc. (ESS), joins in Zacklift's demand for such relief. Plaintiffs Phelep Blumenthal (plaintiff) and Lia Blumenthal cross-move for an order:

(1) granting them leave to amend their complaint to assert a claim for punitive damages against defendants Zacklift and ESS; (2) granting them summary judgment on the issue of liability against Zacklift to the extent that the court grants Zacklift's motion for summary judgment against Autorama on the grounds of spoliation and holding that plaintiffs' claims against Zacklift pass through to Autorama; and (3) granting plaintiffs leave to amend their complaint to assert a direct claim against plaintiff's employer, Autorama, for impairing their right to sue due to spoliation of evidence, including a claim for punitive damages.

Facts and Procedural Background

Plaintiff was injured in an accident that occurred on February 19, 2000 when he was using a Zacklift Z2020, a tow lift (the Lift), and the arm of the Lift suddenly fell to the ground, causing him to sustain serious personal injuries that resulted in the amputation of his leg. The Lift is hydraulically operated and consists of a telescoping "stinger" arm with a cross bar at its end that is attached to a tow truck; the stinger is lowered from its transport position and is placed under the front end of a disabled vehicle so that the vehicle can be towed without damaging the bumper. The Lift has two J-bolt locks, or J-hooks, which hold the load. The J-hooks are held in place by adjustable safety plates and pivot on the plates; the J-hooks should clear the pivot pins by one-sixteenth of an inch, as stated in the Owner's Manual. Four pyramid blocks are located below the safety plates to carry the weight. A safety chain keeps the stinger from unfolding when it is in a folded, vertical transport position.

Zacklift manufactured the Lift. On December 4, 1991, Zacklift sold the subject Lift to ESS, a distributor. In November 1992, Michael Mazzeo, Sr., as the owner of Mike's Heavy Duty Towing, Inc. (Mike's Towing), purchased the Lift from ESS; the Lift was allegedly sold with an Owner's Manual that came in a sealed plastic bag. In approximately 1995 or 1996, Mike's Towing sold the Lift to Autorama; Autorama claims that it never received a manual for the Lift.

On July 26, 2001, plaintiffs commenced an action against Zacklift in the United States District Court for the Southern District of New York (Index No. 01 Civ 6237 [LAK]). On April 2, 2002, plaintiffs commenced the instant action against Zacklift; Mike's Towing; and Weld-Built Body Co., Inc. (Weld-Built). Plaintiffs commenced a second action in Bronx County against Autorama Towing, Inc.; Autorama Maintenance, Inc.; ESS; and Mazzeo. By order dated September 8, 2004, the two state court actions were consolidated in this court. In June 2005, plaintiffs' action was discontinued against Weld-Built.

As is relevant herein, plaintiffs' causes of action against Zacklift sound in negligent manufacture and design, breach of warranty of merchantability and strict products liability. More specifically, plaintiffs allege that the Lift was defectively designed in that the stinger would free fall unexpectedly under normal use, the Lift was not equipped with an adequate mechanical interlock to prevent the stinger from unfolding, the chain was inadequate to prevent unfolding and the folding design was negligent in that there was no independent fold piston. In its answer, Zacklift claims that plaintiff's injuries were caused by his own culpable

conduct, that the Lift was misused, that the danger was open and obvious, that the Lift had been modified and that the Lift had been abused and/or improperly maintained.

On October 10, 2002, Zacklift commenced a third-party claim against Autorama seeking indemnification or contribution, alleging that during the time before plaintiff's accident that Autorama owned the Lift, Autorama altered it, abused it and failed to properly maintain it, thereby rendering it defective or otherwise unsafe.

On August 17, 2005, Zacklift served a Supplemental Discovery Demand on Autorama pursuant to which it sought to inspect all parts removed from the Lift by Hugh Browne, Autorama's mechanic. In its response, dated November 14, 2005, Autorama stated that it was not in possession of the items demanded and forwarded copies of photographs taken of the parts by Steve Kiffer, an employee of The Travelers Insurance Company, Autorama's workers' compensation carrier, on March 9, 2001, along with an affidavit in which Kiffer stated that he did not take any parts from the Autorama location and that he did not know where the parts currently were or where they went after he left them. On July 20, 2006, Zacklift served a Disclosure Response identifying prior accidents involving lifts that it manufactured.

***Zacklift's Demand for Summary Judgment
on the Ground of Autorama's Spoliation of Evidence***

Zacklift's Contentions

In support of its motion, Zacklift alleges that plaintiff's accident did not occur until four to five years after Autorama purchased the Lift. Zacklift avers that prior to the accident,

Autorama replaced the original safety chain, which was one foot long and was intended to secure the stinger to the tow truck, with a chain that was four to five feet long. Zacklift further contends that Autorama did not have any policy regarding the training of tow truck operators; instead, it relied upon the individual tow truck driver's own experience and knowledge.

Zacklift further argues that following the accident, Autorama did not maintain the Lift in the same condition. Instead, Autorama replaced various parts and intentionally or unintentionally lost or discarded them. More specifically, two days after the accident, Autorama ordered two new Jaybird locks, two lock plates and two safety lock pivot pins. Approximately two to four weeks after the accident, Browne replaced the damaged parts. Following instructions given to him by Ernie Diaz, his supervisor and the shop manager, Browne put the old parts in the boxes that the new parts came in and put the boxes on the floor in Autorama's office.

Zacklift further contends that its engineering expert, Dr. Lee Swanger, is of the opinion that the stinger fell because the J-hooks and/or their receiving pins failed to perform due to uneven wear and/or excessive wear, or due to the improper functioning or positioning of the support plates. Swanger further opines that it is impossible for him to determine whether these parts were worn without physically examining them. In addition, Swanger cannot determine if the parts are original Zacklift parts or replications, and that replications could have changed the operating parameters of the Lift.

