At an IAS Term, Part 20 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 11th of December, 2008

P R E S E N T:

HON. ROBERT J. MILLER,

Justice.

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RICARDO SACARELLO,

Plaintiff,

Index No. 29281/03

- against -

THE CITY OF NEW YORK, CRYSTAL WINDOWS & DOOR SYSTEMS AND A.W.L. INDUSTRIES, INC.

Defendants.

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A.W.L. INDUSTRIES , INC.

Index No. 75937/07

Third-Party Plaintiff

-against-

TOMORROW WINDOW CORP.

Third-Party Defendant

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The following papers numbered 1 to 14 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4, 5-6
Opposing Affidavits (Affirmations)	7-12
Reply Affidavits (Affirmations)	13, 14
Affidavit (Affirmation)	
Other Papers	

The plaintiffs are represented by the law of Manual A. Romero, P.C., by Manual A. Romero, Esq., of counsel, the defendants the City of New York are represented by Michael A. Cardozo, Esq., Corporation Counsel of the City of New York by Dana Wiczyk, Esq., of counsel, the defendant Crystal Windows and Doors Systems LTD s/h/a Crystal Windows and Doors Systems is represented by the law firm of Hammill O'Brien, Croutier, Dempsey & Pender, P.C., by Merle Schrager, Esq., of counsel, the defendants A.W.L. Industries, Inc., are represented by the law firm of Conway, Farrell, Curtin & Kelly, P.C., by Peter J. Calandrella, Esq.

Upon the foregoing papers, plaintiff Ricardo Sacarello cross-moves 1) for an order, pursuant to CPLR 3212, granting him summary judgment against the City of New York (The City) on the issue of liability or, in the alternative, for an order striking the City's answer for spoliation of evidence or, in the alternative, precluding the City;" from offering evidence as to the destroyed items of evidence not previously exchanged during discovery or made available for inspection or, in the alternative, at trial, granting him a missing evidence or adverse or negative inference charge or instruction; 2) striking the City's answer for failing to produce a material notice witness for a court-ordered examination before trial or, in the alternative, "precluding the City" or, at trial, granting him a missing witness or adverse or negative inference charge or instruction or, in the alternative, striking the City's answer for failing to comply with court-ordered discovery or, in the alternative, "precluding the City;" 3) granting him summary judgment against defendant AWL Industries, Inc. (AWL) on the

issue of liability pursuant to CPLR 3212 or, in the alternative, striking AWL's answer for failing to produce a witness for court-ordered examination before trial and for failing to produce court-ordered discovery or, in the alternative, "precluding AWL," or at trial, granting him a missing witness or adverse or negative inference charge or instruction; and 4) for an order "extending" the note of issue.[1] AWL and plaintiff separately move and cross-move, respectively, for an order, pursuant to CPLR 3124 and 3126, to permit them to inspect the window which fell on plaintiff and to inspect the premises where plaintiff's accident occurred, to direct the City to produce for inspection and copying 20 boxes of records stored at the City's BQE facility, and for sanctions based upon the City's alleged spoliation of the subject window while in the City's exclusive possession.

Plaintiff, a New York City police detective, commenced the instant action for personal injuries he allegedly sustained on June 17, 2003 when he attempted to close a window in the stairwell of the fourth floor of the building in which he was working, known as Brooklyn Narcotics North, located at 245 Glenmore Avenue in Brooklyn. At his deposition, plaintiff testified that he walked to the fourth floor stairwell in order to make an undercover cell phone call in a quiet area. When he arrived in the stairwell, he stood on the landing in front of a large window, which was approximately three to four feet high and three feet wide. The walls in that area were concrete and the window frame was metal. The window consisted of double panes, meaning that the panes of glass were "one on top of the other." Plaintiff

[1]AWL and Crystal previously moved for relief relating to discovery but these motions were resolved by court order.

testified that the bottom pane opened and closed by sliding up and down, and that the bottom part of the window was opened wide, "as far as it could go," "pushed up, almost to the middle point" of the window.

Plaintiff decided to close the window since there was traffic noise from outside. While holding his cell phone is his left hand, he touched the bottom ledge of the window that extended out with his right hand. Within seconds, the bottom glass pane, along with its frame, "came down," struck him on the top of his head, and broke. The top glass window pane "stayed attached" to the wall. Plaintiff testified that the plate of glass which broke was a double plate of glass, that the first plate was broken, and that the second plate of glass, which had wire inside it, did not break, and was closer to the "outside." He also stated that the window faced "Snyder Street," and that there were approximately three stairwells in the building. Plaintiff's counsel represents that plaintiff testified that there was a mural across the street from the stairwell where plaintiff fell but plaintiff has not included this page of his deposition in support of his cross motion.

The window was manufactured by defendant Crystal Windows & Door Systems (Crystal) and was allegedly installed by AWL or its subcontractor, Tomorrow Window.

The complaint alleges, among other things, that the City, which owned the building, reserved to itself the responsibility of its "caretaking;" repaired the subject window in an unsafe manner; was negligent in permitting the defective window to remain at the premises; and entered into an agreement with Crystal to install the window. The complaint further

alleges that Crystal installed and repaired the window in a negligent manner; that pursuant to an agreement with Crystal, AWL installed the window in an unreasonably safe and inadequate manner; and that Crystal and AWL were negligent in allowing the window to remain in a defective condition.

Plaintiff's Cross Motion against the City

After a protracted period of discovery, plaintiff made the instant cross motion for summary judgment against the City and AWL. In support of that branch of his cross motion which seeks summary judgment against the City, plaintiff argues that the City created and had actual notice of the defective condition. Plaintiff first asserts that the City was on notice of two prior incidents involving the same window which struck him based upon the testimony of non-party witnesses Katie Cyrus, a payroll employee of the New York City Police Department (NYPD), and Veronica Correa, a NYPD detective.[2] To demonstrate that the City created the defective window condition, plaintiff relies on the testimony of Angela Lewis Maddox, a NYPD engineer.

Ms. Cyrus testified that on January 8, 2003, while working at 245 Glenmore Avenue, she was in the fourth floor stairwell "in the rear of the building" where there was a "window over looking [sic] [or facing] Glenmore Avenue." The window had wire inside the glass. The frame of the window was grayish metallic metal. To close the window, it would be pulled down. There were two stairwells in the building, and the other stairwell in the

[2]Detective (Det.). Correa was produced for deposition by the City after plaintiff cross-moved for summary judgment.

building, which she called the "front stairwell," overlooked Snediker Avenue, where there were no windows.

When Ms. Cyrus touched the window to close it, the top part of the window came out of its frame and the center of the window struck her in the head. The glass of the window did not break. She testified that the lower left corner of the frame was bent, or pulled out about two inches, and that the frame of the window had not been "put in properly."

