At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20 day of November 2007.

P R E S E N T:

HON. KAREN ROTHENBERG,
Justice.

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GEOVANE FREITAS,
Plaintiff,
- against -
THE CITY OF NEW YORK, ET ANO.,
Defendants.

Index No. 44769/01

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THE CITY OF NEW YORK, ET ANO.,
Third-Party Plaintiffs,
- against -
ROMANO ENTERPRISES OF NEW YORK, INC.,
Third-Party Defendant.

Third-Party
Index No. 75169/03

----------X

THE CITY OF NEW YORK, ET ANO.,
Second Third-Party Plaintiffs,
- against -
LEIGHTON ASSOCIATES, INC.,
Second Third-Party Defendant.

Second Third-Party
Index No. 76175/05

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THE CITY OF NEW YORK, ET ANO ,
Third Third-Party Plaintiffs,
-against-
ROMANO ENTERPRISES OF NEW YORK, INC.,
Third Third-Party Defendant

Third Third-Party
Index No. 76203/05

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The following papers numbered 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 4
Opposing Affidavits (Affirmations)	5-6
Reply Affidavits (Affirmations)	7
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action by plaintiff Geovane Freitas (Freitas) to recover damages for personal injuries allegedly sustained by him, defendants/third-party plaintiffs the City of New York (the City) and the New York City Department of Transportation (the NYCDOT) move for summary judgment in their favor on their claims for contractual indemnification and common-law indemnification as against third -party defendant Romano Enterprises of New York, Inc. (Romano).

The City and the NYCDOT entered into a contract with non-party Yonkers Contracting Company, Inc. (Yonkers) to perform certain rehabilitation work, which included painting and sandblasting on the Manhattan Bridge (the Manhattan Bridge Rehabilitation Project). By a contract entitled Manhattan Bridge Contract BRC 1568C Painting Agreement, effective December 1, 1999, between Yonkers and Romano (the Romano contract), Romano "agree[d] to assume responsibility for supervising the completion of the Painting Work," which had previously been supervised by Dynamic Painting Corp.[1] under an agreement with Yonkers. Paragraph 11 of the Romano contract provided:

> "11. Indemnification
>
> Notwithstanding, this agreement hereby indemnifies and holds harmless Yonkers . . . and the NYCDOT from any loss, claims, suits, fines, all penalties, attorney's fees, damages or liability from any injury or death of any person, including any of its own employees or damage or destruction to any property arising from or in connection with any acts or omissions. Upon execution of this Agreement, Romano shall procure all necessary and adequate insurance and maintain same until final acceptance of the work, as described within the Agreement, by Yonkers and the NYCDOT. Yonkers and the NYCDOT shall have primary coverage as additional insureds."

[1] Dynamic Painting Corp. allegedly had failed to comply with its contractual obligations.

Romano procured primary insurance with a $1,000,000.00 limit with Royal Speciality Insurance Company (Royal). Romano also procured an excess insurance policy from Indemnity Insurance Company of North America (IICNA), which had a $10,000,000.00 limit. The City and the NYCDOT were named as additional insureds on both the Royal and the IICNA insurance policies.[2]

On October 24, 2000 Freitas, who was an employee of Yonkers, sustained personal injuries while performing sandblasting duties within a containment area on the Brooklyn tower of the Manhattan Bridge. Freitas' accident occurred when the work in the area was ordered halted due to an unhealthy level of dust and lead in the area. When the generator and the air supply to the confinement area were shut off, Freitas quickly attempted to make his way through a small crawl space, and he hit his head on a vertical beam.

On November 9, 2001, Freitas brought this action against the City and the NYCDOT, alleging claims of negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6), and seeking to recover damages for his personal injuries. On February 10, 2003, the City and the NYCDOT commenced a third-party action against Romano, seeking contractual indemnification, contribution, common-law indemnification, and breach of the agreement to secure liability insurance.

In March 2005, Romano's primary insurance carrier, Royal, on behalf of Romano, agreed to indemnify the City and the NYCDOT up to the $1,000,000.00 limit of Romano's primary insurance

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[2] The City and the NYCDOT were also named as additional insureds on an insurance policy obtained by Yonkers from St. Pauls Travelers.

policy with it. In consideration for this agreement, the City and the NYCDOT entered into a stipulation of discontinuance filed on March 4, 2005, discontinuing their third-party action against Romano with a reservation of their rights against it. Demand upon Romano's excess carrier was then made for coverage. In response, IICNA, by letter dated November 15, 2005, disclaimed coverage to the City and the NYCDOT based on the "late notice and the prejudice sustained in the case [due to its] being reported to [it] on the eve of trial."[3] Consequently, on November 18, 2005, the City and the NYCDOT commenced another third-party action against Romano (the third third-party action),[4] seeking common-law indemnification, contribution, and contractual indemnification, and alleging a breach of the agreement to secure liability insurance. By order dated January 17, 2006, Justice Allen Z. Hurkin-Torres severed the third-party actions from the main action.

