To Be Argued By:
Eileen Kaplan
Time Requested: 15 Minutes

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

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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 PLAINTIFFS-RESPONDENTS

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BRIEF OF PLAINTIFF-RESPONDENT

PRELIMINARY STATEMENT

Plaintiff-respondent Srecko Bazdaric respectfully submits this brief seeking to affirm the Hon. Carol R. Edmead's decision and order entered on October 9, 2019, to the extent that it granted his motion for summary judgment on defendants' liability under Labor Law §241(6) and Industrial Code §§ 23-1.7(d), and 23-1.7 (e)(1).

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Mr. Bazdaric was a painter at the defendants' renovation job, when he slipped and fell on a plastic covering over an escalator, while he was trying to paint walls near the escalator. The slippery plastic covering was "intentionally placed" by someone, but the plaintiff did not place it, and the general contractor's superintendent Lucas Calamari did not know who placed it, and the parties' testimony shows unequivocally that the plastic covering was not only not "integral to the work" but a hindrance to the work, and a hazard to the plaintiff. Mr. Calamari acknowledged that the plastic was the wrong covering for the escalator, and that as soon as he learned that the plaintiff fell, he directed that the plastic be removed.

The Supreme Court's decision and order as to the plaintiff's motion for partial summary judgment under Labor Law §241(6) and Industrial Code §§ 23-1.7(d), and 23-1.7 (e)(1) was perfectly correct, and should be affirmed.

COUNTER-ISSUES PRESENTED FOR REVIEW

1) Did the Supreme Court correctly grant the plaintiff's motion for summary judgment on the defendants' liability under Labor Law §241(6) and §23-1.7(d), when the parties' testimony showed that the plaintiff slipped and fell on a plastic covering on the escalator, and that the plastic was slippery, and that it was a "foreign substance" and that the plastic was hindrance to the work, and hazard to the plaintiff?

2) Did the Supreme Court correctly grant the plaintiff's motion for summary judgment on the defendants' liability under Labor Law §241(6) and §23-1.7(e)(1) when the plaintiff slipped and fell on a plastic covering on the escalator, which was a "passageway" and §23-1.7(e)(1) expressly provides that it is protection from "general hazards" and hazards "other" than "tripping" hazards?

It is respectfully submitted that each question should be answered in the affirmative.

COUNTER-STATEMENT OF RELEVANT FACTS

The plaintiff Srecko Bazdaric (plaintiff, Srecko, or Mr. Bazdaric) was a painter. He slipped and fell on an unsecured plastic covering over an escalator, while he was standing on an escalator step, and trying to paint the walls around the escalator. The plaintiff's slip and fall occurred on August 25, 2015 at a renovation job at 180 Maiden Lane in New York County, which premises are owned by defendant 180 Maiden Lane LLC. The general contractor at the job was J.T. Magen & Company Inc. (Magen). (229). The plaintiff testified that he fell backward, and that his head hit the escalator, and his back hit a paint bucket which was resting on an escalator step. Mr. Bazdaric is disabled from his work as a painter, and his serious injuries as a result of his slip and fall at the defendants' job include cervical spinal surgery consisting of an anterior cervical spinal fusion of C4, C5, and C6 with placement of a biomechanical device at C4-C5 and C5-C6. (59-78).

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On the said date, the plaintiff was employed by Kara Painting (Kara), the painting subcontractor retained by defendant Magen. (236). Lucas Calamari was a project superintendent for defendant Magen (224) and Kara's owner was Mustafa Kara. The Kara foreman was Cem Cetin. (237). The renovation work encompassed renovating the lobby and the first, second, and third floors. (229-230). Mr. Calamari

described that "[i]t was demolition construction at the project. We installed a new lobby, and the second and third floors were pantry areas and conference rooms. There were numerous trades on the site – painters, mill workers, carpenters and whatnot." (234). Magen hired Kara for "[i]nstallation of wall covering and painting of walls, ceilings and columns." (238).

