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November 14, 2022

VIA OVERNIGHT MAIL

New York State Court of Appeals
Lisa Le Cours, Chief Clerk and Legal Counsel to the Court
20 Eagle Street
Albany, NY 12207

Re: Bazdaric v. Almah Partners LLC, et al.
AD1 Case No.: 203 AD3d 643 (1st Dept. 2022)
COA Docket No. APL-2022-00083
Our File No.: AFICS-009

LETTER BRIEF FOR DEFENDANTS-RESPONDENTS

Dear Ms. Le Cours:

We represent the Defendants Almah Partners LLC, Almah Mezz LLC, 180 Maiden Lane LLC, Downtown NYC Owner, LLC and J.T. Magen & Company Inc. (hereinafter collectively referred to as "Defendants") in the above-referenced matter. We submit this Opposition to Plaintiffs-Appellants, Srecko Bazdaric and Zorka Bazadric's (hereinafter collectively referred to as "Plaintiffs")[1] submission seeking

[1] References to "Plaintiff" refer to Srecko Bazdaric.

reversal of the Appellate Division, First Judicial Department's opinion, dated March 31, 2022.[2]

Defendants-Respondents respectfully submit that this matter is ripe for Rule 22 NYCRR 500.11 review as the Appellate Division's March 31, 2022 Decision and Order, is well-reasoned and legally sound. Rule 22 NYCRR 500.11 review will save the parties the time and expense of briefing and oral argument while still insuring a full, fair, and judicially efficient consideration of the narrow issues of settled law herein.

Defendants-Respondents also respectfully incorporate, by reference, their brief dated January 4, 2021, submitted to the Appellate Division, First Department, and their arguments within the motion papers submitted to the Supreme Court of the State of New York in opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment.

UNDERLYING FACTS

As set forth in the record, Plaintiff was a painter who suffered a slip and fall while performing painting of the walls and ceilings around the escalator connecting the second and third floors of a building being renovated. Plaintiff was employed by non-party Kara Painting. Defendant J.T. Magen & Company Inc. was the general

[2] Per this Court's correspondence dated July 21, 2022, Defendants hereby enclose two copies of this letter submission and proof of service upon Plaintiffs-Appellants.

contractor (R. 5)[3]. The escalator was protected from paint by "heavy duty plastic" (R. 5). The Supreme Court found that "[a]s he set up to work on the middle of the escalator, [plaintiff] 'slipped [on] that plastic,' and fell backwards onto the escalator, as well as a three-gallon paint bucket that was two steps behind him on the escalator." (R. 6).

Plaintiff's Verified Complaint alleges that Defendants are liable for his accident and injuries pursuant to Labor Law §240(1), §241(6), §200 (R. 33-37) and common law negligence. Defendants' Verified Answer denied all allegations of liability. (R. 38-51, 52-58). Plaintiffs moved for Summary Judgment based on their Labor Law §241(6) and 200 causes of action. (R. 15-271, 289-302). Defendants cross-moved for summary judgment seeking dismissal of Plaintiffs' Labor Law §241(6) and §200 causes of action. (R. 272-288, 303-306).

In its Decision and Order entered on October 9, 2019, the Supreme Court ordered that (1) the branch of Plaintiffs' Motion for Summary Judgment as to Defendants' liability under Labor Law §241(6) is granted; (2) that branch of Plaintiffs' Motion for Summary Judgment as to Defendants' liability under Labor Law §200 is denied; and (3) that Defendants' Motion for Summary Judgment is granted "only to the extent that "Plaintiff's claims under Labor Law §200 are dismissed." (R. 4-13).

[3] Numerals in parentheses refer to pages of the record on appeal.

Defendants appealed the Supreme Court's grant of Summary Judgment as to Plaintiffs' cause of action pursuant to Labor Law §241(6) to the Appellate Division. The Appellate Division reversed the Supreme Court's entry of Summary Judgment to Plaintiffs and dismissed Plaintiffs' Labor Law §241(6) claim. Bazdaric v. Almah Partners LLC, 203 AD3d 643 [1st Dept 2022].

As a last resort, Plaintiffs now ask the New York State Court of Appeals to reverse the Appellate Division's Order and Decision and stand Labor Law §241(6) on its head. Defendants submit that the Appellate Division correctly dismissed Plaintiff's Labor Law §241(6) claim against Defendants.

QUESTION PRESENTED

The First Department certified one question for appeal: "[w]as the decision and order of the First Department, dated March 31, 2022, properly made?"[4] The decision of the First Department dated March 31, 2022[5], was that the heavy-duty plastic covering did not constitute a foreign substance under 12 NYCRR 23-1.7(d), and the heavy-duty plastic covering was part of the staging conditions of the area the worker was tasked with painting, therefore making it integral to his work and barring Plaintiff's reliance on said regulation.

