

**Adzemovic v S & M 52nd FEE LLC**

2019 NY Slip Op 32388(U)

August 7, 2019

Supreme Court, New York County

Docket Number: 158408/2015

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----X  
BASRIJA ADZEMOVIC and IWONA ADZEMOVIC,

Plaintiffs,

-against-

Index No.: 158408/2015

S & M 52nd FEE LLC,

Defendant(s).

-----X  
S & M 52nd FEE LLC,

Third-Party Plaintiffs,

-against-

REMCO MAINTENANCE, LLC,

Third-Party Defendants.

-----X

**COHEN, J.:**

Motion sequence numbers 001, 002, and 003, have been consolidated for disposition.

In motion sequence 001, plaintiffs Basrija Adzemovic (plaintiff) and Iwona Adzemovic move, pursuant to CPLR 3212, for an order granting summary judgment as to the alleged violation of Labor Law § 240 (1) against defendant/third-party plaintiff S & M 52nd Fee, LLC (S & M).

In motion sequence 002, third-party defendant Remco Maintenance, LLC (Remco), moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the third-party complaint.

In motion sequence 003, defendant/third-party plaintiff S & M, moves, pursuant to CPLR

3212, for an order granting summary judgment dismissing plaintiffs' claims for common law negligence and violations of Labor Law §§ 200 and 240 (1).<sup>1</sup>

### **FACTUAL ALLEGATIONS**

#### **Plaintiff's deposition**

Plaintiff alleges that he suffered personal injuries on August 6, 2015, while cleaning a glass canopy at 429 East 52nd Street, New York, New York. Plaintiff testified that he worked as a maintenance foreman for Remco. He received safety training through his union which included scaffolding requirements. Plaintiff testified that he had been working at 429 East 52nd Street every three month period, for five to ten years. He maintains that on the date of his accident, he was cleaning the building's glass and metal which included a glass canopy that spanned from the sidewalk to the front entrance. He testified that the work was considered to be maintenance for both glass and metal. Joining plaintiff at the location were his co-workers, Angel Montes and Barlain Dornevil.

Plaintiff maintains that located on Remco's truck were rags, an eight-foot ladder, a five-foot ladder, a window-washer ladder which extended with attachments, and scaffolding. When the workers arrived at the building, they took the ladders off of the truck, but did not remove the scaffold. He testified that the scaffold could not be utilized due to the height of the glass as it would extend too far away from the glass. In order to reach the glass canopy, plaintiff used two sections of the window washer ladder, which totaled twelve feet, and leaned them on a beam. After ascending the ladder, plaintiff stepped onto the glass. Plaintiff proceeded to scrub

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<sup>1</sup> In plaintiffs' affirmation in opposition dated August 24, 2018, plaintiffs withdrew the part of their complaint which alleged a violation of Labor Law § 241 (6) .

the glass while leaning on his knees. He does not believe that there was other equipment which he could utilize for the job. He did not complain to anyone about the scaffold and testified that he would have used the same type of equipment if he had to return to the location.

As plaintiff approached the end of the piece of glass on which he was located, he placed both of his feet on the trestle of wooden beams which stuck out from under the canopy. Plaintiff testified that when he stepped on one of the wooden beams, it gave in, causing him to fall. He was told by other workers that he fell 18 feet to the ground.

Plaintiff maintains that he kept a safety belt in the truck with a body harness, but that he did not have a line to tie it or hook. Plaintiff never asked for a safety line for the subject job. He recalls that no one ever told him that he should have been tied off, to wear a hard hat, or to check the glass or beams. Plaintiff testified that he had a hard hat and lanyard, but was not wearing either at the time of the accident.

Plaintiff testified that he never spoke with anyone from Remco about stepping on the beams. He maintains that on previous occasions, Remco's supervisor visited the location when he performed the job. However, at the time of his accident, the supervisor had been terminated and no supervisor was present. Plaintiff never made any complaints about the canopy to anyone at Remco. He did not have knowledge as to whether his co-workers had made any complaints.

Plaintiff recalls that "Ann" or "Louis" from the building would watch him clean the canopy, but he does not recall either observing him on the date of the accident. Plaintiff testified that the building superintendent would sign off when his work was finished. Plaintiff maintains that no one from the building told him how to conduct his work, that he never complained to anyone regarding the canopy, that he never had any problems with the beams, and that no one

provided him with equipment to clean the canopy.

Plaintiff testified that he never experienced any shifting or movement of the beams when he was cleaning the canopy. On the day of the accident, he did not notice anything unusual regarding the beams or glass.