Zacklift thus concludes that since it is unable to inspect the parts of the Lift, it is unable to prove its defense to plaintiffs' claims, i.e., that Autorama caused the accident by its negligence in allowing the Lift to become dangerously unsafe or, stated differently, that Autorama's failure to maintain the Lift in proper working order was the proximate cause of the accident, not the alleged design defect of the machine. Hence, by losing or destroying critical evidence, Autorama has irrevocably harmed Zacklift.

Plaintiffs' Contentions

Plaintiffs join in Zacklift's motion seeking summary judgment against Autorama, provided that they are also granted summary judgment against Zacklift on the same basis and that liability for plaintiff's injuries passes through to Autorama.

In support of their position, plaintiffs aver that on February 23, 2001, only four days after the accident, they filed an order to show cause in Supreme Court, Bronx County, which provided that it was:

“FURTHER ORDERED, that respondents, their agents, servants and/or employees be stayed from repairing, modifying or otherwise altering the subject vehicle which caused petitioner's injury pending a hearing on this application; and

“FURTHER ORDERED, that respondents, their agents, servants and/or employees be stayed from selling, disposing or otherwise losing custody and control of the subject vehicle which caused petitioner's injury pending a hearing on this application.”

(the Order to Show Cause).

On March 9, 2001, the parties appeared before the Honorable Kenneth Thompson,

who so ordered a stipulation providing for pre-action discovery, including a direction that respondents provide the identify of the person or entity who repaired the vehicle prior to the incident; that the vehicle be inspected by plaintiffs' attorney and their expert within 15 days; and that Autorama be permitted to continue to use the vehicle, but was enjoined from disposing of it (the Stipulation). On the same day, Kiffer went to the offices of Autorama and examined the truck and its components, taking phonographs of its parts.

Thereafter, when plaintiffs' counsel arrived at the site on March 23, 2001 to inspect the Lift, it was apparent that many of its parts had been replaced and no one knew what had happened to them. During depositions, it was revealed that Browne removed the parts and placed them in Autorama's office, in the presence of Diaz and Powers, the principal of Autorama. In spite of the above discussed court orders, Autorama failed to preserve the evidence, since the parts cannot now be located. Plaintiffs thus claim that they will be prejudiced by Autorama's failure to preserve the parts in that the jury may find it difficult to determine the extent to which the product failed because of faulty maintenance, as opposed to design defect.

ESS

ESS submits an affidavit in support of Zacklift's motion, arguing that it is in the same position as is Zacklift with regard to being able to prove that the accident was caused by faulty maintenance and not by defective design or manufacture. ESS further avers that if plaintiffs are aggrieved by Autorama's mishandling of evidence, plaintiffs should be

permitted to proceed directly against Autorama.

Autorama

In opposition to Zacklift's motion, Autorama argues that the parties fail to establish that it spoliated any evidence. In this regard, Autorama contends that Zacklift never asked that any parts of the Lift be saved, even though it knew of the potential lawsuit early on, when an action was commenced against it in federal court. Autorama thus contends that Zacklift should not be permitted to benefit from its failure to seek discovery in a timely fashion.

More specifically, Autorama argues that when the parties appeared in court on March 9, 2003 for oral argument on the Order to Show Cause, plaintiffs' counsel did not indicate that the temporary stay was violated when the Lift was repaired. Autorama further contends that since the Stipulation permitted it to use the vehicle, it was self evident that the Lift had to be repaired. Autorama also emphasizes that the Stipulation did not require Autorama to retain any parts and points out that in his affidavit, Kiffer does not allege that any parts were missing at the time of his inspection on March 9, 2001. Autorama further explains that it moved twice after plaintiff's accident, hence inferring that the subject parts were inadvertently lost during the moves.

In reliance upon the deposition testimony, Autorama further contends that the parties fail to establish that Autorama negligently lost the parts at issue, since it is not clear when the Lift was first repaired and whether the repairs were made by George Bakker, the owner and

manager of Baker Services Incorporated, a company that repairs commercial trucks and who did work for Autorama before plaintiff's accident, or by Browne. Autorama thus argues that these issues of fact preclude a finding that it negligently or willfully lost the subject parts.

Autorama further avers that plaintiffs fail to establish what effect, if any, the missing parts have on their ability to prove their claims against Zacklift. More specifically, Autorama contends that inasmuch as Zacklift's claim is premised upon a design defect, Zacklift can defend plaintiffs' claims without inspection of every part of the Lift. Further, Zacklift can rely upon the photographs taken by Kiffer, along with the testimony of Bakker and Browne, to establish the condition of the parts as of the date of plaintiff's accident. In addition, the evidence establishes, without an inspection of the missing parts, that the chain that was on the Lift was too long and that the J-hooks were worn.

The Law

“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’ (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1997]; *Popfinger v Terminix Intl., Co. Ltd. Partnership*, 251 AD2d 564 [1998]), thus depriving the party seeking a sanction of the means of proving his claim or defense” (*Kirschen v Marino*, 16 AD3d 555, 555-556 [2005]). Further, “[t]he ‘drastic remedy’ of striking an answer pursuant to CPLR 3126 is warranted when there is ‘a clear showing’ that the failure to comply with discovery demands was

willful and contumacious” (*Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007], quoting *Fellin v Saghal*, 268 AD3d 456, 456 [2000]).