[4] Appellate Division, First Judicial Department, Supreme Court of the State of New York, June 23, 2022 Order.

[5] Bazdaric, 203 AD3d 643 (1st Dept 2022).

We respectfully submit that "yes," the First Department's March 31, 2022, decision and order was properly made. As the First Department correctly determined:

> [h]ere, regardless of whether the heavy-duty plastic covering was the best choice, in retrospect, for the specific task of painting, there can be no dispute that the covering was purposefully laid to protect the escalator and the floor during the renovation project. **Applying our precedent to the facts of this appeal**, the covering was integral to the renovation work, and plaintiff failed to raise an issue of fact in opposition[.]
>
> [Id. at 646 (internal citations omitted)(emphasis added).]

ISSUES PRESERVED

Under the record below, Defendants-Respondents properly argued before the First Department that the cause of Plaintiff's fall was an integral part of the work and accordingly did not violate the industrial code provisions relied upon by Plaintiffs.[6]

Further, Defendants argued that no industrial code provision applied to Plaintiff's accident as alleged. Specifically, 12 NYCRR §23-1.7(d) does not apply to this case because the alleged slippery condition was not caused by a "foreign substance" but rather was allegedly due to an intentionally placed covering and Section 23-1.7(e) does not apply to this case because Plaintiff did not trip.[7]

[6] Defs' Br. at 12-15.
[7] Defs' Br. at 4-10.

ARGUMENT

I. The Majority's Opinion at Bar is in Harmony with the First Department's Precedent, the Laws of the State of New York, and the Interests of Justice

The Appellate Division, First Department's Decision and Order is well-reasoned and in harmony with prior precedent. See Krzyzanowski v City of New York, 179 AD3d 479, 481, [1st Dept 2020]; Johnson v. 923 Fifth Ave. Condominium, 102 AD3d 592, [1st Dept 2013]; and Rajkumar v. Budd Contr. Corp., 77 AD3d 595, [1st Dept 2010].

Plaintiffs improperly attempt to restate the question certified for appeal with their contention that Labor Law §241(6) "is a statutory embodiment of the 'reasonable care' (negligence) standard, applied to the setting of construction, excavation, and demolition." As a matter of law, Plaintiffs' statement is incorrect as that interpretation corresponds to Labor Law §200 which "codifies the common-law duty of an owner or general contractor to provide construction site workers with a safe place to work." Caiazzo v. Mark Joseph Contr., Inc., 119 AD3d 718, 720 [2d Dept 2014]. As set forth by the Appellate Division, Labor Law §200 is not at issue in this appeal. The only statute involved in this appeal is Labor Law § 241(6).

To prevail under Labor Law § 241(6), a plaintiff must establish "that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth a concrete standard

of conduct rather than a mere reiteration of common-law principals." Samaroo v. Patmos Fifth Real Estate, Inc., 932 N.Y.S.2d 763, 763 [Sur. Ct. Kings County, 2011] *citing* Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 502 [1993]. Accordingly, only "provisions of the Industrial Code mandating compliance with concrete specifications' give rise to a non-delegable duty under Labor Law § 241(6)." Toussaint v. Port Auth. of NY, 38 NY3d 89, 94 [2022].

a. The First Department Was Correct in Ruling that the Plastic Covering Was Integral to the Work and Thus the Industrial Code Provisions Are Inapplicable

It is well settled New York law that an alleged Industrial Code violation fails to create a negligent element for a Labor Law § 241(6) claim where the item which allegedly caused plaintiff's slip and fall was "an integral part of the construction." O'Sullivan v. IDI Construction Co., Inc., 7 N.Y.3d 805, 806 [2006]; Cumberland v. Hines Interests Ltd. Partnership, 105 A.D.3d 465, 465 [1st Dep't 2013]; Verel v. Ferguson Electric Construction Co., Inc., 41 A.D.3d 1154, 1157 [4th Dep't 2007]. Here, the only certified question at issue stems from whether the plastic covering was integral to the work. Based on the record, the First Department correctly ruled that the plastic covering was integral to the work being performed, thereby barring Plaintiffs' reliance on 12 NYCRR 23-1.7(d) and consequently properly dismissing Plaintiffs' claims under Labor Law § 241(6).

Plaintiffs' reliance on Mullin v. Genesee County Electric Light, Power & Gas Co., 2020 NY 275 [1911] and Henry v. Hudson & M. R. Co., 201 NY 140, 142 [1911] misses the mark as both cases are based on a common law negligence standard that does not include Labor Law 241(6) or the Industrial Codes. This appeal is not based on the standards of common law negligence, it is solely based on the underlying facts and the standards imposed by Labor Law § 241(6) with its interplay with 12 NYCRR 23-1.7(d) (e).

