

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

D20590
W/kmg

_____AD3d_____

Argued - September 12, 2008

PETER B. SKELOS, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
THOMAS A. DICKERSON, JJ.

2007-06395

DECISION & ORDER

Thomas Mangiaracina, plaintiff-respondent,
v City of New York, et al., defendants-respondents,
General Motors, Inc., appellant, et al., defendant.

(Index No. 1035/05)

Lavin, O'Neil, Ricci, Cedrone & DiSipio, New York, N.Y. (Arthur Del Principe and Timothy McHugh of counsel), for appellant.

Law Office of Michael G. Postiglione, P.C., Mineola, N.Y., for plaintiff-respondent.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Stephen J. McGrath and Cheryl Payer of counsel), for defendants-respondents.

In an action to recover damages for personal injuries, the defendant General Motors, Inc., appeals from an order of the Supreme Court, Queens County (Flug, J.), entered February 14, 2007, which denied its motion pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against it based upon spoliation of evidence or, in the alternative, for summary judgment dismissing the cross claims asserted against it by the defendants City of New York and New York City Police Department.

ORDERED that the order is affirmed, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

The Supreme Court providently exercised its discretion in denying that branch of the

October 7, 2008

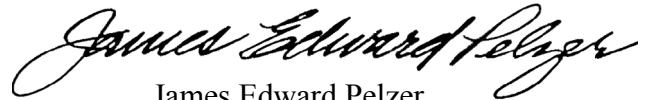
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motion of the defendant General Motors, Inc. (hereinafter GM), which was to dismiss the complaint insofar as asserted against it based on the spoliation of evidence. GM failed to prove that the plaintiff negligently or intentionally destroyed crucial evidence (*see Cordero v Mirecle Cab Corp.*, 51 AD3d 707; *Iamiceli v General Motors Corp.*, 51 AD3d 635). The court providently declined to award GM the alternate relief sought in its motion, to wit, summary judgment dismissing the cross claims asserted against it by the defendants City of New York and New York City Police Department, since GM failed to establish its entitlement to judgment as a matter of law by demonstrating that the unavailability of the subject evidence left it prejudicially bereft of appropriate means to establish a defense to those cross claims (*see Barnes v Paulin*, 52 AD3d 754; *Barone v City of New York*, 52 AD3d 630; *Denoyelles v Gallagher*, 40 AD3d 1027; *Deveau v CF Galleria at White Plains LP*, 18 AD3d 695, 696; *Kirschen v Marino*, 16 AD3d 555, 555-556).

SKELOS, J.P., COVELLO, BALKIN and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court