

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
ADAM KOZUCHOWICZ,

Plaintiff,  
-against-

CENTIMARK CORPORATION, 22 ARKAY LLC  
and L.N.K. INTERNATIONAL INC.

Defendants.

-----X  
22 ARKAY LLC and L.N.K. INTERNATIONAL INC.,

Third-Party Plaintiffs,  
-against-

CITY GREEN STREET, INC.,

Third-Party Defendant.

-----X  
CENTIMARK CORPORATION,

Second Third-Party Plaintiff,

-against-

CITY GREEN STREET, INC.,

Second Third-Party Defendant.

-----X

C O U N S E L O R S :

PLEASE TAKE NOTICE that upon the annexed Affirmation  
of CHRISTOPHER J. DONADIO dated November 25, 2015, and upon all  
of the pleadings and proceedings heretofore had herein, the  
undersigned will move this Court before the I.A.S. Part 11, at

**NOTICE OF  
MOTION**

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502187/2013

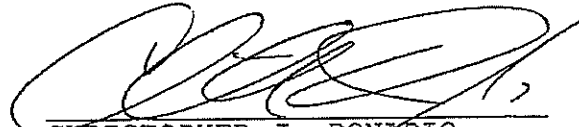
the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 15<sup>th</sup> day of January, 2016, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order granting summary judgment to the plaintiff pursuant to CPLR §3212 and New York State Labor Law §240(1) on the issue of liability against defendants, CENTIMARK CORPORATION, 22 ARKAY LLC and L.N.K. INTERNATIONAL INC., together with such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affirmations, if any, must be served upon the undersigned at least seven (7) days prior to the return date of this motion.

Dated: New York, New York  
November 25, 2015

Yours, etc.,

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CENTIMARK CORPORATION,

Second Third-Party Plaintiff,

-against-

CITY GREEN STREET, INC.,

Second Third-Party Defendant.

-----X

CHRISTOPHER J. DONADIO, hereby affirms under penalty  
of perjury pursuant to CPLR 2106 as follows:

1. I am an associate of the firm of Gair, Gair, Conason,  
Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, attorneys  
for the plaintiff herein and I am fully familiar with all of the

**AFFIRMATION IN  
SUPPORT**

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facts, circumstances, pleadings and proceedings pertaining to this litigation.

2. This Affirmation is submitted in support of the motion by plaintiff for an Order granting the plaintiff Summary Judgment on the issue of liability pursuant to New York State Labor Law §240(1).

3. This is an action pursuant to Labor Law §240(1) wherein the plaintiff, ADAM KOZUCHOWICZ, was seriously injured when the roof platform on which he was performing construction and demolition work collapsed.

4. The instant action was commenced via the filing of a Summons and Complaint on April 26, 2013. See **Exhibit A**. Thereafter, Issue was joined by the Answering defendants. See **Exhibit B**. Verified Bills of Particulars were served upon the Answering defendants. See **Exhibit C**. The Plaintiff filed his Note of Issue on February 24, 2015. See **Exhibit D**. As a result of outstanding Third Party discovery, all parties requested an enlargement of time to file motions for summary judgment. This request was granted by an order of the Honorable Edgar G. Walker on August 13, 2015. Per the order of Judge Walker, the time of file motions for summary judgment was extended until November 30, 2015. See **Exhibit E**.

PLAINTIFF'S STATEMENT OF FACTS

5. The subject accident occurred on August 16, 2012 at approximately 8:00 p.m. at a construction site located at 22 Arkay Drive, in the Town of Hauppauge, County of Suffolk, State of New York.

6. The work being performed at the subject premises was a roof demolition and construction project. The owners of the premises were defendants L.N.K. INTERNATIONAL, INC. and 22 ARKAY LLC (also referred to as LNK). The General Contractor and/or agent for LNK was defendant CENTIMARK CORPORATION (also referred to as CENTIMARK).