For example, Plaintiffs' reliance on Mullin and Henry to introduce the principle of taking "reasonable steps" to address risks inherent with a construction job, is meritless and out of place because this issue is not in question in this appeal. In fact, as a further sign of desperation, the Henry case is based on an incident that occurred in the state of New Jersey and specifically states that "common-law liability has been altered in this state in several respects by statute, but these statutes have no bearing on the case, as the accident occurred in New Jersey." Id. at 142 (emphasis added).

Plaintiffs' reliance on Salazar v. Novalex Contr. Corp., 18 NY3d 134 [2011], a case which discusses a possible violation of Labor Law §240(1), is similarly misplaced. In Salazar, this Honorable Court addressed, in-part, an allegation of a Labor Law § 241(6) cause of action predicated on a violation of 12 NYCRR 23-1.7 (b)(1)(i), a regulation regarding hazardous openings which once again, is not at issue in this appeal or in this case at all. The industrial code regulations at issue in this case

are 12 NYCRR 23-1.7(d) and (e)(1) and (2), dealing with slipping and tripping hazards. Salazar, 18 NY3d 134, 140 [2011].

The "integral part of the work defense" applies to the circumstances of the instant loss. *See* Krzyzanowski v. City of New York, 179 A.D.3d 479, 480-481 [1st Dep't 2020]. In Krzyzanowski, the Plaintiff contended his fall on wooden boards did not give rise to liability under 12 NYCRR 23-1.7(e)(1) because the boards "were not scattered materials or debris, and because they were purposefully laid out upon the floor each day, this being 'integral' to the renovation work being performed." Krzyzanowski, 179 A.D.3d at 480. The Appellate Division noted that, at the minimum, these facts created a triable issue of fact that "the boards were a 'protective covering [that] had been purposefully installed on the floor as an integral part of the renovation project.'" Id. at 481. As a matter of consistency, the same result should occur in this case. Plaintiff was performing work in an area where the plastic sheeting was purposely used as a covering to prevent paint from dripping while Plaintiff was painting. Thus, the plastic sheeting was integral to the work being performed and the Industrial Code provisions relied upon by the Plaintiffs do not apply to these circumstances. Id. at 480-81.

The First Department correctly ruled that "the covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work." Bazdaric, 203 AD3d at 644. Plaintiffs wrongly framed the First Department's

ruling as equating "the defendant's intent = integral to the work, as a matter of law." That is an incorrect interpretation of the First Department's ruling and an improper attempt to reargue. The First Department did not rule that the covering was integral to the work because it was purposefully placed there, rather, it ruled that "[ ] the covering was integral to the work because it was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work." Id.

"The integral to the work defense 'applies to things and conditions that are an integral part of the construction[.]" Id. at 644 (quoting Krzyzanowski, 179 A.D.3d at 481). As concluded by the First Department in their decision, placing materials on the ground to protect it while performing construction is an integral part of the construction. Id. at 645; Johnson v. 923 Fifth Ave. Condominium, 102 AD3d 592, 959 N.Y.S.2d 146 [1st Dept 2013]; and Rajkumar v. Budd Contr. Corp., 77 AD3d 595, 909 N.Y.S.2d 453 [1st Dept 2010]. In this case, the plastic covering was placed on the stairs to protect the escalator and the floor during the renovation project – covering the stairs and floor during construction is an integral part of the work, therefore, the plastic covering was integral to the work and Plaintiffs' claims under 12 NYCRR 23-1.7(d) are barred.

The First Department was correct in finding that the plastic covering was not a foreign substance under 12 NYCRR 23-1.7(d), therefore Plaintiffs' Labor Law § 241(6) claim must be dismissed. The slipping event which resulted in Plaintiff's

injuries was not encompassed by the risks that this regulation was designed to protect against. Indeed, Plaintiff did not slip on a "foreign substance." Rather, he slipped on a plastic covering "installed to protect the escalator from paint." As discussed above, the plastic covering was placed on the escalator as an integral part of the work to protect the escalator from damage or defacement. Therefore, it was not a foreign substance.