Ms. Cyrus walked out of the stairwell, entered the room where roll call was located, and told Carolyn Matthews, one of her supervisors, that the window had fallen on her head. Helen Marshall, another of Cyrus' supervisors, took Cyrus' statement, made a report, and called an ambulance. The report indicates that the location of the accident was "back stairwell on 4th fl." and that "M.O.S. [member of service] attempted to close window, when top window fell out hitting her on the head." In the section of the report which asks "indicate what you have done to prevent similar accidents," the report states: "window shut, do not open sign, building maintenance notified for repair." Ms. Cyrus filed another accident report with her workers' compensation board.

Ms. Cyrus learned from someone else that before her accident, the same window in the same stairwell had struck Detective "Veronica Hall." For a period of "weeks" after her accident, the window was "boarded up" but from the time of her accident until plaintiff's accident, there were no signs posted in any of the stairwells warning people about the use of the windows.

One of Ms. Cyrus' coworkers told her that plaintiff had had an accident in June, 2003 involving the same window at the same location as her accident. When Ms. Cyrus went to the area within a week after plaintiff's accident, blood was still on the floor but the window was boarded up. Ms. Cyrus believed plaintiff's accident occurred in the same stairwell as her accident because she saw blood on the floor of that landing. At her deposition, Ms. Cyrus was shown a picture (Defendant's Exhibit F) of a window that overlooked a mural and said that the street that the window looked out upon was Glenmore Avenue, and that the window looked liked the window involved in her accident. She also testified that the windows where she and plaintiff had their accidents were at the same exact location, and that the window involved in her accident was "recently renovated" and "new."

Det. Veronica Correa testified that sometime before June, 2003, she was talking on her cell phone in the fourth floor stairwell of the building which overlooked Glenmore Avenue and a basketball mural. There were a total of three stairwells in the building; one that overlooked Glenmore Avenue and another that overlooked Snediker Avenue. The panes of the window in the stairwell had wire coming across them, and the window lifted straight up and down. The frame of the window was black or brown metal. As she lifted the window open, the top of the window came down and struck her arm. She lifted her left arm to protect herself, and "shoved the window back in" holding it "like locked." Det. Correa did not make a written report but told her superiors and the "administrator's office" that the window in the stairwell fell on top of her.

A person in the building told Det. Correa about Ms. Cyrus' accident. She learned about plaintiff's accident because plaintiff called her after the window struck him and told her to come to the stairwell. When she arrived there, she saw that plaintiff's head was bleeding, that the window was broken, and that there was glass and blood on the ground. She said the window that struck plaintiff was the same one that had struck her and Ms. Cyrus.

Det. Correa testified that there were no warning signs placed on the window after her accident, that no memo warning about the window was distributed in the precinct before Ms. Cyrus' accident, and that she had never received a memo before plaintiff's accident warning the officers about the window.

Ms. Maddox testified that she was the project manager who oversaw the "full building renovation" at 245 Glenmore Avenue, which began sometime prior to 2001, and included installation of windows on every floor of the building. The City contracted with AWL to act as the prime contractor to oversee the renovation. Ms. Maddox and a City architect, Mr. Philip DiMaria, were responsible for inspecting the windows.

By letter dated July 8, 2003, the NYPD informed AWL that on June 17, 2003, a "Member of Service was injured by a window sash falling out of a 4th floor window frame." The letter further stated that:

> "BMS [Building Maintenance Services] personnel met with a representative from [Crystal], a sub-contractor to AWL [for 245 Glenmore Avenue] [and] [i]t was determined that the windows were not installed as per standard industry practices. Upon examination it was discovered that ceiling tiles were cut and used as blocking for the window frames and not properly

> fastened. AWL is here by [sic] notified to contact [Crystal], the manufacturer and installer of the 3rd and 4th floor windows, to immediately make repairs to all windows, so as to prevent any further accidents."

Mr. Andrew Martin of AWL responded by memo dated August 4, 2003, stating that Tomorrow Window, the installer recommended by Crystal, was no longer in business and that AWL would determine if there was a manufacturing or installation defect of the window during its site visit with Mr. Yang, of Crystal.[3]

During installation of the windows, Ms. Maddox inspected the windows to see if they were installed properly by opening them and examining their frames. During the installation between 2001 and 2002, some of the windows did not open and close properly because they were not "flush," "plumb" or "set right." Others had clips that were supposed to hold the window in place so they would not come down, but those clips were not supported well enough, causing the window to come down too fast. Ms. Maddox said she probably notified Mr. Martin on the phone about these problems, advised him to "tighten up [his] construction," and that AWL made the corrections, although she did not actually observe AWL do so. Ms. Maddox would direct someone in the City's glass shop to inspect whether the windows stayed up.

After the windows were installed, Ms. Maddox directed Mr. DiMaria to ensure that the windows were in compliance with the project. Work orders maintained by the City for the period from June 17, 2001 to June 17, 2003 (the date of plaintiff's accident) indicate that

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[3]Mr. Yang's correct name is Mr. Hui Wang.

there was no request by the NYPD before plaintiff's accident for work to be completed on the windows on the fourth floor. During the time when the City was experiencing problems with the clips on the windows, the City did not make any repairs to the windows on the third or fourth floor that had problems with their clips. Ms. Maddox told AWL to make the repairs, and it was her understanding that it was AWL's responsibility to do so. She testified that she generated reports telling AWL about these problems.

Ms. Maddox further testified that a subcontractor of AWL installed the windows, but also said that "A.W.L. had installers of the windows, they [AWL] said that they would use subs, did they use subs [?], I don't know." She said the window involved in plaintiff's accident was a replacement window installed pursuant to the contract because "all the windows were gone . . . the window in question was a new window that was installed, a replacement window." The windows were manufactured by Crystal Windows, but Crystal did not install them.

Ms. Maddox testified that the windows were double-hung. The sash on the windows would go up and down in order to open and close them. The locking clips on the windows disengaged to allow the window sash to come inward toward the building. The clips are located at the top of the sash, and engage against the frame of the window in order to prevent the window from coming out. Ms. Maddox observed that with respect to the clips, "[t]he installation of the window, it was, the support was not there, nor the clips to have something to lean against." She further explained that "the frame was not close enough to the clips in

order to engage the clips," and said that the top part of the window sash would tilt in too fast, and that if someone were to disengage the clips, the window can open toward the person. Ms. Maddox said she notified Mr. Martin about the window clips not being able to engage the frame by telling him the windows were "not functioning as they should," and asking him to rectify the situation. She had this conversation with Mr. Martin "[j]ust in general during the whole construction," before plaintiff's accident. She did not know the condition of the clips on the window in question on the day of the accident.