“[U]nder the common-law doctrine of spoliation, ‘when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading’” (*Denoyelles*, 40 AD3d at 1027, quoting *Baglio v St. John’s Queens Hosp.*, 303 AD2d 341, 342-343 [2003]; see also *Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287, 1288 [2007]; *Enstrom v Garden Place Hotel*, 27 AD3d 1084, 1086 [2006]; *Wetzler v Sisters of Charity Hosp.*, 17 AD3d 1088, 1089-1090 [2005], amended on other grounds 20 AD3d 944 [2005]; *Barahona v Trustees of Columbia Univ.*, 16 AD3d 445, 445-446 [2005]; *Herrera v Matlin*, 303 AD2d 198, 198 [2003]). It must also be recognized that “[s]poliation sanctions are not limited to cases where the evidence was destroyed willfully or in bad faith, ‘since a party’s negligent loss of evidence can be just as fatal to [an]other party’s ability to present [a case or] a defense’” (*Madison Ave. Caviarteria v Hartford Steam Boiler Inspection & Ins. Co.*, 2 AD3d 793, 796 [2003], quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [1988]). The court “may, under appropriate circumstances, impose a sanction ‘even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might be needed for future litigation’” (*Iannucci v Rose*, 8 AD3d 437, 438 [2004], quoting *DiDomenico*, 252 AD2d at 53; accord *E.W. Howell Co. v S.A.F.*

La Sala, 36 AD3d 653 [2007] [the sanction of dismissal of a pleading may be imposed upon a party who negligently loses key evidence even absent willful or contumacious conduct]).

“The determination of spoliation sanctions is within the broad discretion of the court” (*Denoyelles*, 40 AD3d at 1027; *see also Dennis v City of New York*, 18 AD3d 599, 600 [2005]). “Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness” (*Iannucci*, 8 AD3d at 438; *see also Castillo v Staten Island Cable LLC*, 19 Misc3d 1105 [A] [2008]). “[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense” (*Denoyelles*, 40 AD3d at 1027; *see also Gerber v Rosenfeld*, 18 AD3d 812, 812 [2005]). “Where a party destroys essential physical evidence ‘such that its opponents are “prejudicially bereft of appropriate means to confront a claim with incisive evidence,” the spoliator may be sanctioned by the striking of its pleading”” (*Gerber v Rosenfeld*, 18 AD3d 812 (2005), quoting *New York Cent. Mut. Fire Ins. Co. v Turnerson’s Elec.*, 280 AD2d 652, 653 [2001], quoting *DiDomenico*, 252 AD2d at 53). Thus, where other evidence exists which is sufficient to establish the claim or defense of the proponent of a spoliation motion, sanctions may be denied (*see Denoyelles*, 40 AD3d at 1027; *Myers v Sadlor*, 16 AD3d 257, 258 [2005]).

Discussion

Herein, Autorama cannot successfully refute Zacklift's contention that Autorama was aware that the examination of the physical evidence, i.e., the Lift, including all of its component parts, was crucial to the defense of this matter. In the first instance, it is impossible to determine the degree of wear and tear, and hence proper or improper repair and/or maintenance, without inspecting the parts involved. Moreover, the importance of such an examination was first established by the temporary stay set forth in the Order to Show Cause and then by the Stipulation, which permitted plaintiffs to inspect the vehicle and prohibited Autorama from disposing of it. Further, the deposition testimony of Autorama's mechanic establishes that when he replaced the parts, the old parts were put in boxes in the office, which conduct evidences Autorama's understanding that the parts should not be discarded. Finally, inasmuch as Autorama retained possession and control over the Lift after plaintiff's accident, and therefore was in a position to retain any parts that were removed, it is irrelevant whether the parts were removed by Browne, Bakker or some other unidentified party.

The court similarly finds Autorama's contention that it should not be sanctioned for the loss of the parts because the Stipulation did not require it to maintain said parts and impliedly permitted it to repair the Lift to be disingenuous. In the first instance, there is no authority offered for Autorama's contention that spoliation sanctions can only be imposed for the violation of a court order directing the preservation of evidence. In fact, to the

contrary, case law holds that the court can impose a sanction even if the destruction of evidence occurred through negligence before the spoliator became a party to the action (*see e.g. Iannucci*, 8 AD3d at 438; *DiDomenico*, 252 AD2d at 53). Moreover, inasmuch as the Stipulation enjoined Autorama from disposing of the vehicle, it must be interpreted as enjoining Autorama from disposing of the component parts, or the intent of the provision would be nullified.

Hence, under the circumstances of this case, the court finds that the loss of the parts comprising the Lift at the time of the accident deprives Zacklift of the means of proving that the accident resulted from negligent repair and/or maintenance (*see generally Erdely v Access Direct Sys.*, 45 AD3d 724, 726 [2007] [in light of defendant's negligence in disposing of the ladder, a key piece of evidence, at a time when it should have been obvious that the injured plaintiff would assert a claim, it was appropriate, as a sanction, to preclude defendant from controverting plaintiffs' prima facie showing regarding the existence of a defect and defendant's notice of it]; *Neal v Easton Aluminum*, 15 AD3d 459, 460 [2005] [the court should have granted defendants' motions to dismiss based on plaintiff's negligent loss of a key piece of evidence, the subject bicycle, which was crucial to the defense of the matter, since contrary to plaintiff's contention, a deposition of her expert would not be an adequate substitute for production of the requested discovery]; *Standard Fire Ins. Co. v Fed. Pac. Elec. Co.*, 14 AD3d 213, 220 [2004] [plaintiff's complaint should have been stricken, since there was no dispute that it was on notice at the time of the engineer's inspection of the

premises, conducted within one month of the fire, that the electrical panel and circuit breakers would be needed for future litigation and that inspection was the sole basis for plaintiff's claim]; *Lindquist v Pillsbury Co.*, 1 AD3d 410, 411 [2003] [the court providently exercised its discretion in precluding plaintiff from offering evidence regarding the jar that injured plaintiff, a key piece of evidence crucial to the defense of the action, since plaintiff could not produce the jar and a deposition of her expert would not be an adequate substitute for production of the requested discovery]; *cf. Westbroad Co. v Pace El.*, 37 AD3d 300 [2007] [defendant's request for a spoliation sanction against plaintiff, based on a claimed inability to perform tests on a piece of equipment due to corrosion sustained while stored in plaintiff's basement, was properly denied for failure to show that defendant was on notice that the equipment would be needed for future litigation]).