Additionally, as reasoned by the First Department in their decision, "[a] sensible interpretation of the wording of this regulation 'calls for the application of the maxim ejusdem generis, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Bazdaric, 203 AD3d at 644 (*quoting* 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 [1991]). 12 NYCRR 23-1.7(d) reads in part:

> [e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

"Sensibly interpreted, the heavy-duty plastic covering is not similar in nature to the foreign substances listed in the regulation, i.e., ice, snow, water or grease." Bazdaric, 203 AD3d at 644. For instance, in Stier v. One Bryant Park LLC,113 AD3d 551, 552, 979 N.Y.S.2d 65 [1st Dept 2014] the Court found that Masonite was not a

slipping hazard contemplated by 12 NYCRR 23-1.7(d), and in Kane v. Peter M. Moore Constr. Co., Inc., 145 AD3d 864, 869 [2d Dept 2016], the Court found that a drop cloth that had fallen on the ground, causing a slip and fall, did not constitute a foreign substance. Id. at 866-67, 869. Masonite and cloth are not similar to ice, snow, water, and grease - the foreign substances listed in the regulation.

The alleged slippery condition of the plastic covering is not encompassed by 12 NYCRR 23-1.7(d). Plaintiffs essentially ask this Honorable Court to rewrite 23-1.7(d), include the words "plastic covering" next to the phrase: "[i]ce, snow, water, [and] grease." A "sensible interpretation" of 23-1.7(d) would dictate that the phrase "plastic covering" or any specific tools of the trade are not related to "ice, snow, water, and grease," the types of harms that NYCRR 23-1.7(d) sought to prevent. Nonetheless, as stated by the Appellate Division, "[ ] even if the regulation contemplates plastic sheeting to be a slipping hazard, under the factual circumstances here, the integral to the work defense bars plaintiff's reliance on 12 NYCRR 23-1.79(d)." Bazdaric, 203 AD3d at 644.

The Supreme Court held that Defendants are not liable under Labor Law §200 (and thus their conduct did not negligently cause the plastic covering to be placed on the escalator), and as shown above, the slippery condition of the plastic covering is not encompassed by 12 NYCRR 23-1.7(d). Plaintiffs' Labor Law §241(6) claim to the extent predicated on this Industrial Code section must be dismissed.

II. No Industrial Code Provision Applied to Plaintiff's Accident

Plaintiffs alleged that Defendants are liable under Labor Law § 241(6) because they violated Industrial Code provision 12 NYCRR §23-1.7(d) and/or 23-1.7(e). As fully briefed by Defendants-Respondents in the Appellate Division, Plaintiffs' Labor Law §241(6) claim must be dismissed as no industrial code provision applied to his accident. 12 NYCRR §23-1.7(d) does not apply to this case because the alleged slippery condition was not caused by a "foreign substance" but rather was allegedly due to an intentionally placed covering. Similarly, Section 23-1.7(e) does not apply to this case because Plaintiff did not trip. Section 23-1.7(e)(2) equally does not apply to this claim because Plaintiff did not trip and because Plaintiff's fall was not caused by any of the conditions mentioned in that section. Section 23-1.7(e)(1) does not apply to this claim because Plaintiff did not trip and applying this section to slipping hazards distorts the meaning of this section.

[continued on next page]

CONCLUSION

For the reasons stated above and based upon the undisputed record in the Appellate Division, First Department, Defendants respectfully request that this Court uphold the Appellate Division's ruling and dismiss Plaintiffs' Labor Law §241(6) claim with prejudice; and grant any other such relief as this Court deems proper and necessary.

Dated: November 14, 2022
New York, New York

Respectfully submitted,

CALLAHAN & FUSCO, LLC

Attorneys for Defendants, ALMAH PARTNERS LLC, ALMAH MEZZ LLC, 180 MAIDEN LANE LLC, DOWNTOWN NYC OWNER, LLC and J.T. MAGEN & COMPANY INC.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §500.11 that the foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.11(m) is 2,905.

Dated: November 14, 2022
New York, New York

Respectfully submitted,

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COURT OF APPEALS
STATE OF NEW YORK

SRECKO BAZDARIC and ZORKA BAZDARIC, Plaintiffs-Appellants, -against- ALMAH PARTNERS LLC, ALMAH MEZZ LLC, 180 MAIDEN LANE LLC, DOWNTOWN NYC OWNER, LLC AND J.T. MAGEN & COMAMY INC., Defendants-Respondents.	:	APL-2022-00083 **22 NYCRR PART 500.1(f) DISCLOSURE STATEMENT**

Pursuant to 22 NYCRR PART 500.1(f), Defendants-Respondents state that J.T. MAGEN & COMPANY INC. do not have parents, subsidiaries and/or affiliates. Defendants-Respondents state that 180 Maiden Lane LLC and Downtown NYC Owner, LLC herein identify CalSTRS. To date, the undersigned has been unable to discern whether ALMAH PARTNERS LLC and ALMAH MEZZ LLC have any parents, subsidiaries and/or affiliates. Defendants-Respondents will supplement this information if and when additional information becomes available.

Dated: New York, New York
November 8, 2022

Christopher S. Del Bove, Esq.
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