On February 13, 2006, the City served Romano with a Notice of Vouching-In, which offered Romano control of the defense of the litigation. Romano did not assume the defense of this litigation, and the City and the NYCDOT proceeded to a jury trial in February 2006. After several days of trial, before any finding of liability was rendered, the City and the NYCDOT settled with Freitas for $1,350,000.00. Royal contributed its insurance policy limit of $1,000,000.00. The City and the NYCDOT paid the $350,000.00 balance of the settlement.[5]

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[3] In February 2006, the City and the NYCDOT commenced a declaratory judgment action against IICNA, seeking a declaration of insurance coverage. That action was discontinued in May 2006.

[4] In 2005, the City and the NYCDOT filed a second third-party action against Leighton Associates, Inc. (Leighton), who had been retained by the City and the NYCDOT to test and maintain the air quality in the containment area of the Manhattan Bridge.

[5] Romano asserts that the City and the NYCDOT has not shown the source of this $350,000 payment.

The City and the NYCDOT's third-party claim for contractual indemnification against Romano is predicated upon paragraph 11 of the Romano contract, which (as discussed above) requires Romano to indemnify the City and the NYCDOT "from any . . . claims . . . attorney's fees, damages or liability from any injury . . . arising from or in connection with any acts or omissions." Romano, in opposition to the City and the NYCDOT's motion, points to the fact that the Romano contract provides that the parties agreed that the painting work to be supervised by Romano was "as described in the plans and specifications for Contract BRC 1568C." It states that since these plans and specifications have not been submitted by the City and the NYCDOT, it cannot be determined whether the work performed by Freitas on the date of his injury was within the scope of Romano's obligations and responsibilities under the Romano contract.

Romano, however, does not claim that it is not in possession of these plans and specifications. Additionally, it is noted that the Romano contract provides that "Romano shall supervise the completion of the Painting Work described by the attached Schedule of Bid Items (Attachment A)," and Attachment A lists various activity descriptions, including "near-white blast & prime" towers, a truss, and subway tunnel as well as maintenance painting. Moreover, Romano does not submit any affidavit denying that the supervision of sandblasting was within the scope of Romano's duties and undertaking as set forth in the Romano contract.

Romano further relies upon the fact that Freitas testified at his deposition that he received his assignments from Mike Kinsey, who was a Yonkers' employee. Romano asserts that only Yonkers' employees, and not Romano employees made up the work schedule and provided Freitas with work

assignments, and directed Freitas to perform the sandblasting. Romano also asserts that it was Yonkers or Leighton who was in charge of stopping the air supply in the containment area. Romano contends that the foregoing raises a triable issue of fact as to whether Freitas' work fell within the Romano contract.

In response, however, the City and the NYCDOT have submitted the sworn affidavit of John Donnelly, who was employed by Yonkers as the project manager for the Manhattan Bridge Rehabilitation Project. John Donnelly attests, in his affidavit, that under the Romano contract, "Romano assumed control of the painting and sandblasting operations for the Manhattan Bridge [Rehabilitation P]roject." He explains that "[a]lthough the bridge painters/sandblasters were on Yonkers' payroll, the supervision of the painters and sandblasters was subcontracted by Yonkers to Romano in the . . . Romano contract." John Donnelly specifically asserts that at the time of Freitas' accident, Romano was in control of the labor, including Freitas, and of the materials and equipment, the containment, and any and all safety devices provided to the painters/sandblasters. John Donnelly states that Freitas' accident arose out of and in connection with Romano's contractual undertaking to supervise the completion of the painting/sandblasting work.

The City and the NYCDOT have additionally submitted the sworn affidavit of Satish Raman, who was employed by Yonkers as the project engineer for the Manhattan Bridge Rehabilitation Project. Satish Raman similarly attests that Freitas "was supervised and obtained his work instructions from Mike Kinsey and employees of Romano . . . with which Yonkers contracted to oversee the painting and blasting portion of the [Manhattan Bridge R]ehabilitation [P]roject."