Ms. Maddox testified that the cause of plaintiff's accident was improper installation of the windows because "the supports of the window were not industry standard," meaning there was no backing, such as wood or metal, to hold the window to the brick wall itself. She explained that the window was not "supported well within the frame of the brick wall" and that this "was a problem on forty or fifty percent of the windows observed [sic] by AWL." She also testified that fifty percent of the windows installed at 245 Glenmore Avenue on the fourth floor, including the windows in the stairwells, were installed improperly, and that windows had been improperly installed before plaintiff's accident.

Within a week after plaintiff's accident, Ms. Maddox inspected the window in question and saw that the installation was not properly performed because the window sash was loose from the actual wall of the building. She said that window was not "supported well within the frame of the brick wall." She did not observe any defects with the clips that were attached to the sash of that window, or observe any missing clips and could not find any

defects in the window, except for the broken glass, which probably occurred when the sash fell.

The City's Opposition

The City argues that Ms. Maddox' testimony that the windows were installed by AWL pursuant to a contract demonstrates that the City did not create the defective window.

The City also asserts that a question of fact exists as to whether Ms. Cyrus and plaintiff's accidents involved the same window.[4] In this regard, the City notes that plaintiff testified that he was injured by a window on the fourth floor landing in the stairwell which faced "Snyder Street," and that there were approximately three stairwells in the building. In contrast, Ms. Cyrus testified that there were approximately two stairwells in the building, that her accident occurred in the stairwell of the fourth floor where there was a window overlooking Glenmore Avenue, and that the front stairwell overlooked Snediker Avenue, where there was no window. The City also notes that although Ms. Cyrus testified that her accident involved the same window as the window which struck plaintiff, Ms. Cyrus did not witness plaintiff's accident, and her testimony was based on what her supervisor and coworkers told her, as well as seeing blood on the same window a week after plaintiff's accident occurred.

The City also asserts that to obtain summary judgment based on the prior two

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[4]Apart from arguing that any statements made by plaintiff or Ms. Cyrus regarding Det. Correa's accident are inadmissible hearsay, the City presumably does not argue that a question of fact exists as to whether Det. Correa's accident involved the same window as plaintiff's accident because Det. Correa was not deposed until after the City filed its opposition papers.

accidents, plaintiff must establish that the prior accidents were caused by the same defective condition of the window, which plaintiff failed to demonstrate by expert submission indicating the cause of plaintiff or Ms. Cyrus' accident.

The City also maintains, among other things, that plaintiff cannot demonstrate that it breached its duty as a matter of law, particularly since it did not install the windows, and that questions of fact exist as to whether it acted reasonably under the circumstances.

Plaintiff's Reply

Plaintiff replies that Det. Correa testified that the window involved in her accident was the same window involved in plaintiff and Ms. Cyrus' accident, and that, as such, there is no question of fact as to whether the three witnesses were struck by the same window. Plaintiff also asserts that the City's response that "no maintenance or repair records" were located for the window constitutes an admission that the window was left in the same defective condition as it was following Ms. Cyrus' accident five months before plaintiff's accident. Therefore, plaintiff argues that the City had both actual and constructive notice of the defective window condition and failed to maintain the premises, effectively creating the condition. Plaintiff also notes that actual knowledge of a dangerous condition places a responsible party on constructive notice of each recurrence of that same condition. In this regard, plaintiff notes that Ms. Cyrus and Det. Correa both testified that they reported their incidents to their respective administration offices, that Ms. Cyrus' written report and plaintiff's aided report "are consistent in all respects with regard[] to the location and

mechanism of the injury" and that both reports were received by the City and provided the precise location of and mechanism of the injury. Plaintiff therefore concludes that "[i]t was the same window which injured [him] and [Det.] Correa on the City's premises . . . [t]he City possessed enough notice to correct the window."

Analysis

"To prove a prima facie case of negligence, a plaintiff is required to show that the defendant either created the condition that caused the accident or had actual or constructive notice thereof" (*Carrillo v PM Realty Group*, 16 AD3d 611, 611-612 [2005]; *Khamis v CG Foods, Inc.*, 49 AD3d 606, 607 [2008], quoting *Enamorado v KHR Holding Co., LLC*, 24 AD3d 411, 412 [2005]; *Ogletree v Rush Realty Assoc., LLC*, 29 AD3d 875 [2006] ["'A property owner may be held liable for a dangerous or defective condition on the property if the owner created the condition or had actual or constructive notice of it'"]).

Here, plaintiff has failed to make a prima facie showing that the City created the defective window condition. In this regard, Ms. Maddox testified that a subcontractor of AWL installed the windows. She also testified that AWL said that they would use a subcontractor to install the windows, but did not know if they did. Further, plaintiff asserts in his papers that AWL "improperly installed the window which had fallen on plaintiff." Finally, AWL entered into a subcontract with Tomorrow Windows for the installation of sixty-four or sixty-six double hung windows, nine double hung frosted windows, and one two-unit window at 245 Glenmore Avenue, which was part of the general contract entered

into between AWL and the NYPD for renovation of the building.

Further, a question of fact exists as to whether the City had actual or constructive notice of the defective window which fell on plaintiff. Ms. Cyrus testified that the window which struck her overlooked Glenmore Avenue, was located in the fourth floor stairwell in the "rear of the building," and that she told her supervisors that "the window had fallen on her head." Her accident report, prepared by the City, identified her accident location as "back stairwell 4th fl." Similarly, Det. Correa testified that her accident took place on the fourth floor of the building in the stairwell which overlooked Glenmore Avenue, that there were three stairwells in the building, that one stairwell overlooked Snediker Avenue and that another stairwell overlooked Glenmore Avenue, and that the window involved in her accident overlooked a basketball mural. Det. Correa also testified that there were two stairwells in the building, and that the other stairwell, which she called the "front stairwell," overlooked Snediker Avenue, where there were no windows. Further, Det. Correa told her supervisors that the window in the stairwell fell on top of her," but did not make a written report. In contrast, plaintiff testified that the window which fell on him was located in the stairwell of the fourth floor of the building, and that the window faced "Snyder Street." Thus, a question of fact exists as to whether the City had actual or constructive notice that the window which struck plaintiff was the same window which struck Ms. Cyrus and Det. Correa.

Plaintiff argues that Ms. Cyrus and Det. Correa reported their accidents to their

respective administrative offices, which provided notice to the City. However, each witness testified that her accident occurred at a location different than the location where plaintiff identified the location of his accident. Further, contrary to plaintiff's contention, Ms. Cyrus and plaintiff's written accidents are not "consistent in all respects with regard[] to the location" of the injury. Ms. Cyrus' accident report indicates that her accident occurred at the "back stairwell" on the fourth floor of the building, while plaintiff's aided report merely indicates that his accident occurred at the "fourth floor stairway," or "fourth floor stairwell," without any additional identifying details.