Accordingly, Zacklift's motion is granted to the extent of precluding Autorama from offering any evidence to refute Zacklift's claim that the accident occurred because the Lift was negligently repaired and/or maintained (*see e.g. Scherer v North Shore Car Wash*, 32 AD3d 426 [2007] [under circumstances where defendant owner repaired the vehicle involved in the subject accident in violation of an outstanding "Amended Notice to Preserve," the sanction of precluding him from offering any evidence at trial regarding the condition of the vehicle was appropriate]; *Cabasso v Goldberg*, 288 AD2d 116, 116-117 [2001] [defendant U-Haul's answer was properly stricken for its spoliation of key evidence, i.e., irretrievably dismantling the braking system of the subject trailer, after an inspection had been conducted

by its own expert, where U-Haul thereafter denied plaintiff and co-defendant an opportunity to inspect the trailer, despite their immediate requests to do so, and notwithstanding ensuing court orders which directed U-Haul to make the trailer available for inspection, since U-Haul's actions deprived plaintiff and co-defendant any means of establishing a prima facie case against it as premised upon the claim of negligent maintenance and repair]).

In so holding, the court implicitly rejects Autorama's contention that Zacklift is not prejudiced by the loss of the component parts of the Lift because it can rely upon the photographs taken by Autorama's workers' compensation carrier. In this regard, Zacklift's expert opined that he was unable to make an exact measurement of the degree of wear of the parts without a physical inspection and Bakker testified at his depositions that he could not state whether the photographs of the damaged Lift depicted the Lift that he worked on (*see generally New York City Tr. Auth. v Consolidated Edison Co.*, 40 AD3d 273, 273 [2007], *appeal denied* 9 NY3d 817 [2008] [dismissal of the complaint was an appropriate sanction where plaintiffs spoliated the cable tray that allegedly caused the subject accident, since inspection of the tray was necessary to a proper investigation of the cause of the fire and photographs of the fire site it was allowed to take were not an adequate substitute therefor]; *Kirkland*, 236 AD2d at 175 [the physical items themselves, in the precise condition they were in immediately after an accident, may be far more instructive and persuasive to a jury than oral or photographic descriptions]).

Inasmuch as ESS is in the same position as is Zacklift with regard to proving that the

Lift was improperly repaired and/or maintained, Autorama is similarly precluded from offering any evidence on the issue as against ESS.¹

***Plaintiffs' Demand for Summary Judgment
on the Ground of Autorama's Spoliation of Evidence***

Plaintiffs' Contentions

In support of their demand for summary judgment, plaintiffs contend that unless they are also awarded summary judgment against Zacklift and Autorama, so that they will be able to proceed to trial on the issue of damages, with Autorama responsible for Zacklift's liability, Autorama would reap a windfall. More specifically, Autorama would argue that the Lift failed because of improper maintenance and it is insulated from liability to plaintiff by the Workers' Compensation Law because it was his employer at the time of the accident. Plaintiffs further argue that "the failure to preserve the evidence . . . has eliminated plaintiff's ability to disprove defendant Zacklift's contention that the product was so badly worn such that its design did not contribute to the happening of the accident." In the alternative, the jury could reasonably find that even if the Lift was defectively designed, the design was not a substantial factor in causing plaintiff's injuries, and instead opt to find that Autorama's alleged poor maintenance was the sole cause of the accident.

¹ Although ESS did not move for such an order by separate cross motion, its demand for such relief was clearly before the court and all parties were given ample opportunity to object to the entry of such an order in favor of ESS.

Autorama's Contentions

Autorama opposes this branch of plaintiffs' cross motion, arguing that plaintiffs lack standing to obtain such relief, since they have no direct claims against Autorama. Autorama further argues that plaintiffs are not entitled to summary judgment if Zacklift's motion is granted, since Zacklift's claim against Autorama for indemnification is based upon negligent maintenance and plaintiffs' claim against Zacklift is premised upon a claim of defective design. Autorama further avers that plaintiffs' demand for summary judgment cannot be granted in that plaintiffs do not offer any expert opinion in support of their position.

Autorama also relies upon a affidavit submitted by William J. Meyer, a mechanical engineer, in which he opines that the Lift was defectively designed in that it used a single hydraulic actuator, as opposed to separate units for raising and lowering the Lift and that the J-hooks are subject to undue wear and failure and can disengage, which permits a free fall of the stinger. Meyer further states that he is able to offer an opinion regarding the defect of the design of the Lift and to assess whether maintenance was reasonable without the component parts, since the photographs, along with the other evidence reviewed, are sufficient. Meyer thus concludes that it is his opinion that the Lift was defectively designed and that it relies upon unreasonable maintenance practices and unusual operational procedures to avoid the problem of the stinger falling.

Zacklift's Contentions

In opposition to this branch of plaintiffs' cross motion, Zacklift argues that plaintiffs

fail to make a prima facie showing of negligence, breach of warranty or a design defect on the part of Zacklift.

The Law

It is well established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues” (*see e.g. Kolivas v Kirchoff*, 14 AD3d 493, 493 [2005], quoting *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Kolivas*, 14 AD3d at 493; *accord Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 573-574 [2004]).

