To be Argued by:
RICHARD C. IMBROGNO
(Time Requested: 15 Minutes)

New York County Clerk's Index No. 159433/15

New York Supreme Court
Appellate Division – First Department

Appellate Case No.: 2020-03296

SRECKO BAZDARIC and ZORKA BAZDARIC,

Plaintiffs-Respondents,

– against –

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

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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I. PRELIMINARY STATEMENT

This brief is submitted on behalf of the defendants-appellants in support of their appeal (2-3)[1] from the Decision and Order of the Supreme Court, New York County (Hon. Carol R. Edmead, J.), entered on October 9, 2019, which granted plaintiffs-respondents partial summary judgment on their Labor Law §241(6) cause of action and denied the other causes of action asserted on this motion by both plaintiffs and defendants (4-13).

II. QUESTIONS PRESENTED

1. Whether the Supreme Court erred in granting summary judgment to plaintiffs based on defendants' alleged violations of Industrial Code provisions 22 NYCRR §23-1.7(d) and 22 NYCRR §23-1.7(e)? The Supreme Court granted summary judgment to plaintiffs based on those provisions and and we respectfully disagree.

2. Whether the Supreme Court erred in refusing to recognize that the conditions on which the Court relied were an integral part of the work and thus not within the scope of the Industrial Code provisions relied upon by plaintiffs? The Supreme Court held that the Industrial Code provisions did not

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

involve the integral part of the work and we respectfully disagree.

III. BACKGROUND

This appeal concerns the plaintiff's 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 contractor (5).

The escalator was protected from paint by "heavy duty plastic" (5). The Supreme Court concluded 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" (6).

IV. PLAINTIFFS' COMPLAINT AND DEFENDANTS' ANSWER

Plaintiff's complaint alleges that defendants are liable for his accident and injuries pursuant to Labor Law §240(1) and Labor Law §241(6) as well as common law negligence and Labor Law §200 (33-37). Defendants' answer denied all liability to plaintiffs 38-51, 52-58).

V. THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs made a motion for summary judgment based on their Labor Law §241(6) and 200 causes of action (15-271, 289-302). Defendants made a cross-motion for summary judgment seeking dismissal of plaintiffs' Labor Law Labor Law §241(6) and §200 causes of action (272-288, 303-306).

VI. THE SUPREME COURT'S DECISION AND ORDER

In its Decision and Order entered on October 9, 2019, the Supreme Court ordered (1) that branch of plaintiff's motion for summary judgment as to defendants' liability under Labor Law §241(6) is granted; (2) that branch of plaintiff's 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" (4-13).

VII. ARGUMENT

It is important at the outset to recognize that the instant appeal only involves plaintiff's cause of action pursuant to Labor Law §241(6). Plaintiffs did not appeal from the Order to the extent that it dismissed plaintiffs' Labor Law §200 cause of action. It also does not involve plaintiffs' Labor Law §240(1) cause of action which was not the subject of the motions below.

A. Plaintiffs Are Not Entitled To Summary Judgment On Their Labor Law §241(6) Cause Of Action

1. The Standards Applicable To Labor Law §241(6) Claims

To prevail under Labor Law §241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth a specific standard of conduct. Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343, 348-350 (1997)("section 241[6] imposes liability upon a general contractor for the negligence of a subcontractor"; the negligent party must have violated an Industrial Code provision with "concrete specifications"; the violation of an Industrial Code provision is "merely some evidence" of negligence and the defendant may raise "any valid defense" to the alleged negligence).

2. Plaintiffs' Labor Law §241(6) Claim Must Be Dismissed As No Industrial Code Provision Applied To His Accident

The Supreme Court held that plaintiffs were entitled to partial summary judgment on their Labor Law §241(6) claim based on two alleged violations of the Industrial Code. Neither Industrial Code provision is applicable to this matter.

(a) 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

The Supreme Court held that 12 NYCRR §23-1.7(d) applied to this case and granted plaintiffs partial summary judgment against defendants on the issue of liability. That Industrial Code provision states:

> (d) Slipping hazards. Employers 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.

The Supreme Court explained its holding that this Industrial Code section applied to the plaintiff's accident as follows (8-10):

> Defendants argue that this provision is not applicable, as Plaintiff slipped on a plastic cover that was intentionally placed, rather than a foreign substance. Moreover, Defendants argue that Defendant was using the escalator as a "working area" rather than a passageway.
>
> Defendant's argument as to the situs of the accident is unpersuasive. Plaintiff was obliged to walk along the escalator to reach the area in the middle of the escalator where he was attempting to perform his work. Thus the escalator was both a passageway and an elevated work area, both of which are covered under this litigation.

> As to Defendant's foreign substance argument, the first sentence of the regulation states that employers shall not suffer or permit a "slippery condition" on elevated working surfaces. The second sentence directs employers to remove foreign substances that may cause slippery conditions. Thus, the "intentionally placed" versus "foreign substance" distinction is one without difference under the regulation, and Defendants have violated 12 NYCRR 23-1.7(d) if they permitted a slippery condition on the escalator.
>
> * * *
>
> Here, there is no issue of fact as to whether the plastic covering was a slippery condition. . . .
>
> * * *
>
> The branch of Plaintiff's motion seeking summary judgment as to Labor Law §241(6) must be granted as Defendants have violated 12 NYCRR 23-1.7(d) and that violation was a proximate cause of Plaintiff's injuries. . . .