7. The plaintiff, ADAM KOZUCHOWICZ, was working at the subject premises for the Third-Party and Second-Third Party defendant CITY GREEN STREET, INC. (also referred to as CITY GREEN STREET), a subcontractor, who was hired to do asbestos abatement at the subject roof. See **Exhibit F**, Contract between CITY GREEN STREET and LNK. The scope of the work for City Green Street was to remove roofing material and roof fans that contained asbestos. See Exhibit F.

8. The deposition of the plaintiff was taken on May 29, 2014. See **Exhibit G**. Mr. Kozuchowicz testified that he first started working at the subject premises in early August 2012. (Exhibit G, p. 21).

9. On the night of his fall, Mr. Kozuchowicz was tasked with removing two black metal beams from the roof. The beams are depicted in the photograph attached as Exhibit H.

10. It was this task that he was performing at the time of the accident:

Q: Okay. And, what were you doing when the accident happened?

A: I was cutting the beam. Actually, I finished to cut the beam and I wanted to fetch it to the spot we collected all the metal junk. So I lifted it, I made maybe half of the step and I don't remember anything else except that my father appeared next to me.  
(Exhibit G, p.47-48, 18-25, 2-4).

11. Mr. Kozuchowicz fell through a part of the concrete roof and landed inside the warehouse below. A photograph of the area where Mr. Kozuchowicz landed after his fall is depicted in **Exhibit I**.

12. As demonstrated by the citations issued following the investigation of the subject incident by the Occupational Safety and Health Administration, Mr. Kozuchowicz and his co-workers were not provided any instruction regarding the avoidance of falls at the work site, nor were they provided safety devices such as "guardrail systems, safety net systems or personal fall arrest systems." See **Exhibit J**.

13. In addition, Mr. Kozuchowicz had no reason to believe that he needed to use any sort of safety device in the area where he was directed to work. No one informed him that the area where he was directed to work was a dangerous area that could collapse. (Exhibit H, p. 49-50). Although the photograph of the area appears to show the words "bad deck" in the area where Mr. Kozuchowicz fell, Mr. Kozuchowicz testified that on the night of his fall, there was no writing in that area. (Exhibit H, p. 50). Even if the writing had been there, there is no dispute that he does not read or understand English. (Exhibit H, p. 50).

14. As is obvious from the photo of where Mr. Kozuchowicz landed after his fall, Mr. Kozuchowicz fell approximately 15-20 feet through the roof to the floor.

15. The defendant General Contractor, Centimark Corporation, LLC, was deposed via Michael Horwath on May 30, 2014. Annexed hereto as **Exhibit K** is the transcript of Mr. Horwath. Mr. Horwath explained that Centimark was hired by LNK to perform roofing work at the subject location. The work included removing, recovering and overlaying the roof. (Exhibit K, p. 31).

16. At some point during Centimark's work at the subject premise, it was determined that asbestos abatement would be needed on certain areas of the roof. (Exhibit K, p. 69). As a



result, Centimark sought out a subcontractor to remove the asbestos laden materials. (Exhibit K, p. 72). Centimark received a proposal for the asbestos abatement from City Green Street. (Exhibit K, p. 76).

17. At this point, LNK was informed by Centimark that if LNK contracted with City Green Street directly, rather than Centimark hiring them as a subcontractor, LNK could save money. This was explained by Mr. Horwarth at his deposition:

Q: I just want to make sure I have it clear. Centimark requested the proposal from City Green Street, but L.N.K. didn't want to include City Green Street as a cost item within the Centimark contract; is that correct?

A: Could you rephrase that?

Q: Sure. L.N.K. wanted to save some money so they hired City Green directly; is that correct?

A: Yes.

Q: As opposed to having any type of management overhead markup, if City Green Street was a subcontractor officially under Centimark; is that correct?