Herein, plaintiffs seek to recover from Zacklift under theories of negligent design and manufacture, breach of warranty of merchantability and strict products liability. In order to succeed on a claim for a breach of warranty of merchantability, “the jury need[s] to find that the product was not ‘fit for the ordinary purposes for which such goods are used’” (*Bradley v Feiden*, 8 NY3d 265, 273, citing UCC 2-314 [2] [c]; *Denny v Ford Motor Co.*, 87 NY2d 248, 258-259 [1995], *rearg denied* 87 NY2d 969 [1996]).

Under the doctrine of strict products liability, the focus shifts from the concept of fault

to the presence of a defect (*Caprara v Chrysler*, 52 NY2d 114, 123 [1981], *rearg denied* 52 NY2d 1073 [1981]). In discussing such liability the court has explained that:

“In a defective design cause of action, a claim for negligent design defect is functionally synonymous with a claim for strict products liability with respect to the manufacturer. *Denny v Ford Motor Co.*, 87 NY2d 248, 258 (1995). In order to establish a prima facie case of negligent design defect, the plaintiff must prove that the manufacturer failed to exercise reasonable care in designing the product, and that he knew or should have known of the dangerous condition of the product. *Giunta v Delta Intern. Mach.*, 300 AD2d 350, 352 (2d Dept. 2002). To prevail in strict products liability, a plaintiff must prove that the product contained an unreasonably dangerous design defect. *Id.* Thus, the plaintiff in a design defect action ‘must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff’s injury.’ *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 (1983).”

(*Rose v Brown & Williamson Tobacco*, ___ AD3d ___, 2008 NY Slip Op 3147, 12-13 [2008])

Stated differently:

“‘[A] defectively designed product is one which, at the time it leaves the seller’s hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce.’”

(*Denny*, 87 NY2d at 269 [1995], quoting *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479 [1980]). “Where there is no proof of a specific defect in a product, a plaintiff may rely on circumstantial evidence that the product did not function as intended

to prove a defect” (*Dubecky v S2 Yachts*, 234 AD2d 501, 502 [1996]).

As is also relevant herein, it has been recognized that:

“in certain circumstances, a manufacturer may have a duty to warn of dangers associated with the use of its product even after it has been sold. Such a duty will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer; the existence and scope of such a duty are generally fact-specific.”

(*Liriano v Hobart*, 92 NY2d 232, 240 [1998]; *accord Cover v Cohen*, 61 NY2d 261, 274-275 [1984]; *Magadan v Interlake Packaging*, 45 AD3d 650, 653 [2007]).

In order to demonstrate entitlement to judgment as a matter of law, a defendant must establish that the subject product was not defective in any regard, and that if there was a defect, it was not a proximate cause of the plaintiff’s injuries (*see e.g. Wengenroth v Formula Equip. Leasing*, 11 AD3d 677, 679 [2004]), or that users were not adequately warned of the product’s dangers (*see generally Warlikowski v Burger King*, 9 AD3d 360, 361 [2004]; *Vail v KMart*, 25 AD3d 549, 551 [2006]).

With regard to the Autorama’s alleged liability to plaintiff, it must also be recognized that Autorama is insulated from liability to him because Autorama was his employer at the time of the accident (*see generally Workers’ Compensation Law* §§ 11, 29 [6]; *Reich v Manhattan Boiler & Equip.*, 91 NY2d 772, 779 [1998] [when an employee is injured in the course of employment, the sole remedy for the employee lies in the Workers’ Compensation Law]; *Gonzales v Armac Indus.*, 81 NY2d 1, 8 [1993] [the sole and exclusive remedy of an employee against his employer for injuries in the course of employment is compensation

benefits]; *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 139 [2000] [the sole remedy of an employee against his employer for injuries in the course of employment is benefits under the Workers' Compensation Law]; *Duche v Star Recycling*, 261 AD2d 503 [1999] [plaintiffs could not maintain an action against the employer or fellow employee of the plaintiffs' decedent for the death that arose out of and in the course of the decedent's employment]; *Williams v Brentwood Wholesale*, 261 AD2d 470 [1999] [plaintiff's personal injury cause of action was barred by the exclusive remedy provisions of the Workers' Compensation Law]).

Discussion

Applying the above principles of law to the instant facts, plaintiffs have failed to demonstrate that they are entitled to summary judgment against either Zacklift or Autorama. With regard to Zacklift, plaintiffs fail to make a prima facie showing that the Lift was negligently designed or maintained, that there was a breach of the warranty of merchantability or that he is entitled to recover on the theory of strict products liability. In so holding, the court notes that although plaintiffs rely upon the deposition testimony of Bakker and Browne, and the affidavits of Frank Russo and Richard Eisele, as is more fully discussed hereinafter, to establish that the Lift was defectively designed and that the design defect was the proximate cause of plaintiff's accident, none of these parties have been qualified as an expert. Moreover, even if the opinions of Bakker, Browne, Russo and Eisele

are considered,² an issue of fact that cannot be resolved on the papers is created by the affidavit submitted by Autorama's expert, wherein he opines that the accident was caused by improper repair and/or maintenance of the Lift, and not by a design defect.