In further support of his claim that the City had actual notice of the defective window which fell on him, plaintiff points out that Det. Correa testified at her deposition that she saw the stairwell where plaintiff fell and that the window which fell on plaintiff was the same window which fell on her. Plaintiff also notes that he testified that the window where his accident occurred overlooked a basketball mural, as did Det. Correa. In addition, Ms. Cyrus also testified that a window that overlooked a mural looked out upon Glenmore Avenue, suggesting that plaintiff was mistaken in stating that his window looked out upon Synder Street. Nevertheless, in light of the notice received by the City indicating that the prior accidents occurred at a location different than the location where plaintiff's accident occurred, an issue of fact remains as to whether the City had actual or constructive notice of the defective window which fell on plaintiff. Finally, while Det. Correa testified that the window which struck her was the same window which struck Ms. Cyrus, Det. Correa did

not have firsthand knowledge as to where Ms. Cyrus' accident occurred, having only learned about it from someone else.

Even assuming that the same window was involved in all three accidents, "[i]t is well settled that proof of a prior accident, whether offered as proof of the existence of a dangerous condition or as proof of notice thereof, is admissible only upon a showing that the relevant conditions of the subject accident and the previous one were substantially the same" (*cf. Hyde v County of Rensselaer*, 51 NY2d 927 [1980]; *Fischer v Westchester County*, 24 AD3d 498 [2005]["the plaintiff's argument that the County had notice of the defective or dangerous condition based on two prior accident reports is unavailing, absent proof that the prior accidents occurred under substantially the same conditions as the plaintiff's accident"]; *Goode v City of New York,* 15 AD3d 440, 442 [2005] ["The plaintiff proffered evidence of prior and subsequent accidents but failed to demonstrate that those accidents involved circumstances and conditions substantially the same as the instant accident."]; *Bounds v Western Reg'l Off Track Betting Corp.*, 256 AD2d 1165 [1988][same]).

Here, the record reveals that all three accidents involved the sash of the window coming down after the window was touched in an effort to open or close the window, except that plaintiff's accident included the frame falling as well. Further, Ms. Maddox testified that the window which fell on plaintiff was not installed properly because the window sash was loose from the actual wall of the building, and the window was not "supported well within the frame of the brick wall." However, but for the foregoing, no evidence has been provided

by plaintiff in the form of an expert affidavit or otherwise indicating that the prior accidents involved circumstances and conditions that were substantially the same as plaintiff's accident (*id.; compare Herbert v Sivaco Wire Corp.*, 289 AD2d 71, 72 [defendant wire manufacturer required to produce entire contents of its customer complaint files because prior incidents involved unspooling difficulties substantially similar to the problem alleged by plaintiff]). In this regard, there is no evidence regarding the condition of the windows involved in the accidents of Ms. Cyrus and Det. Correa. Thus, even assuming that the same window was involved in all three accidents, a question of fact exists as to whether the prior accidents involved circumstances and conditions substantially the same as plaintiff's accident. Based upon the foregoing, this branch of plaintiff's cross motion for summary judgment against the City is denied.

Plaintiff's Cross Motion to Strike the City's Answer

Plaintiff next argues that the City's answer should be stricken for failure to: produce Det. Correa and Caroline Matthews for a deposition; disclose a computer generated print-out of a work order summary; respond to his demands for discovery and inspection dated March 11, 2005 and December 29, 2005; respond to AWL's three demands for discovery and inspection dated May 11, 2007;[5] and respond to Crystal's notice for discovery and inspection, dated February 8, 2005.

As to the claim regarding the City's failure to produce Det. Correa and Caroline

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[5]The City appears to have misidentified the date of these demands as March 19, 2007.

Matthews for deposition, plaintiff made two separate notice demands to the City, dated January 5, 2006 and October 24, 2006, to produce Det. Correa and Det. Correa aka Det. Hall, respectively. The second demand also requested that the City produce Caroline Matthews for deposition. Plaintiff states that the City defaulted in producing Det. Correa, and that the City produced Veronica Hall, aware that Det. Hall was not the witness plaintiff demanded the City produce. Moreover, by order dated July 21, 2006, the City was directed, among other things, to "produce Project Mgr. for deposition after defendant AWL on or before 9/7/06;" to "produce Veronica Hall-Cor[r]ea for deposition on or before 9/14/06;" [and to] "produce Carline Matthews for deposition on or before 9/21/06, to the extent these individuals are still employed by the City." The order also directed the City to produce an accident report of Det. Veronica Hall.

The City asserts and the record reveals that it produced Ms. Maddox, the project manager, for deposition on September 14, 2006, before AWL produced a witness for deposition. The City also states that on September 12, 2006, it provided to all parties an affidavit of Veronica Hall in which Det. Hall stated that she had never been injured by a window at 245 Glenmore Avenue, and was not present at that site on the date of plaintiff's accident. Thus, the City contends that while it made all parties aware that Det. Hall was not the correct notice witness at least three weeks before she was produced for a deposition, plaintiff proceeded to depose Det. Hall although it was obvious she was not the witness plaintiff wanted to depose. The City also notes that plaintiff testified at his deposition that

he did not know the last name of "Veronica" whom he heard had also been injured by the window which fell on him, and that Ms. Cyrus testified that the woman who was injured by the window was "Veronica Hall." The City states that it is the burden of plaintiff to provide the correct name of the witness he seeks to depose, and that under the circumstances, it cannot be held accountable for failure to produce the correct witness. The City notes that pursuant to a conference call with all parties and Justice Miller, the parties agreed that the deposition of Det. Correa would be scheduled on February 8, 2008, the return date of all pending motions in this case. Finally, the City states that it has located Caroline Mattis (not Matthews) and will schedule her deposition at a time agreeable to all parties.

In reply, plaintiff states that Det. Correa (who was deposed on February 25, 2008), testified that she was only notified to appear for her deposition in 2008, which demonstrates that the City never intended to comply with the July 21, 2006 order directing her to appear for a deposition. Plaintiff also states that the production of Det. Correa "does not excuse [the City's] prior defaults."

"It is well settled that actions should be resolved on their merits whenever possible, and that the drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands was willful and contumacious" (*Jenkins v City of New York*, 13 AD3d 342, 342-343 [2004]). In this regard, "[t]he Supreme Court is vested with broad discretion in supervising disclosure, and its determination that the sanction of dismissal is not warranted will not be disturbed absent an improvident exercise of that

discretion" (*id*).