**Louis Calero's deposition**

Louis Calero (Calero) testified on behalf of S & M. Calero testified that he works as a building superintendent for San-Dar, a real estate management company, and that he was assigned to work at 429 East 52nd Street. Calero maintains that he lives in the subject building and supervises the property. Calero hired Remco to perform metal and glass maintenance at the property. Once a month, or once every quarter, Remco would clean the entrance trellis, the greenhouse, and the glass canopy. Calero testified that he would not always be made aware when Remco would be visiting the building.

Calero testified that when Remco obtained the account to clean the glass, he spoke with plaintiff and described the construction of the canopy. He recalls telling plaintiff not to stand on the trusses because they had no structural value and were for aesthetic purposes. He did not tell plaintiff to stay off of the glass or what safety equipment to utilize. At the time of the conversation, Calero was not aware as to how much weight the trusses could support. He testified that other than himself, no one inspected the canopy and that the trusses had not collapsed prior to plaintiff's accident. Calero maintains that when he would see plaintiff, he would not discuss the work.

Calero testified that he recalled observing plaintiff and other co-workers utilizing a ladder to access the canopy, but did not remember seeing scaffolds. He recalls observing the workers

on top of the glass for cleaning purposes. He believes that Remco's work was a two-day activity. Calero testified that he learned of plaintiff's accident after it occurred. Although Calero maintains that he spoke with two of plaintiff's co-workers, neither co-worker observed the accident. He was told that plaintiff fell about ten feet after stepping on a truss.

Calero maintains that there were no complaints made about the trusses or canopy on the morning of the accident and that he had not previously observed workers from Remco putting weight on the trusses. He testified that workers from Remco would bring their safety equipment to the site. He never conducted a physical inspection of the glass canopy, but would visually inspect it as he would walk through it two to three times a week. Calero testified that no one from Remco had ever asked him for ladders or equipment. He testified that no one from the building instructed Remco how to perform their work or told the workers that they should be using safety equipment while cleaning the canopy.

#### **Angel Montes' deposition**

Angel Montes (Montes) testified that he worked for Remco and conducted maintenance work which included cleaning windows and metal. Montes recalls working at the subject location with plaintiff and another worker to clean windows and the marquee. Montes maintains that they would clean the canopy every four months. It would take about five days for the canopy to be cleaned by utilizing a three-man crew. When working at the location, the workers would bring three ladders, scaffolds, chemicals and towels.

Montes testified that on the date of plaintiff's accident, the workers set up the scaffold in order to reach the canopy. Plaintiff climbed on top of the canopy by using the scaffold, and kneeled to clean the glass. Montes maintains that although he did not see plaintiff's accident,

plaintiff was alerted of the accident when he heard a noise and observed plaintiff on the ground. After the accident, Montes did not speak with plaintiff or learn how the accident occurred. However, he did notice that a beam for the canopy was out of place as it was hanging in a lower position. Montes had never used that beam to climb into place, nor saw anyone, including plaintiff, use a beam to climb onto the canopy. Montes had never heard any complaints about working on the canopy.

Montes maintains that he was not present at any meetings in which he was told to not stand on the canopy. He testified that there was a building superintendent named Louis who would discuss the scope of the work, but Louis never told the workers how to clean the glass or not to stand on the beams. Montes maintains that he was not provided safety devices to utilize while on top of the glass and that there was no safety lines above the glass canopy in which a harness could be tied. Montes testified that he had worked at another site for Remco at which a scissor lift was utilized.

**Nicholas Bellizzi's affidavit**

Nicholas Bellizzi, P.E. (Bellizzi), a registered and licensed professional engineer in New York, submits an affidavit dated May 10, 2018 on behalf of plaintiff. Bellizzi reviewed photographs of the site, an incident report, an employee claim form, a C-3 form, and depositions of plaintiff, Calero, and Montes. Bellizzi states that plaintiff could not use a scaffold to reach the top section of glass in which he was cleaning as it was part of a glass canopy. He states that plaintiff stood on a 2 x 10 beam which he referred to as joists, or intermediate beams, and that after putting his left foot on one of the joists, and his right foot on an adjacent joist, the joist collapsed, causing him to fall off of the canopy.

Bellizzi concludes that Labor Law § 240 (1) was violated as the joist was not structurally sound to provide a safe work platform, support, or protection to plaintiff. He states that the building should have assured that all supporting elements, including the wooden trusses, were inspected and secured in place to prevent dislodgement. Bellizzi maintains that there was no independent safety cables or lifelines erected for the workers to tie off. He maintains that OSHA approved anchorage points should have been utilized.