Moreover, the court notes that if plaintiffs were permitted to recover against Zacklift on the basis of Autorama's conduct in failing to retain the Lift and its parts, they would be permitted to recover damages without making a prima showing of entitlement to judgment in the first instance. Further, an award of summary judgment to plaintiffs on the basis of spoliation would be particularly inappropriate on these facts because plaintiffs are not unduly prejudiced by loss of the Lift and its component parts in seeking to establish the existence of a design defect (*see generally Lichtenstein v Fantastic Mdse.*, 46 AD3d 762 [2007] [a design defect may be established even in the absence of the specific instrumentality that caused a plaintiff's injuries by, inter alia, introducing into evidence other products of the same design]; *Rios v Johnson V.B.C.*, 17 AD3d 654, 656 [2005] [in cases alleging design defects, the loss of the specific instrumentality that allegedly caused plaintiff's injuries was not automatically prejudicial to the manufacturer thereof because defects could be exhibited by other products of the same design]; *Dayal v Coinmach Indus. Co.*, 284 AD2d 206 [2001] [plaintiff's theory that the subject machine was defectively designed would not necessarily require inspection of the particular machine that occasioned plaintiff's injuries].

² In this regard, the court notes that it is well settled that "an expert may be qualified without specialized academic training through '[l]ong observation and actual experience'" (*Price v New York City Hous. Auth.*, 92 NY2d 553, 559 [1998]), quoting *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398 [1941]).

Similarly, plaintiff is not entitled to summary judgment as against Autorama, directly, since his only remedy as against his employer is the recovery of workers' compensation benefits. Thus, the issue of whether Zacklift is entitled to contribution or indemnification from Autorama has no relevance to the determination of the issue of whether plaintiff is entitled to recover damages as against Autorama.

Plaintiffs' Cross Motion to Amend Their Complaint

Plaintiffs' Contentions

In support of that branch of their cross motion seeking leave to amend the complaint to interpose a demand for punitive damages against Zacklift and ESS, plaintiffs argue that the Lift at issue herein had a known history of causing injuries. In the event that plaintiffs are not granted summary judgment, they also seek leave to amend the complaint to assert a direct cause of action against Autorama for impairing their right to sue Zacklift and ESS.

More specifically, plaintiffs allege that they are entitled to an award of punitive damages against Zacklift and ESS for manufacturing and distributing a product which they knew was dangerous without warning its end users. In this regard, plaintiffs allege that Zacklift was aware of at least two accidents that occurred in the same manner prior to plaintiff's injury and that resulted in lawsuits against it, i.e., Lowell Inselman was injured when the stinger on a Zacklift Z-20 fell on him in 1990 and Butch Licari was injured by such a fall on April 26, 1994. It is plaintiffs' contention that all of the lifts manufactured by Zacklift shared the same basic design and hence defects.

In addition, Frank Russo, a tow operator in the Bronx for over 36 years, provides an affidavit in which he alleges that he observed three separate instances, involving two different Zacklift lifts, in which the stinger free fell. Russo further avers that he personally spoke to Stanley Zackovich, the principal of Zacklift, in 1993, and gave him a simple and inexpensive suggestion on how to prevent such an occurrence, i.e., use a rubber block to keep the J-hook from unlocking; Zacklift never adopted this suggestion. Russo further alleges that after the first time one of the lifts fell, he spoke with Timothy Tierney of Rose Ledge, a Zacklift distributor, and that Tierney was already aware that the Zacklift towing device was defective in this regard. Russo also notes that the fact that the stinger was not held in position by a retaining valve, and was instead held only by gravity, was a problem.

Further, Richard Eisele, an employee of Crown Towing in the Bronx, for approximately 13 years, states in his affidavit that he allegedly complained about his Zacklift towing device, claiming that the rubber tipped bolts which were designed to keep the J-hooks from slipping were flimsy and bent easily, and the stinger was not held up by any hydraulic force. When he called Zacklift to order more rubber tipped carriage bolts, he was sent a V spring to be installed on the J-hook, so it no longer had to be turned with the rubber tipped bolts. Moreover, Zackovich testified at his deposition that Zacklift did not notify its customers of any issues with the product, since there were none. In addition, Zacklift changed the design of the Lift to close the J-hooks by using a spring loading system, instead of the manual system previously used, but failed to advise its existing customers of this

change.

Plaintiffs accordingly conclude that Zacklift's conduct demonstrates a callous and wilful disregard for the well being of the product's users. Plaintiffs further aver that they should be entitled to an award of punitive damages on the ground that numerous experts, including that retained by Zacklift and Autorama, as well as the deposition testimony of Bakker and the affidavit of Russo and Eisele, establish that the Lift was defectively designed. More specifically, plaintiffs assert that Zacklift was aware that the design of its product would allow the stinger to free fall, instead of creeping slowly down, consistent with industry standards.

Plaintiffs further seek to add a claim for punitive damages against Autorama on the ground that it failed to preserve the component parts of the Lift involved in the accident. In the alternative, plaintiffs allege that they should be permitted to amend their complaint to assert a direct cause of action against Autorama for impairing their right to sue Zacklift, since it is well established that an employee may bring a direct cause of action against his or her employer under circumstances where the employer destroys evidence and such spoliation impairs the employee's right to sue a third-party tortfeasor.

ESS

ESS submits an affidavit in opposition to this branch of plaintiffs' cross motion, arguing that an award of punitive damages is available in a products liability case only if a plaintiff can demonstrate that a defendant's conduct is reckless, grossly negligent or callous.

Herein, plaintiffs are not able to meet this standard with regard to ESS, since their claim that the Lift had a well known history of causing injury cannot be sustained. In so arguing, ESS avers that there is no allegation that anyone at ESS had any knowledge of the failure of any of Zacklift's equipment. ESS further avers that since plaintiffs admit that the accident could have been caused by negligent maintenance alone, there can be no award of punitive damages against the manufacturer or distributor.

ESS does not oppose that branch of plaintiffs' motion that seeks to amend the complaint to interpose a direct claim against Autorama.