Here, the record reveals that the City did not respond to two of plaintiff's demands to produce Det. Correa. While the court does not condone this failure to comply with discovery demands, in light of the confusion with respect to Det. Correa's identity, there has been no clear showing that the City acted willfully or contumaciously. Moreover, since Det. Correa was deposed while plaintiff's motion was pending, striking the answer of the City is not warranted (*Pascarelli v City of New York*, 16 AD3d 472, 473 [2005] ["the defendant substantially complied with outstanding discovery requests while the motion to strike was pending. Under these circumstances, the Supreme Court providently exercised its discretion in denying the motion" to strike defendant's answer]; *see also Patel v DeLeon*, 43 AD3d 432, 432-433 [2007][in absence of evidence that defendant willfully and contumaciously failed to appear for an examination before trial, the Supreme Court should not have conditionally stricken answer; appropriate remedy was to preclude witness from offering any testimony at trial unless he was deposed before trial]). In addition, the production of Det. Hall, the wrong witness who did not possess knowledge of any accident, does not warrant striking the pleading since plaintiff does not dispute, in his reply, that he deposed her having been aware that she was not the correct notice witness (*cf. Traina v Taglienti*, 6 AD3d 524, 525 [2004] [plaintiff's dissatisfaction with the answers given by the appellant's employee at the examination before trial was an insufficient basis upon which to conclude that the appellant willfully and contumaciously failed to comply with the stipulation to produce the witness]).

Plaintiff appears to have abandoned his claim with respect to Caroline Mattis but may, if he desires, request that she be produced for deposition at a court conference, to be scheduled as indicated below.

As to plaintiff's assertion that the City failed to disclose a computer generated print-out of a work order summary, plaintiff states that the City produced Officer Dallas Pannone for a deposition, during which time he reviewed a work order summary (a summary of repairs requested by workers at 245 Glenmore Avenue). Plaintiff states that when he called for production of these documents at Officer Pannone's deposition, the City refused to provide them, although the record reveals that the City took the request "under advisement."

As the City asserts, it was directed to provide this printout pursuant to the July 21, 2006 court order, which it provided to plaintiff on September 12, 2006 and January 28, 2008, and to AWL on January 8, 2008. Inasmuch as this document has been provided, this branch of plaintiff's motion to strike the City's answer has been rendered moot. Notably, plaintiff appears to have abandoned this claim as he does not address it in his reply.

As to plaintiff's claim that the City did not respond to his December 29, 2005 discovery demand, the City was directed to respond to this demand in the July 21, 2006 order, which it did in its response dated September 12, 2006. Plaintiff has abandoned this claim as he does not address this demand in his reply, or argue that the response was deficient. Further, with respect to the March 11, 2005 demand, the City notes that plaintiff moved to strike the City's answer after serving this demand. This motion was resolved by

court order dated July 21, 2006, which directed the City to respond to the December 29, 2005 demand, but not to plaintiff's demand dated March 11, 2005. In any event, the City has annexed its response to the March 11, 2005 demand in the instant opposition papers. While the court does not condone the City's delay in providing its responses, it has not been "clearly demonstrated" that its failure was the product of wilful and contumacious conduct (*Pascarelli*, 16 AD3d at 473). Moreover, inasmuch as the City has complied with this outstanding discovery, the sanction of striking the City's answer is unwarranted (*id.*).

With respect to plaintiff's claim that the City failed to respond to three of AWL's demands for discovery and inspection dated May 11, 2007, the City responded to these demands on January 8, 2008, thereby rendering this claim moot (*id.*). The City does not address plaintiff's claim that it did not respond to Crystal's demand for discovery, but plaintiff does not address this claim in its reply. Thus, it is presumed abandoned.

Finally, plaintiff has improperly argued for the first time in his reply that the City has failed to produce various important documents. Nevertheless, the court will schedule a discovery conference to address the purported missing discovery, as indicated below.

Plaintiff also cross-moves to strike the City's answer on the ground of spoliation of evidence. Plaintiff argues that because the City intentionally or negligently discarded the top sash and frame of the window which fell on him, he is prevented from making his prima facie case, which has caused him irreparable prejudice.

In opposition, the City asserts that plaintiff has not met his burden of demonstrating

that the entire window was not preserved. In this regard, while Mr. Wang, a representative of Crystal, testified that only a portion of the window was present for inspection on January 26, 2005, the City asserts that it was not present at that on-site inspection, did not receive an expert report based on it, and thus cannot confirm the veracity of Mr. Wang's statement. The City also argues that plaintiff cannot demonstrate that portions of the window were discarded after the court directed its preservation, by order dated February 27, 2004. In addition, the City maintains that plaintiff has not met his burden of demonstrating that the entire window was the cause of the accident or that it was necessary to inspect the entire window in order to understand how the accident occurred. Moreover, the City contends that this branch of plaintiff's motion must be denied because there are alternative means by which plaintiff can attempt to prove his case. Counsel for the City also asserts that on January 17, 2008, she personally examined the bottom sash of the subject window which allegedly fell on plaintiff, that it has been preserved, and that it is still available for inspection.[6]

Plaintiff replies that because the City neither affirms nor denies that it has the window, it must be inferred that it deliberately destroyed it. Plaintiff also asserts that the City has failed to address the prejudice he sustained.

Relying upon a letter apparently sent by plaintiff's former counsel to the City, AWL also moves for unspecified spoliation sanctions against the City on the grounds that the City

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[6]It should be noted that the court granted the application of AWL to inspect the bottom sash on or about September 26, 2008 (see *infra*).

dismantled the window "from the state it was in when it allegedly fell.

"'[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'" (*Barnes v Paulin*, 52 AD3d 754, 755 [2008], quoting *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007] [internal citations omitted]). Nevertheless, "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. The determination of spoliation sanctions is within the broad discretion of the court" (*id.; Dean v Usine Campagna*, 44 AD3d 603 [2007] ["Where a party's negligent loss or destruction of evidence does not deprive its opponent of a means to present or defend against a claim, striking a spoliator's pleading is not warranted"]).

Here, at her deposition, Ms. Maddox testified that the City brought the "damaged" window back to building maintenance. It appears that the damaged window to which Ms. Maddox referred was the bottom sash of the window which fell on plaintiff and broke, since she made reference to a photograph exhibit of the window which fell on plaintiff. She was then asked "[w]as it the sash that you brought back to the building maintenance or entire window including a frame?" and she replied "[i]ncluding a frame." Also, asked whether "both the sash as well as the surrounding frame were removed by the police department or the building maintenance department?" she responded " I don't know who removed it."

When asked, "to your knowledge, was it removed?" she replied "[i]t was removed and brought back to building maintenance." Based upon Ms. Maddox' testimony, it appears that only the bottom sash of the window was removed to building maintenance.