**John M. Tomich's affidavit**

John M. Tomich (Tomich), principal of North Star Consultants of New York, LLC, submits an affidavit dated August 22, 2018, on behalf of S & M. Tomich has worked for over 45 years in the occupational safety and health profession and was employed for 32 years with OSHA. In preparing his affidavit, Tomich reviewed Remco's "Request for Proposal," the verified bill of particulars, an incident report, the supplemental verified bill of particulars, third supplemental verified bill of particulars, defendant's demand for verified bill of particulars, depositions of Montes, Calero, plaintiff, and photographs.

Tomich states that based upon the testimony, scaffolding was available and should have been used to perform the work. Tomich concludes that if plaintiff had used these devices instead of the window washer ladder and the truss, the accident would not have occurred. Tomich maintains that the trusses were never intended to be a safety device for plaintiff's work and were designed to be an aesthetic component to the canopy. He maintains while Bellizzi discusses the use of cables, lifelines, and anchorage points, the work was routine maintenance. Tomich concludes that plaintiff's failure to use the scaffold in his truck, and intentionally stepping upon the wooden beam which he had previously been instructed not to stand upon, is the sole

proximate cause of his injuries.

## DISCUSSION

### Summary Judgment Standard

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

### Labor Law § 240 (1)

Plaintiffs allege that summary judgment must be granted as to their allegation that Labor Law § 240 (1) was violated, while S & M seeks to dismiss the claims made pursuant to this section of the Labor Law.

Labor Law § 240 (1) provides in part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"The failure to provide safety devices constitutes a per se violation of the statute and subjects owners and contractors to absolute liability, as a matter of law, for any injuries that result from such failure since workers are scarcely in a position to protect themselves from

accident." *Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 (1st Dept 2009) (citations and quotations omitted).

The Court of Appeals has held that "[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001) *citing Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 (1993); *see also Nieves v Five Boro Air Conditioning & Refrigeration Corp.*, 93 NY2d 914, 916 (1999) (holding "[t]he core objective of the statute in requiring protective devices for those working at heights is to allow them to complete their work safely and prevent them from falling. Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240 (1) liability exists").

Plaintiffs contend that S & M violated Labor Law § 240 (1) when the truss collapsed. Plaintiffs argue that although plaintiff had a safety harness at the time of the accident, the safety harness failed to provide proper protection as there was no independent structures in which plaintiff was able to tie onto. Plaintiffs also argue that neither comparative negligence nor assumption of risk may be asserted as a defense by defendants in a Labor Law § 240 (1) action.

In opposition, S & M contends that plaintiff's work was routine maintenance, that it was not a protected activity pursuant to Labor Law § 240 (1), and that the cleaning of the canopy was unrelated to the protection of construction workers in ongoing construction, renovation, painting, alteration or repair projects. S & M argues that the work was not related to the condition of the

premises, but took place four times a year as part of the ordinary and regular maintenance of the canopy. S & M argues that the work required neither specialized equipment, nor a level of expertise.

S & M contends that in *Soto v J. Crew, Inc.*, 21 NY3d 562 (2013), the Court of Appeals set forth a test for differentiating between "cleaning" cases and "routine maintenance" cases that fall outside of the purview of Labor Law § 240 (1). In *Soto v J. Crew, Inc.*, the Court of Appeals held:

"[o]utside the sphere of commercial window washing (which we have already determined to be covered), an activity cannot be characterized as "cleaning" under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other."

*Id.* at 568-569.

First, the court notes that although plaintiff argues that he had a harness at the time of his accident, plaintiff's testimony is unclear as to whether he was wearing it and indicates that it was located in the truck. Plaintiff's EBT, 200-203. Plaintiff also testified that he was not wearing a lanyard. *Id.* at 243.