Autorama

In opposition to plaintiffs' cross motion, Autorama argues that New York does not permit a party to sue for impairing his or her right to sue, since the law prohibits separate causes of action based upon spoliation. Rather, if it is established that an employer improperly destroyed evidence, the court may impose such sanctions as it deems appropriate.

Autorama further argues that plaintiffs are not entitled to amend the complaint to demand punitive damages as against it, since plaintiffs fail to establish that Autorama intentionally, maliciously, outrageously or wantonly destroyed the parts at issue herein. Instead, at most, plaintiffs have demonstrated that Autorama negligently mislaid the parts. Autorama further argues that although it takes no position with regard to whether plaintiffs should be permitted to obtain punitive damages against Zacklift, Zacklift cannot obtain contribution or indemnity from it on such an award.

Leave to Amend

It is well settled that “[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Morris v Queens Long Is. Med. Group*, 49 AD3d 827 [2008], quoting *Alan Assoc. v Lazzari*, 44 AD3d 95, 99 [2007]). “Prejudice requires that ‘the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position’” (*RCLA v 50-09 Realty*, 48 AD3d 538, 538 [2008], quoting *Loomis v Civetta Corinno Constr.*, 54 NY2d 18, 23 [1981]). “Prejudice, of course, is not found in the mere exposure of the defendant to greater liability” (*Loomis, id.* at 23-24, citing *Wyman v Morone*, 33 AD2d 168, 172 [1969] [Cooke, J, dissenting]).

Furthermore, as recently stated by this Court in the case of *Lucido v Mancuso* (49 AD3d 220 [2008]):

“[A] plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance [and] the legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt (*Sample v Levada*, 8 AD3d 465, 467-468; see *Sleepy’s, Inc. v Orzechowski*, 7 AD3d 511; *Zacma Cleaners Corp. v Gimbel*, 149 AD2d 585, 586).”

Punitive Damages

In discussing whether an award of punitive damages is appropriate, it has been held that:

“To warrant an award of punitive damages, there must be proof of recklessness, or a conscious disregard of the rights of others. *See Hartford Acci. & Indem. Co. v Hempstead*, 48 NY2d 218 (1979). It is also well settled that punitive damages may not be premised upon mere negligence. *See Everett v Loretto Adult Community, Inc.*, 32 AD3d 1273 (4th Dept. 2006); *Morton v Brookhaven Memorial Hosp.*, 32 AD3d 381 (2d Dept. 2006) (‘[p]unitive damages are recoverable where the conduct in question evidences a high degree of moral culpability, or the conduct is so flagrant as to transcend mere carelessness, or the conduct constitutes willful or wanton negligence or recklessness) (internal quotation marks and citations omitted).”

(*Rose*, 2008 NY Slip Op 3147 at 23). “[A] principal goal of punitive or exemplary damages is to ‘deter future reprehensible conduct’ by the wrongdoer ‘and others similarly situated’ (*Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 81 [2007], quoting *Ross v Louise Wise Servs.*, 8 NY3d 478, 479, 489 [2007] [citations omitted]).

As is also relevant herein, it is now well settled that a cause of action premised upon the willful failure to warn has been recognized in products liability actions and has been deemed an appropriate vehicle for the assessment of punitive damages (*see e.g. Home Ins. Co. v American Home Prods.*, 75 NY2d 196 [1990]; *Anderson v Fortune Brands (In re Kings County Tobacco Litig.)*, 187 Misc2d 404, 407 [2000]). Similarly, it has been held that plaintiff was properly granted leave to amend his complaint to interpose a demand for punitive damages where he predicated his claim on defendants’ failure to equip the subject machine with safety mechanisms even though, as their pretrial deposition testimony showed, they were aware of the need for such devices, since punitive damages may be awarded when a defendant’s conduct is so reckless or wantonly negligent as to be the equivalent of a

conscious disregard of the rights of others and may be recovered in a negligence action as well as a strict products liability action, at least insofar as it is founded on a failure to warn (*Dumesnil v Proctor & Schwartz*, 199 AD2d 869, 870-871 [1993]).

Additionally, it is well settled that indemnity for punitive damages is barred by public policy (*Biondi v Beekman Hill House Apt.*, 257 AD2d 76, 81 [1999]).

Herein, plaintiffs have demonstrated that Zacklift was aware of two previous accidents and other complaints arising out of the use of its lifts, and that Zacklift made no effort to advise the owners of its equipment of any danger involved in using the lifts. Hence, plaintiffs' request to amend their complaint to interpose a demand for punitive damages as against Zacklift is not palpably insufficient or patently devoid of merit. Accordingly, leave to so amend the complaint is granted, with the factual sufficiency of the demand to be determined by further motion practice or at trial. Indeed, in addressing a similar motion seeking to amend a complaint to assert of demand for punitive damages in a products liability action, the court held that:

“While defendants have vigorously argued that the evidence does not support an assessment of punitive damages against them, this argument is more appropriately raised on a motion for summary judgment or at trial because a motion to amend is not a proper vehicle for the determination of the merits of an issue (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:11, at 361).”

(*Dumesnil*, 199 AD2d 869, 871 [1993]).

Implicit in this holding is the court's finding that plaintiffs' delay in seeking leave to

amend the complaint does not warrant denial of the motion. In this regard, it is noted that Zacklift's knowledge of the other accidents involving its lifts was not made known to plaintiffs until July 2006, almost four years after the action was commenced. Moreover, Zacklift's contention that it will be prejudiced in obtaining information regarding the prior accidents and/or complaints due to the passage of time is specious inasmuch as Zacklift defended those actions and/or received the complaints at a time when any pertinent information was available to it. Finally, after obtaining notice of the prior accidents, plaintiffs, who were not parties thereto, needed time to investigate and to obtain supporting affidavits (*see generally Baleno v Jacuzzi Research*, 93 AD2d 982, 982-983 [1983] [the court properly granted plaintiffs leave to amend their complaint to assert a demand for punitive damages where there was no indication that defendants were hindered in the preparation of its case or prevented from taking the necessary measures to support their position]).