In addition, the City has annexed the affidavit of Mr. Jagdeo Raj, the Glass Supervisor of the BMS NYPD, who asserts that on either the day or the day after plaintiff's accident, he arrived at 245 Glenmore Avenue to perform a temporary repair of the window which fell on plaintiff. When he arrived there, he saw the bottom sash of the window, which was broken, on the floor. The entire window frame and the top sash were still intact. He boarded up the bottom portion of the window with plexiglass, left the window frame and top sash intact and attached to the building, and took the bottom sash back to his office at BMS. Further, he states that at some point after August 7, 2003, the window was permanently repaired by a contractor. Documents provided by AWL reveal that AWL hired subcontractor R. Klich Window & Door System, Inc. to install a new window.

Based upon the foregoing, plaintiff has failed to demonstrate that the City disposed of the entire window. After the City removed the broken bottom sash, the top sash and frame were still attached to the building. Thereafter, AWL's subcontractor replaced the window with a new window. As such, it would be speculative for the court to conclude that the City disposed of the top sash and frame.

AWL has also failed to demonstrate that the City dismantled the window. As an initial matter, the letter upon which AWL relies constitutes unsworn hearsay. In any event,

in the letter, the attorney asks who "took the window apart and destroyed the other sash and the frame and jams?" However, this statement merely confirms the statement made by Mr. Raj, namely that the City only removed the broken bottom sash of the window after plaintiff's accident. While the letter also states that the sash "is not as it appeared on the date of the accident," the attorney does not set forth the basis for this claim. Finally, inasmuch as AWL's subcontractor replaced the broken window with a new window, it is just as likely that AWL's subcontractor removed the old window and disposed of it.

In any event, the City correctly contends that plaintiff and AWL have failed to demonstrate by evidence in admissible form that the entire window caused the accident or that it was necessary to inspect the entire window in order to ascertain how the accident occurred (*see De Los Santos v Polanco*, 21 AD3d 397, 398 [2005] ["The plaintiffs failed to establish that without the police vehicle they were deprived of the evidence needed to prove that the police were speeding at the time of the accident and thus were acting in 'reckless disregard' of the plaintiffs' safety."]; *Compare Ingoglia v Barnes & Noble College Booksellers, Inc.*, 48 AD3d 636 [2008] [defendant's expert affidavit showed that defendant was severely prejudiced by the plaintiff's intentional destruction of evidence]; *see also Metro. N.Y. Coordinating Council on Jewish Poverty v FGP Bush Terminal, Inc.*, 1 AD3d 168 [2003]["Where, as here, the disposed-of evidence was not key to the proof of plaintiff's case, the court properly exercised its discretion in limiting its sanction against [the] defendant . . . for spoliation to an adverse inference charge."]). By failing to make this showing,

plaintiff and AWL have not sustained their burden of proving that the entire window is essential to their case or that they were prejudiced by its loss (*see Foncette v LA Express*, 295 AD2d 471, 472 [2002]). Moreover, the City properly notes that the only admissible evidence, namely the deposition testimony of Ms. Maddox, raises an issue of fact as to whether the installation of the window was the cause of the accident, not a defect in the window itself. Finally, plaintiff may establish notice through the deposition testimony of Ms. Cyrus and Det. Correa and liability through the deposition testimony of Ms. Maddox and representatives of AWL (*see Longo v Armor Elevator Co.*, 278 AD2d 127 [2000]). Similarly, AWL may rely upon the deposition testimony of its witnesses and the witness from Crystal to defend its case. In view of the foregoing, these branches of AWL's motion and plaintiff's cross motion are denied.

Plaintiff's Cross Motion for Summary Judgment Against AWL

Plaintiff argues that the above-noted deposition testimony demonstrates that AWL knew about the two prior incidents involving the same window and the installation complaints. Plaintiff also contends that AWL negligently installed the subject window as evidenced by the July 8, 2003 letter sent by the City to AWL indicating that the windows at the building were improperly installed.

In opposition, AWL argues that plaintiff has failed to make a prima facie showing that it created or had notice of the defective window condition. In this regard, AWL asserts that

its representatives, Mr. Robert Pavlovich and Mr. Martin, state in sworn affidavits that the original plans for window installation did not require a new window to be installed in stairwell number 1, where AWL states that plaintiff's accident occurred, and that a new window was not placed there. AWL also argues that the deposition of Mr. Wang, a representative of Crystal, shows that the window involved in plaintiff's accident (also identified as the sash) was manufactured by Crystal prior to 1998 (sometime between 1993-1997) which, plaintiff states, contradicts the testimony of the City's witness (Ms. Maddox) that the sash which broke was new and installed by AWL. In addition, AWL contends that even assuming it installed the subject window, Ms. Cyrus' testimony that coworker Steve Simmerman repaired the window after her accident on January 8, 2003 constitutes a superseding, intervening cause which severed any causal connection between its alleged negligence and plaintiff's injuries, relieving it of any liability.[7] Finally, AWL argues that the City, which was on notice of the defective condition, had the ultimate responsibility as owner of the property to correct it.

In a supplemental affirmation in opposition, AWL annexes the deposition testimony of Mr. Pavlovich and Mr. Martin. AWL asserts that while each witness acknowledged the *possibility* that AWL's subcontractor installed the subject window, they nevertheless testified that AWL did not perform its installation.

The record reveals that in his sworn affidavit, Mr. Pavlovich states that AWL was hired by the City in 2000 as the general contractor for construction work being performed at 245

[7] This argument is rejected as Ms. Cyrus testified that she did not know if Mr. Simmerman repaired the window.

Glenmore Avenue. This work included renovation of the third and fourth floors of the 5-story building for office space. The window installation aspect of the job was completed during the period of October through November, 2001. Although Mr. Pavlovich states that AWL hired Tomorrow Window, a window installer, and that Tomorrow Window's invoice indicates that 74 windows were installed, Mr. Pavlovich asserts that according to the plans and drawings submitted for renovations,[8] AWL did not contract to perform window replacement in the fourth floor stairwell area marked # 1, where plaintiff alleges his accident occurred, and that its subcontractor did not perform work on or install a window in that stairwell. He also states that while the City notified AWL via letter dated July 8, 2003 that a window fell out of a 4th floor window frame, AWL inspected the window and determined that neither it nor its subcontractor had installed it. Mr. Martin, who oversaw the construction work being performed at the building in 2001, reiterates in his sworn affidavit that neither AWL nor its subcontractor installed a window on the fourth floor stairwell area where plaintiff's accident occurred.

Mr. Hui Wang, Manager of Research and Development at Crystal, testified that Crystal manufactured windows and doors which were sold wholesale to general contractors. He examined the broken bottom window sash which allegedly injured plaintiff. He identified the sash as being a Crystal-manufactured window based on the logo on the sash lock and the

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[8]The plans and drawings submitted for renovations which Mr. Pavlovich reviewed were the "Detailed Scope of Work, Job Plans, meeting minutes for the period of October to December 2001, and the Tomorrow Window contract and invoice."

insulating glass unit.[9] He said the latch on the right side was broken and that the latch on the left side was damaged. He also said that the sash may have been installed between 1993 and 1997 because beginning in 1998, Crystal began using a different spacer than the spacer which was used on the window sash that struck plaintiff.

