

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

D25889
H/hu

_____AD3d_____

Argued - November 17, 2009

REINALDO E. RIVERA, J.P.
MARK C. DILLON
HOWARD MILLER
SHERI S. ROMAN, JJ.

2008-09929

DECISION & ORDER

Steven Cherner, appellant, v City of New York,
defendant, Grace Industries/El Sol Contracting &
Construction Corporation, a Joint Venture, et al.,
respondents.

(Index No. 18399/05)

The Perecman Firm, PLLC, New York, N.Y. (David H. Perecman, Rudolf B. Radna,
and Joseph Gorczyca of counsel), for appellant.

Torino & Bernstein, P.C., Mineola, N.Y. (Vincent J. Battista of counsel), for
respondents Grace Industries/El Sol Contracting & Construction Corporation, a Joint
Venture, and Grace Industries, Inc.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Sampson, J.), entered October 1, 2008, which granted the motion of the defendants Grace Industries/El Sol Contracting & Construction Corporation, a Joint Venture, and Grace Industries, Inc., individually and as a partner in Grace Industries/El Sol Contracting & Construction Corporation, a Joint Venture, and the separate motion of the defendant El Sol Contracting and Construction Corporation, individually, and as a partner in Grace Industries/El Sol Contracting & Construction Corporation, a Joint Venture, for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with costs.

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 (*id.* at 140).

Here, the respondents established, *prima facie*, that they owed no duty of care to the plaintiff. The contract at issue was not exclusive and comprehensive (*see Torchio v New York City Hous. Auth.*, 40 AD3d 970; *Roveccio v Ry Mgt. Co., Inc.*, 29 AD3d 562; *Hagen v Gilman Mgt. Corp.*, 4 AD3d 330). Additionally, there is no evidence that the plaintiff detrimentally relied upon the respondents' continued performance of their alleged contractual duties or that the respondents launched an instrument of harm (*see DeMartino v Home Depot U.S.A., Inc.*, 37 AD3d 758). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. Accordingly, the Supreme Court properly granted the respondents' motions for summary judgment dismissing the complaint insofar as asserted against them.

RIVERA, J.P., DILLON, MILLER, ROMAN and , JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court