The court reaches a different conclusion, however, with regard to ESS, since plaintiffs fail to allege any facts that support a finding that ESS had any knowledge of prior accidents or unsafe functioning. Hence, that branch of plaintiffs' cross motion seeking leave to amend the complaint to interpose a demand for punitive damages against ESS is denied, since the proposed amendment is patently devoid of merit. In so holding, the court notes that in their reply affirmation, plaintiffs discuss only Zacklift's knowledge of the previous accidents and consumer complaints, making no mention whatsoever of ESS.

Similarly, plaintiffs' request for leave to interpose a demand for punitive damages as

against Autorama is denied as devoid of merit. In this regard, the court notes that Autorama was not involved in the manufacture or distribution of the Lift and plaintiffs point to no case law authority that would allow the court to award punitive damages as a sanction for the spoliation of evidence. In addition, plaintiffs fail to allege any facts that would permit the court to conclude that Autorama's spoliation of evidence or the alleged improper maintenance and/or repair was anything more than negligent. Further, inasmuch as it has not been determined that Zacklift is liable to plaintiffs for any damages whatsoever, it would be premature to address the issue of indemnification (*see generally Pennsylvania General Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 469 [1986] [inasmuch as none of the underlying claims had yet been resolved and neither the fact nor extent of the loss had been determined, a declaratory judgment on the indemnification issue would be premature]; *Cook v Consolidated Edison Co.*, ___ AD3d ___, 2008 NY Slip Op 4200, 2 [2008] [since issues of fact existed concerning the owner's and the tenant's negligence, the owner's motion for summary judgment on its cross claim for contractual indemnification against the tenant was correctly denied]; *Rivera v Ambassador Fuel & Oil Burner*, 45 AD3d 275 [2007] [summary judgment based on common law indemnification was premature, since no allocation could be made prior to the resolution of factual issues concerning liability]; *Brunjes v Lasar Mfg. Co.*, 40 AD3d 567 [2007] [since defendant did not establish entitlement to summary judgment dismissing the negligence cause of action, the conditional grant of summary judgment in its favor on its cause of action for indemnification was premature]).

Direct Cause of Action against Autorama

In addressing this demand for relief, it must first be recognized, as discussed above, that the sole and exclusive remedy of an employee against his employer for injuries in the course of employment is compensation benefits (*see e.g. Reich*, 91 NY2d at 779; *Gonzales*, 81 NY2d at 8; *Lane*, 276 AD2d at 139; *Duche*, 261 AD2d 503; *Williams*, 261 AD2d 470).

It must also be noted that the tort of third-party negligent spoliation of evidence is not cognizable in this state (*Ortega v City of New York*, 9 NY3d 69 [2007]). It has been held, however, that an employee can maintain a common law action against his or her employer if the employer's actions impaired the employee's right to recover damages from a third-party tortfeasor (*see Monteiro v Werner Co.*, 301 AD2d 636, 637 [2003], citing *DiDomenico*, 252 AD2d at 53; *Vaughan v City of New York*, 201 AD2d 556 [1994]; *Coley v Ogden Mem. Hosp.*, 107 AD2d 67 [1985]).

Applying the above general principles of law, and in view of the facts of this case, the court finds that plaintiffs are not entitled to amend the complaint to assert a direct cause of action against Autorama. In the first instance, plaintiff's sole and exclusive remedy against Autorama, as his employer, for injuries incurred in the course of employment, is compensation benefits. This rule of law accordingly precludes the court from issuing an order that would allow plaintiff to assert a cause of action directly against Autorama for injuries that he sustained in the course of his employment and for which he received workers' compensation benefits

Further, as is also discussed above, an employee can assert a claim “if the employer’s actions impaired the employee’s right to recover damages from a third-party tortfeasor.” Here, however, as discussed above, plaintiff’s right to sue Zacklift has not been impaired, since he can establish that the Lift at issue herein was defectively designed or manufactured in reliance upon other evidence (*see generally Lichtenstein*, 46 AD3d 762; *Rios*, 17 AD3d 654; *Doyal*, 284 AD2d 206). Indeed, plaintiffs’ claim for punitive damages is predicated upon its claim that other lifts manufactured and sold by Zacklift suffer from the same defects as did the Lift that injured plaintiff. In the alternative, plaintiffs need not assert a direct cause of action against Autorama to obtain sanctions against it for spoliation of evidence or negligent impairment of ability to assert a third-party claim, since the court already has jurisdiction over Autorama, so that any sanctions deemed appropriate can be awarded within the context of the pending action (*see generally Millard v Alliance Laundry Sys.*, 20 AD3d 866, 867 [2005]).

Conclusion

Zacklift’s motion is granted only to the extent of precluding Autorama from offering any evidence to refute Zacklift’s defense that plaintiff’s accident occurred as the result of Autorama’s improper maintenance and/or repair of the Lift; ESS is granted the same relief. Plaintiffs’ cross motion is granted only to the extent of permitting them to amend their complaint to assert a demand for punitive damages as against Zacklift; an amended complaint so providing shall be served within 45 days of service upon plaintiffs of a copy of this

decision with notice of entry, or plaintiffs shall be deemed to have waived the right to amend.

All other relief requested herein is denied.

The foregoing constitutes the order and decision of this court.

ENTER.

J. S. C.

Honorable Martin M. Solomon **S.C.**