On a motion for summary judgment, where, as here, the movant has made a prima facie showing of its entitlement to judgment as a matter of law, it is incumbent upon the opposing party to assemble and lay bare its proof, by the submission of evidentiary proof, in admissible form, sufficient to raise a triable issue of fact (*see Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Naranjo v Star Corrugated Box Co., Inc.*, 11 AD3d 436, 437-438 [2004]). Bare conclusory allegations by the party's attorney are insufficient to satisfy this burden (*see Zuckerman*, 49 NY2d at 563).

Here, Romano has only submitted the affirmation of its attorney, who speculates that there are issues of fact as to Romano's responsibility for Freitas' work. Romano fails to submit any sworn affidavit which disputes the sworn assertions by John Donnelly and Satish Raman or specifically denies that it was responsible for the supervision of Freitas and the work being performed on the date of the accident.

Romano further points to the fact that the City and the NYCDOT previously stated on page 3 of their brief before the Appellate Division, Second Department (which denied a motion for summary judgment by them in this action with respect to Freitas' claims against them) that "[t]he only entities at the project site [that] had the power and authority to direct, control, and supervise [Freitas] and the sandblasting operations on the day of the alleged incident were non-parties Yonkers . . . and Leighton." Romano contends that this is a "prior exculpation of any liability" of it by the City and the NYCDOT, which raises an issue of fact as to its culpability.

Romano's contention is devoid of merit. The City and the NYCDOT, on page 28 of the same brief, stated that "as established by [Syed] Arfeen's[6] deposition testimony and [Satish] Raman's affidavit . . . Romano had the power and authority to control and direct [Freitas'] work methods."

Romano also argues that the City and the NYCDOT's current statements are inconsistent with their attorney's affirmation in support of their earlier motion for summary judgment because their attorney had stated that other than Yonkers, there were no other entities except inspectors on the bridge at the time of Freitas' accident. Such argument, however, is unavailing since even if Romano was not physically present on the work site on the date of the accident, Romano has not refuted the City and the NYCDOT's showing that the work being performed by Freitas at the time of his injury fell within the scope of its undertaking under the Romano contract. Thus, Romano has failed to raise a triable issue of fact regarding whether Freitas' accident was in the scope of its work covered by the indemnification provision in the Romano contract.

Romano further argues that the City and the NYCDOT have not demonstrated their entitlement to contractual indemnification because they have failed to demonstrate that there is no issue of fact as to its negligence. Such argument must be rejected. As noted above, the indemnification provision in the Romano contract broadly provided for contractual indemnification by Romano when there was a claim arising "from or in connection with any acts or omissions." Thus, the triggering of Romano's contractual obligation to indemnify the City and the NYCDOT was not contingent upon proof that Romano had been

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[6] Syed Arfeen was the Assistant Engineer for the NYCDOT in charge of the Manhattan Bridge Rehabilitation Project.

negligent (*see Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [2007]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [2002]; *Velez v Tishman Foley Partners*, 245 AD2d 155, 156 [1997]).

Romano also argues that there is an issue of fact as to whether the City and the NYCDOT were negligent. The absence of a finding of negligence on the part of the City and the NYCDOT is a predicate to enforcing the contractual indemnification provision against Romano since General Obligations Law § 5-322.1 prohibits indemnification agreements in which an owner or contractor seeks to require a contractor or subcontractor to indemnify it for its own negligence, even if the injury was caused only in part by the indemnified owner's or contractor's negligence (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794-795 [1997]; *Brown v Two Exch. Plaza Partners,* 76 NY2d 172, 178 [1990]). Where, however, there is no finding of active negligence on the part of the indemnitee, the agreement does not violate General Obligations Law § 5-322.1 (*see Itri Brick & Concrete Corp.*, 89 NY2d at 795; *Neighborhood Partnership Hous. Dev. Fund v Blakel Constr. Corp.*, 34 AD3d 303, 304 [2006]; *Nicholas v EPO-Harvey Apts., Ltd. Partnership*, 31 AD3d 1174, 1175 [2006]; *Brennan v R.C. Dolner, Inc.* 14 AD3d 639, 639 [2005]; *Biance v Columbia Washington Ventures, LLC*, 12 AD3d 926, 927 [2004]; *Naranjo,* 11 AD3d at 438).

In the case at bar, John Donnelly, in his sworn affidavit, attests that the City and the NYCDOT did not direct or control the sandblasting work that Freitas was performing at the time of his accident. In addition, Satish Raman, in his sworn affidavit, attests that Freitas did not receive any work instructions from the City or the NYCDOT, nor was his work directed or controlled by them.