Mr. Martin testified that he was the project manager for the renovation AWL was performing on the third and fourth floors of 245 Glenmore Avenue, which included, among other things, partial window replacement or repairs, and installation of some new windows; that the contract between AWL and the City involved the installation of 76 Crystal windows, including nine double-hung aluminum windows; that obscured wire glass was to be used in the windows in the stairwells; that Tomorrow Window, not AWL, installed the windows; and that Scott McClaren, of AWL, supervised the window installation. Mr. Martin testified that AWL was the general contractor on site, that it supervised the subcontractors, including installation of the windows, and that if it saw a subcontractor performing a job in an unsafe manner. it was obligated to stop the work.

After Mr. Martin received the July 8, 2008 letter describing plaintiff's accident, Mr. McClaren inspected the window which fell on plaintiff and AWL hired someone to make repairs to the windows referenced therein. Mr. Martin testified that based on the letter, these windows had been installed using ceiling tiles to make the windows level or "plum" with the

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[9]An insulating glass unit is a spacer between two pieces or sheets of glass. Mr. Wang also testified that a sash was one of the panels for a double hung window, that the top panel is called the top sash and the bottom panel is called the bottom sash, and that the sash lock was connected to the bottom sash.

wall, which was not "standard practice, and that AWL itself did not install ceiling tiles on the frames of these windows, was not aware that ceiling tiles were being used as framing for these windows until after plaintiff's accident, and did not work on any of the windows at the site. When Mr. Martin conducted walk-throughs of the building to see the progress of the job, he was never made aware of a problem with the windows.

Mr. Martin testified that NYPD Detailed Scope of Work dated May 6, 2002, and a job order indicated that additional windows requested by the NYPD to be installed by AWL at 245 Glenmore Avenue were not included on the original scope of work or original contract drawing, but he did not know whether these additional windows were on the third or fourth floors. He did not know if Tomorrow Window installed the window which fell on plaintiff, and said that AWL did not perform any work on that window before plaintiff's accident. He claimed that someone else installed windows in the building before AWL began performing work at the building, but according to the contract drawing, AWL was contracted by the NYPD to perform window installation and repairs on the third and fourth floors. Based upon the original contract drawing, Mr. Martin did not know who installed the window which fell on plaintiff. Mr. Martin examined the window sash that broke at a post accident inspection but did not know if that sash was part of the renovation project.

Mr. Pavlovich testified that prior to June 17, 2003, AWL entered into a contract with the NYPD which included worked to be performed at 245 Glenmore Avenue. After he received the July 8, 2003 letter from the City advising AWL of plaintiff's accident and

requesting a window repair, Mr. Martin visited the job site, and informed Mr. Pavlovich that the window in need of repair was not one of the windows that AWL had installed. Mr. Pavlovich first said Mr. Martin sent correspondence dated August 4, 2003 indicating that he would correct the window, but then said that the letter indicated that Mr. Martin was waiting for Mr. James Yang of Crystal to notify him as to when he would accompany Mr. Martin to the site to inspect the window. Mr. Pavlovich did not know if Mr. Martin repaired the window. Mr. Pavlovich further testified that AWL subcontracted with Tomorrow Window to install the windows.

Mr. Pavlovich looked at the original scope of work dated June 22, 2001 and he did not see "anything regarding the windows on the fourth floor." He testified that AWL performed window installation on the fourth floor if it was "indicated in the drawings." When asked whether [AWL] did window installation on the fourth floor, he answered "I'm not for sure, but, yes." Asked whether "[t]he drawings we had shown you before shows window installation on the fourth floor?" he said "yes," that it showed installation by AWL on the fourth floor, but he also testified that the *detailed scope of work* did not show installation to the fourth floor.

With respect to the window involved in plaintiff's accident, the original window contract drawings had "no particular window encoded on it," meaning there was "no work noted on the original contract." A punch list of incomplete items dated December 27, 2001 did not contain any items relating to windows.

Mr. Pavlovich testified that after Mr. Martin examined the window involved in plaintiff's accident, he and Mr. Martin looked at the contract drawings and determined that the window was not part of AWL's contract with the City. Mr. Pavlovich said that as a common practice, AWL did not perform installation of windows but instead subcontracted window installation out to window installers or carpenters. Mr. Pavlovich said that before AWL began work at the building, Crystal had installed some windows on the third and fourth floors, although he later testified that he did not know who installed the windows prior to AWL. In this regard, he testified that there was "an ongoing window replacement where [AWL] replaced some windows and other people replaced other windows."

The project that AWL contracted for with respect to window installation at the building was limited to the third and fourth floors. Mr. Pavlovich stated in his affidavit that AWL did not install windows at this project. However, he testified that he could not be 100% sure that neither AWL nor its subcontractor, Tomorrow Window, did not install or perform any work on the fourth floor stairwell identified as stairwell number 1, where plaintiff's accident occurred. In this regard, he said that by looking at the original contract drawings he saw no evidence that AWL performed any work at that location, but added that he could not identify the additional windows that AWL was asked to install. When asked whether it was possible that AWL or Tomorrow Window installed or performed any work on the window where plaintiff's accident occurred, he responded "[l]ook anything is possible, you know, I don't know."

Mr. Pavlovich testified that a total of 76 windows were going to be replaced, and that the windows in the stairwells in the building were to be "obscured wire glass," meaning wire mesh. He said that Mr. Martin told him that the window which fell on plaintiff may have broken because people smoked in the stairwell and opened and closed the window frequently, which may have caused it to malfunction, noting that it had been "two years since we installed the window, it's been since that window was there it was used a lot."

Review of the record reveals that questions of fact exist as to whether AWL created or had actual or constructive notice of the defective window. First, a question of fact exists as to whether AWL installed the window which fell on plaintiff. As noted above, Ms. Maddox testified that AWL subcontracted installation of the windows or that AWL stated that they did so. She also testified that the City contracted with AWL to act as the prime contractor to oversee the renovation. Further, the July 8, 2003 letter sent by the City to AWL directed AWL to contact Crystal, "the manufacturer and installer of the 3rd and 4th floor windows," evidencing the City's tacit recognition that AWL acted as the general contractor which did not perform window installation. Further, AWL hired a subcontractor to perform window installation at the building.