A: Yes. (Exhibit K, p. 77-78, 23-25, 2-16)

18. Although the contract was between LNK and City Green Street directly, Centimark as the general contractor and/or agent of LNK, directed the day to day work of City Green Street. The Centimark foreman, Daniel Seaver, for the subject roofing project, was deposed on November 25, 2014. See **Exhibit L**. Mr. Seaver explained that it was his duty as the Centimark foreman

to direct the work of City Green Street each and every day.

(Exhibit L, p. 49). Mr. Seaver would direct the work by speaking with the owner of City Green Street, Marek Kruk:

Q: On most days, would there be at least a meeting between yourself and someone from City Green Streets?

A: Me and Marek, yes.

Q: Would that be every day?

A: Every day.

Q: What would you discuss every day? What would you talk about with Marek every day?

A: I would just show him the area where they had to work and then he would take over. (Exhibit L, 49-59, line 18-25, 2-5).

19. Finally, of relevance to this motion, defendants 22 ARKAY LLC and L.N.K. INTERNATIONAL, INC., were deposed on March 18, 2015 via John Caraciolo. Annexed hereto as **Exhibit M** is the deposition transcript of Mr. Caraciolo. Mr. Caraciolo confirmed that the owner of the subject property was defendant 22 ARKAY LLC and L.N.K. INTERNATIONAL, INC. (Exhibit M, p.8-10). The building itself was a commercial building which housed an over-the-counter pharmaceutical company. (Exhibit M, p. 9).

#### **ARGUMENT**

#### **VIOLATION OF LABOR LAW §240(1) IMPOSES STRICT LIABILITY ON THE DEFENDANTS**

20. Labor Law §240(1) imposes a non-delegable duty upon the owner and contractor to provide adequate safety devices to protect

workers at an elevation from falling. Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280, 771 NYS2d 484 (2003); and Vergara v. SS 133 W. 21 LLC, 21 A.D.3d 279, 280, 800 N.Y.S.2d 134 (1<sup>st</sup> Dept. 2005). Here, defendants are comprised of the owner and general contractor and/or agent of the property. In addition, the plaintiff was working at an elevation, as testified to by the plaintiff Adam Kozuchowicz and was not provided appropriate safety devices, including a secured platform to work on, safety netting, guardrails, or personal fall protection. Further, plaintiff, Adam Kozuchowicz was a protected employee under Labor Law 240(1) as he was engaged in construction activities, as part of the demolition of the roof. Narducci v. Manhasset Bay Associates, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001). Therefore, the defendants are strictly liable for failing to comply with Labor Law 240(1).

21. Section 240, subdivision (1) of the Labor Law provides as follows, insofar as relevant to the instant case:

All contractors and owners...who contract for but do not direct or control the work, in the erection, demolition, construction...of a building or structure, shall furnish or erect...scaffolding, hoists, stays, ladders...and other devices, which shall be so constructed, placed and operated as to give proper protection to a person so employed.

22. Labor Law §240(1) imposes a non-delegable duty and absolute liability with respect to its provisions upon general contractors, owners and agents. Haimes v. New York Telephone Company, 46 N.Y.2d 132, 412 N.Y.S.2d 863; McGurk v. Turner Construction Co., 127 A.D.2d 526, 512 N.Y.S.2d 71 (1<sup>st</sup> Dept. 1987).

23. The liability of the defendants, pursuant to Labor Law §240 was firmly established by the Court of Appeals in Haimes v. New York Telephone Company, 46 N.Y.2d 132, 412 N.Y.S.2d 863:

In calling a halt to its earlier backtracking, the Legislature minced no words. Referring expressly to both Section 240 and Section 241, its stated purpose in redrafting these statutes was to fix 'ultimate responsibility for safety practices...where such responsibility actually belongs, on the owner and general contractor (N.Y. Legis. Ann., 1969, p. 407).