In opposition to this prima facie showing by the City and the NYCDOT of an absence of any negligence on their part, Romano relies upon the fact that a negligence claim and Labor Law § 200 and § 240 claims were pleaded in Freitas' complaint, and Justice Martin Schneier, by order dated February 4, 2005, summarily denied a motion by the City and the NYCDOT for summary judgment. That order, however, only stated that Freitas withdrew his Labor Law § 240 cause of action and, apparently referring to the argument made by the City and the NYCDOT, in support of their motion, that Freitas' conduct was the sole proximate cause of his own injuries, stated that the City and the NYCDOT's motion to dismiss the complaint "because [plaintiff's] actions not proximate cause of injury is denied - question of fact for jury."[7] Justice Schneier, in his February 4, 2005 order, did not render a finding that issues of fact existed as to any negligence on the part of the City and the NYCDOT, and he, therefore, did not determine the merits of this issue so as to constitute the law of the case herein (*see generally Meekins v Town of Riverhead*, 20 AD3d 399, 400 [2005]). Thus, there is no evidentiary proof whatsoever to raise a triable issue of fact as to any negligence on the part of the City or the NYCDOT which would preclude enforcement of the contractual indemnification provision *(see Nicholas*, 31 AD3d at 1175; *Landgraff v 1579 Bronx River Ave., LLC,* 18 AD3d 385, 387 [2005]; *Biance*, 12 AD3d at 927; *Naranjo*, 11 AD3d at 438).

"When an indemnitor has notice of the claim against it, the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make" (*Coleman v J. R.'s Tavern,* 212 AD2d 568, 568 [1995]; *see also Goldmark Indus. v Tessoriere*, 256 AD2d 306, 307

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[7] The denial of the motion for summary judgment motion was appealed to the Appellate Division, Second Department, but due to the settlement of this action, the appeal was not determined.

[1998]; *Gray Mfg. Co. v Pathe Indus.*, 33 AD2d 739, 739 [1969], *affd* 26 NY2d 1045 [1970]). Here, Romano was given notice of the claim against him by the third third-party action against it as well as the Notice of Vouching-In. In addition, the City and the NYCDOT have shown that they made a reasonable settlement, in good faith, with Freitas, who suffered severe injuries, and that they could have been found liable if they proceeded with the trial of Freitas action against them (*see Goldmark Indus.*, 256 AD2d at 307; *Coleman*, 212 AD2d at 568-569). Thus, Romano is obligated contractually to indemnify the City and the NYCDOT for the balance of the settlement amount, together with reasonable attorneys' fees and expenses incurred by the City and the NYCDOT in connection with defending and settling the action (*see Goldmark Indus.*, 256 AD2d at 307; *Coleman*, 212 AD2d at 569; *Gray Mfg. Co.*, 33 AD2d at 739).

As to the City and the NYCDOT's request, in their motion, for common-law indemnification from Romano, it is noted that there is some authority for the view that a party who has settled a claim cannot seek common-law indemnification from another because common-law indemnity is available only when a party is compelled by judgment to respond in damages for the wrongful conduct or neglect of another (*see Allstate Ins. Co. v State of New York*, 152 Misc 2d 869, 872 [1991]). There is, however, contrary authority on this issue (*see Antonelli v City of Mount Vernon*, 20 Misc 2d 331, 332 [1959]; *Lanser v Baumrin*, 2 Misc 2d 610, 611 [1956]). In any event, since the court has determined that the City and the NYCDOT are entitled to contractual indemnification from Romano, which encompasses the same recovery, it is unnecessary to reach this issue.[8]

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[8] It is noted that the City and the NYCDOT, in their attorney's reply affirmation, abandon their argument for common-law indemnification.

While the City and the NYCDOT also make arguments in support of their third-party claim against Romano for failure to procure insurance coverage, summary judgment on this claim was not requested in their notice of motion, and this issue is, thus, not properly before the court.[9] It is noted, though, that Romano, in opposing this relief, points out that the Romano contract only required that it procure "all necessary and adequate insurances," and it obtained a $1,000,000.00 primary insurance policy and a $10,000,000.00 excess insurance policy from IICNA." In any event, however, the granting of the City and the NYCDOT's contractual indemnification claim affords the same recovery to them as sought by this claim.

Accordingly, the City and NYCDOT's motion is granted insofar as it seeks summary judgment in their favor on their contractual indemnification claim for the remaining $350,000.00 balance of the settlement plus reasonable attorney's fees and expenses incurred by them in connection with defending and settling this action. A hearing shall be held to determine the City and the NYCDOT's attorney's fees and expenses before a Judicial Hearing Officer.

This constitutes the decision and order of the court.

E N T E R.

J. S. C.

[9] The City and the NYCDOT do not pursue this claim in their reply papers.