

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

D24324
Y/kmg

_____AD3d_____

Argued - May 28, 2009

JOSEPH COVELLO, J.P.
FRED T. SANTUCCI
JOHN M. LEVENTHAL
ARIEL E. BELEN, JJ.

2008-02234

DECISION & ORDER

Geovane Freitas, plaintiff, v City of New York, et al.,
defendants third-party plaintiffs, second third-party
plaintiffs, and third third-party plaintiffs-respondents,
et al., third and second third-party defendants, Romano
Enterprises of New York, Inc., third third-party
defendant-appellant.

(Index No. 44769/01)

Nixon Peabody, LLP, Jericho, N.Y. (Aidan McCormack and Mark L. Deckman of
counsel), for third third-party defendant-appellant.

Fabiani Cohen & Hall, LLP, New York, N.Y. (Lisa A. Sokoloff of counsel), for
defendants third-party plaintiffs, second third-party plaintiffs, and third third-party
plaintiffs-respondents.

In an action to recover damages for personal injuries, the third third-party defendant
Romano Enterprises of New York, Inc., appeals from so much of an order of the Supreme Court,
Kings County (Rothenberg, J.), dated November 27, 2007, as granted that branch of the motion of
third third-party plaintiffs City of New York and New York City Department of Transportation for
summary judgment on their contractual indemnification claim.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The contention of Romano Enterprises of New York, Inc. (hereinafter Romano), that
the indemnification provision in its contract with general contractor Yonkers Contracting Co. did not

October 13, 2009

Page 1.

FREITAS v CITY OF NEW YORK

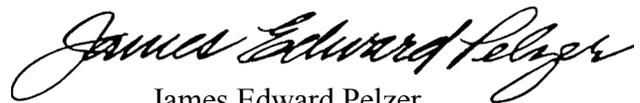
manifest a clear intention for Romano to indemnify the City of New York and the New York City Department of Transportation (hereinafter together the City) is raised for the first time on appeal, and, therefore, is not properly before this Court (*see Rosario v New York City Hous. Auth.*, 230 AD2d 900).

Romano's contention that the indemnification provision was void and unenforceable under General Obligations Law § 5-322.1 is also raised for the first time on appeal and, therefore, is also not properly before this Court (*see Pierce v City of New York*, 253 AD2d 545).

In light of the City's un rebutted prima facie showing that it was not negligent in the happening of the plaintiff's accident, it was entitled to summary judgment on its contractual indemnification claim (*see Castilla v K.A.B. Realty, Inc.*, 37 AD3d 510; *Reborchick v Broadway Mall Props., Inc.*, 10 AD3d 713).

COVELLO, J.P., SANTUCCI, LEVENTHAL and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court