24. The collapse of a roof upon which a worker is performing demolition work is prima facie evidence of a Labor Law §240(1) violation. See Dyrmyshi v. Clifton Place Development Group, Inc., 7 A.D.3d 565, 775 N.Y.S.2d 908 (2<sup>nd</sup> Dept. 2004) (holding that plaintiff who fell through roof was entitled to summary judgment); See Also Taylor v. V.A.W. of America, Inc., 276 A.D.2d 621, 714 N.Y.S.2d 321 (2<sup>nd</sup> Dept. 2000) (same); Charles v. Eisenberg, 250 A.D.2d 801, 673 N.Y.S.2d 461 (2<sup>nd</sup> Dept. 1998) (same).

25. The circumstances in Dyrmyshi v. Clifton Place Development Group, Inc., 7 A.D.3d 565, 775 N.Y.S.2d 908 (2<sup>nd</sup> Dept. 2004), are identical to our present case. In Dyrmyshi, the plaintiff was employed to perform construction work on a roof. Id. While working on the roof, it gave way and caused the plaintiff to fall to the floor below. Id. Based on this evidence, the Second Department determined that plaintiff was entitled to summary judgment on his Labor Law §240(1) claim.

26. In the instant case, there is no question that at the time of his accident, Adam Kozuchowicz, was performing demolition work on the roof of the subject premises. There is also no question that the roof was being used as a "functional scaffold" as it served as a work platform for the demolition work. It is also undisputed that Mr. Kozuchowicz was working at an elevated height when he fell through the roof of the subject building some 15-20 feet to the floor below. There is also no question that Mr. Kozuchowicz was not provided with sufficient safety devices, such as a safety net, guardrail, scaffold, etc. Also, it is not disputed that Mr. Kozuchowicz was not made aware of the risk of falling in the area where he was directed to work. Under the Court's analysis in Dyrmyshi summary judgment should be granted

to the plaintiff pursuant to Labor Law §240(1) against all defendants.

**DEFENDANT CENTIMARK IS A GENERAL CONTRACTOR  
AND/OR AGENT OF DEFENDANT OWNER**

27. Plaintiff is entitled to summary judgment against defendant Centimark as a result of Centimark acting as general contractor of the subject construction project. Even if Centimark was not the "general contractor" by title, by (1) controlling and directing City Green Street's work; (2) having the ability to stop City Green Street from working at the site; (3) admitting that Centimark "managed" City Green Street; and (4) obtaining City Green Street on behalf of LNK, Centimark acted as an agent for the owner and therefore is subject to the provisions of Labor Law §240(1). See Walls v. Turner Construction Company, 4 N.Y.3d 861, 831 N.E.2d 408 (2005).

28. In Walls v. Turner Construction Company, 4 N.Y.3d 861, 831 N.E.2d 408 (2005), the Court of Appeals addressed situations where defendant contractors attempt to skirt liability under the Labor Law by claiming they are not a "general contractor". The Court of Appeals explained that even where one is not the general contractor of a project, "one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to

control the activity which brought about the injury." Id. at 863-864. The necessary analysis in determining whether or not the labor law attaches to a particular contractor is whether that contractor "has supervisory control and authority over the work being done when the plaintiff is injured." Id.

29. In our present case, defendant Centimark did in fact have "supervisory control and authority over the work being done when the plaintiff was injured." At the time of his injury, Mr. Kozuchowicz was demolishing portions of the roof at the subject premises that tested positive for asbestos. Although Mr. Kozuchowicz was employed by City Green Street, City Green Street's work was directed and supervised by Centimark.

30. As explained by Daniel Seaver, Centimark's foreman on the subject job site, Mr. Seaver was responsible for directing the work of City Green each night:

- Q: On most days, would there be at least a meeting between yourself and someone from City Green Streets?
- A: Me and Marek, yes.
- Q: Would that be every day?
- A: Every day.
- Q: What would you discuss every day? What would you talk about with Marek every day?
- A: I would just show him the area where they had to work and then he would take over.  
(Exhibit L, 49-59, line 18-25, 2-5).

