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

D25550
G/prt

_____AD3d_____ Argued - December 1, 2009

REINALDO E. RIVERA, J.P.
HOWARD MILLER
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2008-11649 DECISION & ORDER

Robert Kotara, plaintiff-respondent, v City of New York, et al., defendants-respondents, Drain Kleen Sewer Service, Inc., appellant.

(Index No. 18313/06)

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville, N.Y. (Eileen M. Baumgartner of counsel), for appellant.

Greenstein & Milbauer, LLP, New York, N.Y. (Andrew Bokar of counsel), for plaintiff-respondent.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Mordecai Newman of counsel; Brian Soucek on the brief), for defendants-respondents.

In an action to recover damages for personal injuries, the defendant Drain Kleen Sewer Service, Inc., appeals, as limited by its reply brief, from so much an order of the Supreme Court, Kings County (Rothenberg, J.), dated November 14, 2008, as denied its motion, in effect, for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the motion of the defendant Drain Kleen Sewer Service, Inc., in effect, for summary judgment dismissing the complaint insofar as asserted against it is granted.

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.,* 98 NY2d 136, 140). However, a party

who enters into a contract to render services may be said to have assumed a duty of care and, thus, may be potentially liable in tort to third persons where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Espinal v Melville Snow Contrs.,* 98 NY2d at 140). Here, the appellant established its entitlement to judgment as a matter of law by demonstrating, prima facie, that none of the exceptions are applicable to this case (*see Alvarez v Prospect Hosp.,* 68 NY2d 320). In opposition, the respondents failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.,* 68 NY2d 320).

RIVERA, J.P., MILLER, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court