

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

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Submitted - September 11, 2006

HOWARD MILLER, J.P.
GLORIA GOLDSTEIN
WILLIAM F. MASTRO
MARK C. DILLON, JJ.

2006-03127

DECISION & ORDER

Evangeline Maria Boone, et al., plaintiffs, v City of New York, defendant third-party plaintiff-respondent; Keyspan Energy Delivery N.Y.C., s/h/a Brooklyn Union Gas Company, third-party defendant-appellant.

(Index No. 49107/97)

Cullen and Dykman, LLP, Brooklyn, N.Y. (Dawn C. Wheeler of counsel), for third-party defendant-appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Larry A. Sonnenshein and Julian L. Kalkstein of counsel), for defendant third-party plaintiff-respondent.

In an action to recover damages for personal injuries, etc., the third-party defendant appeals from an order of the Supreme Court, Kings County (Hinds-Radix, J.), dated February 24, 2006, which denied its motion for summary judgment dismissing the third-party complaint.

ORDERED that the order is reversed, on the law, with costs, and the motion for summary judgment dismissing the third-party complaint is granted.

The third-party defendant met its burden of establishing, prima facie, that it did not create the allegedly dangerous condition upon which the plaintiff Evangeline Maria Boone tripped and fell, and the third-party plaintiff failed to raise a triable issue of fact in opposition (*see Cendales v City of New York*, 25 AD3d 579; *Schwartz v City of New York*, 23 AD3d 368; *Verdes v City of New York*, 253 AD2d 552, 553; *Curci v City of New York*, 240 AD2d 460).

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Accordingly, the third-party defendant's motion for summary judgment should have been granted.

The third-party plaintiff's contentions regarding the best evidence rule and an affidavit of the third-party defendant's employee are improperly raised for the first time on appeal, and, in any event, are without merit.

MILLER, J.P., GOLDSTEIN, MASTRO and DILLON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court