In addition, although Mr. Martin testified that the contract between AWL and the City involved the installation of 76 Crystal windows, he also testified that AWL was the general contractor; that Tomorrow Window, not AWL, installed the windows; that AWL did not install ceiling tiles on the frames of these windows, and that AWL did not work on any

windows at the site. Further, he testified that while the NYPD requested the installation of additional windows, he did not know whether these windows were on the third or fourth floor of the building. In addition, he stated that he did not know if Tomorrow Window installed the window which fell on plaintiff and that someone else installed the windows in the building before AWL began its work there. Moreover, when Mr. Martin responded to the July 8th letter regarding defective windows, he responded that Tomorrow Window, the installer recommended by Crystal, was no longer in business.

Similarly, although Mr. Pavlovich testified that AWL performed window installation on the fourth floor of the building, he stated that he subcontracted with Tomorrow Window to install the windows at the building; that before AWL began work at the building, another entity had installed windows there; and that there was "on ongoing window replacement where [AWL] replaced some windows and other people replaced other windows." While he also testified that he could not be 100% sure that neither AWL nor Tomorrow Window did not install or perform any work on the fourth floor stairwell where plaintiff's accident occurred, his testimony merely raises an issue of fact as to whether AWL was involved in window installation.

Finally, Mr. Wang of Crystal testified that the window sash which fell on plaintiff may have been installed before 1997, instead of in 2001, when Ms. Maddox testified it was installed, thereby contradicting Ms. Maddox' testimony that the sash which broke was new, and presumably installed pursuant to the renovation project. In addition, Mr. Martin testified

that AWL did not install ceiling tiles on the frames of these windows. Based upon the foregoing testimony, the court finds that a question of fact exists as to whether AWL installed the window which fell on plaintiff.

A question of fact also exists as to whether AWL had notice of the allegedly defective window. While Ms. Maddox testified that she notified AWL about defects in the installation of the windows before plaintiff's accident, Mr. Martin testified that AWL was never made aware of a problem with the windows when he conducted walk-throughs of the building, and that AWL was not aware that ceiling tiles were being used as framing for these windows until after plaintiff's accident. Moreover, the November 21, 2001 punch list makes no mention of repair to a window on the fourth floor stairwell, and the record reveals that after construction was completed, the City never made a specific complaint to AWL about a defect in the window located on stairwell number 1 on the fourth floor. Lastly, there is no evidence that AWL was notified of Det. Correa and Ms. Cyrus' accidents. In light of these questions of fact, this branch of plaintiff's cross motion is denied.

In the alternative, plaintiff asserts that he is entitled to an order striking AWL's answer for failing to appear for at least eight court-ordered depositions and for failing to provide court-ordered discovery. This branch of plaintiff's cross motion is also denied.

With respect to plaintiff's claim that AWL failed to provide court-ordered discovery, AWL has annexed five responses to discovery, including AWL's response to plaintiff's March 11, 2005 discovery notice; the Job Plan, Detailed Scope of Work, Tomorrow Window contract

and invoice; and the denial of coverage letter. Further, Mr. Pavlovich and his assistant have submitted sworn affidavits indicating that they have searched and are unable to locate the Job Order Contract and the complete Job file for the work performed at 245 Glenmore Avenue; that the contract and the box with the job folder was presumably destroyed by AWL personnel through the regular course of managing old storage boxes; and that they did not intentionally destroy these documents. Mr. Pavlovich testified at his deposition that when this suit was commenced against AWL, AWL gave its attorney the relevant records, including the job plans and scope of work. According to AWL, the City has provided relevant records from the job site, including meeting minutes and punch lists, so that plaintiff cannot claim prejudice. In addition, AWL states that the City is still searching for its copy of the Job Order Contract, which it maintains for 20 years.

AWL has substantially complied with all discovery demands. Moreover, the affidavits of Mr. Pavlovich and his assistant indicate that they were unable to locate the Job Order contract and job file, despite a diligent search. "The penalty of striking an answer is extreme and should only be imposed after 'a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith'" (*181 S. Franklin Assocs. v Y&R Assocs.*, 6 AD3d 594, 595 [2004], quoting *Herrera v City of New York*, 238 AD2d 475, 476 [1997]). On the present record, plaintiff has failed to make this showing. To the extent any of court-ordered discovery remains outstanding, such will be addressed at a court conference indicated below.

That branch of plaintiff's motion to strike AWL's answer for failure to appear for court-ordered depositions is also denied. Plaintiff has not demonstrated that AWL deliberately failed to appear for court-ordered depositions on a repeated basis. AWL has provided reasonable excuses for its failure to appear for depositions, which plaintiff does not dispute. Moreover, the depositions of AWL representatives have been taken, warranting denial of this branch of plaintiff's cross motion (*Pascarelli,* 16 AD3d at 473).

Plaintiff and AWL's Motions for Inspection and Discovery

Those branches of AWL and plaintiff's motion and cross motion, respectively, to allow them to inspect the premises where plaintiff's accident occurred and the window which fell on plaintiff has already been granted by order of this court on or about September 26, 2008.

AWL and plaintiff also move and cross-move, respectively, for an order compelling the City to produce for inspection and copying 20 boxes of records stored at the City's BQE facility that relate to the installation of the window which fell on plaintiff. In this regard, Ms. Maddox testified at her deposition that there were approximately 20 boxes pertaining to the total renovation project, that she had only been able to look through sixty percent of them for documents relating to the installation of the windows, and that there might have been more documents pertaining to the window installation. At oral argument held on September 26, 2008, counsel for the City stated that Ms. Maddox subsequently separated the documents by floor, and that counsel removed all the documents that related to the windows, and provided them to all parties.

In opposition to these branches of the motions, the City argues, in substance, that movants have failed to demonstrate that their request is reasonable and that the relief sought is necessary to the prosecution of this action.

These branches of the motion and cross motion are granted. Plaintiff and AWL are entitled to review the documents to determine whether any of them pertain to the installation of the window at issue. The City is directed to provide the 20 boxes noted above for inspection and copying within 45 days of service of this order with notice of entry.

In summary, those branches of plaintiff's cross motion for summary judgment, to strike the answers of the City and AWL, and for related sanctions are denied. The motion and cross motion of AWL and plaintiff, respectively, for inspection of the window and premises, production of documents, and spoliation sanctions is granted to the extent of directing the City to produce for inspection and copying the above-noted 20 boxes of documents stored at the City's BQE facility within 45 days of service of this order with notice of entry, and is otherwise denied. The parties are directed to appear for a compliance conference before the court to settle all outstanding discovery issues on January 20th 2009 at 360 Adams Street Courtroom 476 at 9:30 a.m.

This constitutes the decision and order of the court.

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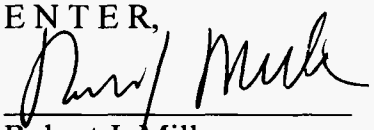

Robert J. Miller
J. S. C.