With regards to S & M's argument that plaintiff was engaged in routine maintenance, the Appellate Division, First Department, examined a similar factual scenario in *Fox v*

*Brozman-Archer Realty Servs.*, 266 AD2d 97, 98 (1st Dept 1999). There, plaintiff, a maintenance worker employed by Monarch, was injured when he fell from a ladder which slipped while he was power-washing the plexiglass canopy of Monarch's residential condominium premises. The court held:

"[p]laintiff was entitled to the protection of Labor Law § 240 (1) since at the time of his accident he was engaged in the "cleaning ... of a building" (*see, Chapman v International Bus. Machs. Corp.*, 253 AD2d 123; *Ekere v Airmont Indus. Park*, 249 AD2d 104). Although Chapman and Ekere involved commercial buildings, their holdings are nonetheless applicable since the power-washing of the plexiglass canopy affixed over the entry to the subject condominium premises does not fall under the rubric of "truly domestic" household cleaning (*Vernum v Zilka*, 241 AD2d 885, 886), nor was plaintiff's work being performed for a residential unit owner, distinguishing the matter from *Brown v Christopher St. Owners Corp.* (87 NY2d 938)."

*Id.* at 98.; *see also Ekere v Airmont Indus. Park*, 249 AD2d 104, 105 (1st Dept 1998) (holding plaintiff, who was injured when he fell from a ladder while cleaning an awning with a pressure cleaning machine and a brush, was entitled to the protection of Labor Law § 240 [1]).

Here, the work which plaintiff was conducting, specifically standing on top of sheets of glass on short wooden beams for cleaning purposes at an elevation of at least ten feet, required specialized expertise and included a risk not inherent in typical domestic or household cleaning. Therefore, Labor Law § 240 (1) is applicable as to the type of work performed by plaintiff. However, based upon the conflicting expert affidavits of Bellizzi and Tomich, a question of fact exists as to whether plaintiff was provided with adequate protection for his work.

Bellizzi, who submits an affidavit on behalf of plaintiff, states plaintiff could not use a scaffold to reach the top section of glass which he was cleaning. Bellizzi concludes that the truss was not structurally sound as to provide for a safe work platform or proper support and

protection to plaintiff, that the building should have assured that all supporting elements including the wooden trusses were inspected and properly secured in place to prevent dislodgement, and that there was no independent anchorage points, safety cables, or lifelines erected for the workers to tie off.

Tomich, who submits an affidavit on behalf of S & M, states that a scaffold was available and should have been utilized to perform the work. Tomich concludes that plaintiff's failure to use the scaffold in his truck, and intentionally stepping upon the wooden beam which he had previously been instructed not to stand upon is the sole proximate cause of his injuries.

Therefore, because the testimony and the expert affidavits raise an issue of fact as to whether the ladder which plaintiff was utilizing was an adequate safety device, or whether other devices such as a line with an anchorage point, should have been provided to work on the elevated glass, the motions of plaintiffs and S & M which seek summary judgment as to the alleged violation of Labor Law § 240 must be denied.

Finally, while S & M contends that plaintiff's actions contributed to his injuries, contributory negligence is not a defense to a violation of Labor Law § 240. *See Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 (1st Dept 2013); *Ernish v City of New York*, 2 AD3d 256, 257 (1st Dept 2003).

**S & M's claims for Common Law Indemnification, Contractual Indemnification, and Breach of Contract**

Remco contends that S & M's common law indemnification and contribution claims must be dismissed because plaintiff did not sustain a grave injury pursuant to section 11 of the Workers Compensation Law. "Section 11 bars third-party lawsuits for contribution and

indemnification against an injured employee's employer unless the employee suffered a "grave injury," limited to death and the exclusive list of disabilities defined in the statute, or the employer agreed to contribution and indemnification in a written contract entered into with the third party prior to the accident." *New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501, 505 (2014).

Section 11 of the Workers Compensation Law provides:

"An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

The Court of Appeals has held that "[t]he grave injuries listed are deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action." *Castro v United Container March. Group*, 96 NY2d 398, 402 (2001) (citation omitted). Furthermore, with regard to a brain injury, a brain injury results in "permanent total disability when the evidence establishes that a worker is not employable in any capacity." *Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 413 (2004).

Remco argues that based upon the totality of the testimony, expert reports, and medical records, plaintiff did not sustain a grave brain injury. Remco contends that itself and S & M shared a vocational rehabilitation specialist as an expert, Mr. Peter Capotosto, who opined that plaintiff is capable of returning to work. Remco also contends that Dr. Erlanger, a

neuropsychologist, evaluated plaintiff and concluded that there was no evidence of a traumatic brain injury and that plaintiff can return to work on a full-time basis. Remco concludes that as there is an absence of a grave injury, the common law indemnification and contribution claims against Remco must be dismissed.

In opposition, S & M fails to address whether plaintiff has a grave injury and does not address plaintiff's cognitive or physical condition. Instead, S & M contends that it was not negligent and that Remco was negligent as it controlled the means and methods which led to plaintiff's injuries.