The Supreme Court cited the Conklin[2] case as authority for its holding (8). In Conklin, "[p]laintiff allege[d] that he was injured when he slipped on a 'chicken ladder' or 'makeshift ladder,' consisting of two parallel wooden planks with two-by-fours nailed across them at regular intervals, which was placed on sloped ground to function as a ramp, and which provided the sole means of access to his employer's shanty." 49 A.D.3d at 320-321. This Court held that "[t]he claim predicated upon section 23-1.7(d) should have been sustained

[2] Conklin v. Triborough Bridge & Tunnel Authority, 49 A.D.3d 320 (1st Dep't 2008).

because the ramp constituted a passageway alleged to have been covered in a slippery substance." 49 A.D.3d at 321. This Court noted, however, that "[p]laintiff slipped not on muddy ground but on mud covering the cross-pieces of the ramp." 49 A.D.3d at 321.

The present case differs from Conklin in several important ways with respect to the applicability of §23-1.7(d). In the present case, plaintiff was not working on any of the areas listed in that regulation. Also, unlike in Conklin, plaintiff was not using the escalator to as a means of access to another floor or area. At the time of his accident, he was standing on the escalator so he could paint the nearby walls and ceilings.

Moreover, it is significant that plaintiff did not slip on any of the hazards identified in the regulation: ice, snow, grease, "and any other foreign substance." Indeed, plaintiff did not slip on any "foreign substance" at all. Rather he slipped on a plastic covering "installed to protect the escalator from paint" by a worker or workers. The plastic covering was intentionally placed on the escalator as an integral part of the work to protect the escalator from damage or defacement. The slipping event which resulted in plaintiff's injuries was not encompassed by the risks that this regulation was designed to protect against.

Whether or not the plastic covering was slippery is not the issue with respect to §23-1.7(d) liability. The regulation only applies to the factual scenarios encompassed by its terms. This is important because if §23-1.7(d) applies to a set of facts, then an owner or general contractor may be liable although that party was not negligent and did not supervise or control the work which resulted in the accident. If the requirements of §23-1.7(d) do not apply to a particular scenario, then only persons who were actually negligent may be held liable. A slippery condition may or may not be within the applicable scope of §23-1.7(d).

This distinction was recognized by this Court in Conklin. In holding that §23-1.7(d) was applicable to the circumstances in that case, this Court noted that "[p]laintiff slipped not on muddy ground but on mud covering the cross-pieces of the ramp." Conklin, 49 A.D.3d at 321. Both the "muddy ground" and the "mud covering the cross-pieces" constituted slippery conditions which each posed a risk to the workers. This Court recognized the distinction because one risk (the mud covering the cross-pieces) was within the scope of §23-1.7(d) and could result in the liability of the general contractor without fault while the unprotected presence of "muddy ground" would at most be an occasion of ordinary negligence for which only the negligent party would be liable.

The same result should occur in this case. The alleged slippery condition of the plastic covering is not encompassed by §23-1.7(d) and is at most an occasion of ordinary negligence for which the party actually at fault for placing the plastic covering may be liable. As the Supreme Court has 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 §23-1.7(d), plaintiffs' Labor Law §241(6) claim to the extent predicated on this Industrial Code section must be dismissed.

(b) Section 23-1.7(e) Does Not Apply To This Case Because Plaintiff Did Not Trip

Plaintiff alleges that his slip and fall is encompassed by §23-1.7(e) which provides:

> (e) Tripping and other hazards.
>
> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Neither of these provisions apply to this claim.

(1) Section 23-1.7(e)(2) 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

Plaintiff's fall is not encompassed by §23-1.7(e)(2) because that section applies only to tripping and plaintiff's fall was caused by slipping, not tripping. Also, plaintiff's fall was not caused by "accumulations of dirt and debris and from scattered tools and materials and from sharp projections." Accordingly, this section does not apply to plaintiff's fall.

(2) 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

This section does not apply to this claim for the same reasons that §23-1.7(e)(2) does not apply: plaintiff did not trip and his fall was not caused by any of the conditions listed in the section. Moreover, the Supreme Court recognized that "the fact that the Court has already found as a matter of law that the plastic covering was a slipping hazard would preclude a violation of 12 NYCRR 23-1.7(e)(1), as courts traditionally upheld the distinction, drawn in the Industrial Code, between slipping hazards and tripping hazards" (10).

The Supreme Court nonetheless applied what it termed "a less technical approach," citing two Appellate Division cases (10). According to that Court, "the analysis focuses on the nature of the hazard, rather than the precise nature of the accident" (11). The Supreme Court held that "the plastic covering does not fall under type of tripping hazards prohibited by 12 NYCRR 23-1.7(e)(2)" and "[t]hus, that regulation does not apply" (11). But the Supreme Court held that the regulation applies to any "conditions" that could cause tripping, the plastic covering could cause tripping, and, since plaintiff fell, §23-1.7(e)(1) applies to this accident (11).

