

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 08-01956

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

P. MARC SAMPSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RAINBOW FORD LINCOLN MERCURY, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
DANIEL LANG, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

RAINBOW FORD LINCOLN MERCURY, INC., THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

P. MARC SAMPSON, DOING BUSINESS AS SAMPSON AUTO
SALES, THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

WILSON, ELSEER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (DOUGLAS R.
KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL F. CHELUS OF
COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

JOHN J. FLAHERTY, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (NORMAN B. VITI, JR., OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court,
Cattaraugus County (Larry M. Himelein, A.J.), entered December 5, 2007
in a personal injury action. The order denied the motion of
defendant-third-party plaintiff for summary judgment and denied the
motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: We affirm for reasons stated in the decision at
Supreme Court. We write only to note that the contention of
defendant-third-party plaintiff that Workers' Compensation Law § 29
(6) bars plaintiff's action against it is raised for the first time on
appeal, and we therefore do not consider it (*see Oram v Capone*, 206

AD2d 839, 840).

Entered: March 20, 2009

JoAnn M. Wahl
Clerk of the Court