Once a movant meets his or her burden of establishing the absence of a grave injury, the opponent must come forward with admissible evidence indicating that there is a triable issue of fact on the issue of grave injury. *See Barbieri v Mount Sinai Hosp.*, 264 AD2d 1, 7 (1st Dept 2000) (holding plaintiff's affidavit in support of his motion for summary judgment fails to allege the injuries which are required by section 11 of the Workers Compensation Law).

As S & M fails to meet its burden to demonstrate that there is a triable issue of fact as to whether plaintiff has a grave injury or that contribution was agreed to in a written contract, the part of S & M's motion seeking summary judgment as against Remo for contribution and common law indemnification must be denied.

Remco also argues that the third-party claims for contractual indemnification and breach of contract for failure to procure insurance must also be dismissed. Remco contends that the only written agreement between itself and S & M is a two-page proposal which does not contain a contractual indemnification provision, or an insurance procurement obligation.

In its affirmation in partial opposition to Remco's motion for summary judgment, S & M

fails to discuss Remco's arguments regarding the third party claims for contractual indemnification and breach of contract for failure to procure insurance. Therefore, because S & M fails to address such claims or present an argument in opposition, S & M's claims for contractual indemnification and breach of contract are deemed abandoned and must be dismissed. *See Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (holding plaintiff "did not oppose that branch of the motion and, as the Supreme Court noted, he has abandoned his claim . . .").

### **Labor Law § 200**

S & M contends that the part of its motion seeking summary judgment dismissing plaintiff's claims for common law negligence and a violation of Labor Law § 200 must be granted.

Labor Law § 200 (1) states, in pertinent part, as follows:

"[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. . . ."

"Liability pursuant to Labor Law § 200 may be based either upon the manner in which the work is performed or actual or constructive notice of a dangerous condition inherent in the premises." *Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 736 (2d Dept 2008). In order for an owner or general contractor to be liable for common-law negligence or a violation of Labor Law § 200 for claims involving the manner in which the work is performed, it must be shown that the defendant had the authority to supervise or control the performance of the work. For

claims which arise out of an alleged dangerous premises condition, it must be demonstrated that an owner or general contractor had control over the work site and either created the dangerous condition causing an injury, or did not remedy the dangerous or defective condition, while having actual or constructive notice of it. *See Abelleira v City of New York*, 120 AD3d 1163, 1164-1165 (2d Dept 2014).

S & M contends that there is no evidence which demonstrates that it exercised supervisory control over the injury producing work, that there was anything wrong with the design or construction of the canopy, or that there were problems with the canopy beams prior to plaintiff's accident. S & M maintains that Calero testified that he did not tell plaintiff how to clean the canopy and did not tell plaintiff what safety equipment to use.

Here, the testimony of Calero raises a question of fact as to whether S & M had the authority to supervise or control the performance of the work which ultimately caused plaintiff's injury. While Calero testified that he did not tell plaintiff to not stand on the glass or what safety equipment he should utilize, he did tell plaintiff not to stand on the trusses because they were for esthetic purposes and told plaintiff that the trusses had no structural value. He also testified that he spoke with plaintiff and described the construction of the canopy.

As Calero was aware of the work which plaintiff was conducting and did instruct plaintiff not to stand on certain areas of the canopy including the trusses, a question of fact exists as to whether S & M had the authority to supervise or control the performance of the work which ultimately caused plaintiff's injury. Therefore, the part of S & M's motion seeking summary judgement dismissing plaintiff's claims for common law negligence and Labor Law § 200 must be denied.

**CONCLUSION and ORDER**

Accordingly, it is

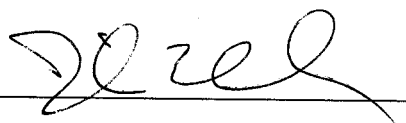
ORDERED that plaintiffs Basrija Adzemovic and Iwona Adzemovic motion for summary judgment against S & M 52nd Fee, LLC, as to the alleged violation of Labor Law § 240 (1) is denied; and it is further

ORDERED that Remco Maintenance, LLC's motion for summary judgment dismissing S & M 52nd Fee, LLC's third-party complaint is granted; and it is further

ORDERED that S & M's 52nd Fee, LLC, motion for summary judgment dismissing plaintiffs claims for common law negligence and violations of Labor Law §§ 200 and 240 (1) is denied.

Dated: August 7, 2019

ENTER:

  
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J.S.C.

**HON. DAVID B. COHEN**  
J.S.C.