The application of §23-1.7(e)(1) to this accident applies a regulation for tripping hazards to a slipping hazard, contrary to the language of these regulations and this Department's case law (see Velasquez v. 795 Columbus LLC, 103 A.D.3d 541, 541 [1st Dep't 2013]["12 NYCRR 23-1.7(e), which protects workers from *tripping* hazards, is inapplicable to the facts of this case"; only a regulation concerning slipping hazards might apply). The resolution of the conflict between the clear language of §23-1.7(e) and this Department's prior case law with the two cases cited by the Supreme Court need not be resolved in this case because, unlike the hazards at issue in those two cases, the instant case does not involve a "tripping hazard." In our case, the only hazard presented by the plastic covering is a

slipping hazard. Therefore, even under the analysis of the two cases relied upon by the Supreme Court (10-11), neither prong of §23-1.7(e) applies to this case as no tripping hazard is involved.

3. 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 Plaintiff

It is well-settled that an alleged Industrial Code violation fails to provide a predicate 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)(material in brackets added), affirming 23 A.D.3d 225, 226 (2d Dep't 2006) ("there is no liability under section 241[6] where the injury-producing object is an integral part of what is being constructed"; "the protruding pipe was an integral part of the floor on which he was working"); Cumberland v. Hines Interests Ltd. Partnership, 105 A.D.3d 465, 465 (1st Dep't 2013)(Industrial Code provision did not apply where the pipe and pipe fittings that plaintiff tripped over were consistent with the work being performed in the room); Verel v. Ferguson Electric Construction Co., Inc., 41 A.D.3d 1154, 1157 (4th Dep't 2007)(Industrial Code provision is inapplicable to the facts of this case "because the

electrical pipe[s] or conduit[s] that plaintiff tripped over [were] an integral part of the construction"); Tucker v. Tishman Construction Corp., 36 A.D.3d 417, 417 (1st Dep't 2007)(rebar steel that the plaintiff tripped over was not debris, scattered tools or materials, or a sharp projection, but rather, it was an integral part of the work being performed").

That the integral part of the work defense applies to the circumstances of the instant loss is established by Krzyzanowski v. City of New York, 179 A.D.3d 479, 480-481 (1st Dep't 2020). In that case the plaintiff contended that his fall on wooden boards was not a violation of 23-1.7(e) but rather "there is no liability because the boards were Masonite, 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 "the 'integral part of work defense' applies to 12 NYCRR 23-1.7(e)(1)" (Krzyzanowski, 179 A.D.3d at 480 [citing Colon v. The Carnegie Hall Society Inc., 159 A.D.3d 655, 655 [1st Dep't 2018]). At a 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.'" Krzyzanowski, 179 A.D.3d at 481 (citations omitted). Also, the plaintiff's contention improperly limited the scope of the

integral part of the work doctrine (Krzyzanowski, 179 A.D.3d at 481 [citations omitted]):

> [S]ummary judgment in favor of plaintiff was improper because it was based on the mistaken supposition that the "integral-to-work" defense means integral to plaintiff's specific task. The defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident. Plaintiff failed to establish that the boards were accumulated debris or scattered materials and not protective covering purposely placed on the floor, while there was ongoing construction.

The same result should occur here. Plaintiff was performing work in an area where the plastic sheeting was purposely used as a covering to prevent paint from fouling the escalator. Thus the plastic sheeting was integral to the work being performed and the Industrial Code provisions relied upon by plaintiff do not apply to these circumstances. Krzyzanowski, 179 A.D.3d at 480-481 ("as a general rule, where Masonite is 'an integral part of the construction,' a Labor Law §241(6) claim whether predicated on an alleged violation of Industrial Code 12 NYCRR §23-1.7(e)(1), or (e)(2), should be dismissed"; citing Colon).

Accordingly, the Labor Law §241(6) cause of action must be dismissed because the Industrial Code provisions relied upon by plaintiff do not apply as a matter of law.

VIII. CONCLUSION

For the foregoing reasons, the Order appealed from should be modified to the extent that it held that appellants are liable pursuant to Labor Law §241(6) by substituting a phrase that states that appellants are not liable pursuant to Labor Law §241(6).

Dated: New York, New York
January 4, 2021

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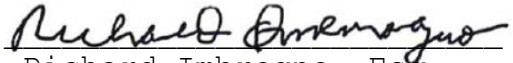
By: 
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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

Appellate Division – First Department

SRECKO BAZDARIC and ZORKA BAZDARIC,

Plaintiffs-Respondents,

– against –

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

Defendants-Appellants.

1. The index number of the case in the court below is 159433/15.

2. The full names of the original parties are as above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about September 14, 2015, by the filing of a Summons and Verified Complaint. The Verified Answers were served thereafter.

5. The nature and object of the action is as follows: recover damages for personal injuries sustained as the result of a work-related accident.

6. The appeal is from a decision and order of the Honorable Carol R. Edmead, dated and entered on October 9, 2019.

7. This appeal is being perfected on a full reproduced record.