31. Regarding the day of the incident, Mr. Seaver recalled that he directed City Green Street to remove two fan curbs and the I-beams that Mr. Kozuchowicz was removing at the time of his accident:

- Q: I understand. I am just trying to find out what you know, what you remember. Do you remember what work which you indicated to Mr. Kruk was going to be performed by City Green Street (on the day of the accident)?
- A: Removal of -- I mean, is there another picture? Removal of whatever was left to be taken out, these I-beams and two fan curbs. (Indicating the I-beams in the photo annexed hereto as Exhibit H)  
(Exhibit L, p. 60, 6-14)

32. Not only did Mr. Seaver recall directing plaintiff's employer to remove the I-beam that was involved in plaintiff's incident, he recalled spray painting the I-beams as further guidance to plaintiff and his co-workers as to what items had to be removed on the night of the accident:

- Q: Are (the I-beams) marked in any way by you as far as indicating they are to be removed?
- A: Yes.
- Q: Could you point to me, show me the markings?
- A: Right here, the spray paint. (Indicating paint on I-Beam shown in Exhibit H)
- Q: Is that yellow?
- A: Yellow or orange. One or the other, yes.  
(Exhibit L, p. 61, 9-18)

33. In addition to directing the work, Centimark demonstrated its ability to control the work when it stopped City



Green Street from working at the site. Mr. Seaver explained how on at least one occasion he stopped City Green Street from performing their work when he saw them working without any safety equipment. Exhibit N, p. 90, 6-21. Centimark also stopped City Green Street from working after Mr. Kozuchowicz's fall. Centimark employee Brian Banigan, who was produced for a deposition (attached as **Exhibit N** is a copy of Mr. Banigan's transcript) explained that Centimark informed City Green Street that they had to cease working at the site for the time being. In an email Mr. Banigan sent after Mr. Kozuchowicz's fall, Mr. Banigan informed various Centimark employees and City Green Street's principle, Marek Kruk, that work is to be stopped at the subject site. A copy of the email is attached hereto as **Exhibit O**. Mr. Banigan authenticated this email at his deposition. (Exhibit N, p. 92-93).

34. Along with demonstrating that Centimark controlled and directed the work of City Green Street, in another email authenticated by Mr. Banigan, he acknowledged that Centimark "managed" City Green Street at the subject construction site. See November 16, 2012 email attached hereto as **Exhibit P**. In that email, Mr. Banigan of Centimark explained to John Caraciolo of LNK that Centimark was not responsible for permits for the site

and reminds Mr. Caraciolo that "the contract for the abatement was from LNK to City Green we helped manage it saving several thousands of dollars to LNK."

35. Finally, it was Centimark that originally sought out City Green Street to perform the asbestos abatement. After the determination was made that asbestos was present at the subject job site, LNK representatives asked Mr. Banigan of Centimark to find a contractor to remove the asbestos. (Exhibit N, p. 25). Eventually, Mr. Banigan came across City Green Street, and spoke to them about performing the asbestos abatement at the subject premises. (Exhibit N, p. 26-28). City Green Street, having the understanding that they were being hired as a subcontractor of Centimark, originally prepared their proposal for the asbestos work and provided it directly to Centimark. See **Exhibit Q**. It was not until, Centimark informed LNK that they could save money by contracting directly with Centimark that the second proposal was drafted by City Green Street and given to LNK. See Exhibit F.


36. As a result of Centimark having "the ability to control the activity which brought about the injury", under Walls v. Turner Construction Company, 4 N.Y.3d 861, 831 N.E.2d 408 (2005), Centimark is subject to Labor Law §240(1). Therefore, Mr. Kozuchowicz is entitled to summary judgment against Centimark.

WHEREFORE, it is respectfully requested that plaintiff's motion for an Order granting summary judgment to the plaintiff pursuant to CPLR §3212 and Labor Law §240(1) on the issue of liability against defendants, CENTIMARK CORPORATION, 22 ARKAY LLC and L.N.K. INTERNATIONAL INC., be granted in all respects, together with such other and further relief as this Court may deem just and proper.

Dated: New York, New York  
November 25, 2015

Yours, etc.,

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