Slip and fall on unsecured plastic while trying to paint walls by escalator

The plaintiff has only been a painter. (157-158) ("Have you ever done anything else in your life than be a painter? A. No, only painter. I do only painting"). After the August 2015 fall at the defendants' job, the plaintiff "cannot work anymore." (91)

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In 2015 the plaintiff was employed by Kara; he worked for Kara for about five months, when he was assigned to work at the renovation job at 180 Maiden Lane. He had been at the site "one day only, two days" before he fell backwards on the escalator when he was trying to paint the wall. (95).

The plaintiff's foreman that day was "Jim." (114). On August 25th Jim assigned the plaintiff "to do escalator, paint, paint escalator walls, and ceilings. Around the escalator between second and third floor." (115). The only equipment he was given was a roller, and paint; he had his own brush. (115-116). For painting

the ceiling, a scaffold was used, but "not for [the] wall." (116). Srecko saw that there was "heavy plastic" on the escalator steps. (117). He was not sure who placed the plastic there. (117).

Srecko explained the circumstances leading up to his slip and fall:

> "Jimmy say this way. "Steve, you got to paint this wall and escalator." I say "No problem." When I see this, the escalator protection, I told him "Jimmy, this no way to work on this." [1] The plaintiff continued to relate Jimmy's comments: "Why you complain?" I say, I got to complain. This is no way to work, this way," and he says, "You have to do it. I go for coffee." […] "You go paint, I go buy coffee." (121).

The plaintiff continued to explain that he walked to the middle of the escalator with the buckets. (132) ("Q. had you taken any steps on the escalator before you fell? A. I walk down, I take the steps like to middle escalator. I walk down before accident."). The plaintiff further explained:

> "I started because I have to take the order, he give me like 3-gallon paint and 5-gallon bucket" and then he continued : "I take the roller and stick, and I put stick on and roll. As soon as I get – and roller was maybe 2 step behind me was paint. Not maybe. That's for sure. Because you need a little room and, you know, you can step in the paint. So as soon as I get roller, my feet fell – I mean I slipped to that plastic because I told him I no want to work like that. I have to take order. As soon as I slip I fell. The paint – then I pull the paint, almost 3-gallon paint fall on my leg, flush me in my – my feet hit me and I lay down and I hit metal of the escalator. That's what happened." (122).

[1] Jimmy's immediate response to the plaintiff's comments can be viewed in the record at 121.

The plaintiff described that the buckets of paint were placed on a different step of the escalator than the step that he was standing on. (123-124). The paint bucket was on a higher step than the step that the plaintiff was standing on (126), and when the plaintiff fell, he actually fell "back up the escalator" (126) and his back hit the paint bucket. (126-127) ("all paint came out"). His head hit the metal escalator. (128). The plaintiff summarized the situation: "I pull the plastic when I slip, plastic was so danger to work." (128).

Plaintiff described that at the time that he slipped on the plastic, he was trying to paint the wall "above his head" -- about seven, eight or nine feet above, and that he used an "extension stick. Nine feet, something like that, longer stick." (130-131). The longer stick did not belong to Srecko, his foreman gave it to him. (131). Srecko explained that he fell a "couple of minutes" after he started the job; he did not actually do any painting – he "just put roller up and I fell." (131, 133).

The boss acknowledged that plastic was the wrong covering

Mr. Calamari recalled that the plaintiff's fall occurred on the escalator between the second and third floors. (238-239). Mr. Calamari did not know that the Kara painters were standing on the escalator steps while trying to paint with roller on the walls around the escalators. (241).

Q. Would it be important if the workers had to step on the escalator steps while they were painting, would it be important for the covering whatever was covering those escalator steps to be secured?

A. Yes.

Q. That is because you wouldn't want any slipping or tripping hazards on the work area where they are working. Correct?

A. Yes.

Q. If there was plastic being used, you would expect that plastic to be held down securely?

A. Yes.

Q Was it also expected to be non-slippery type of plastic if they were using plastic?

A. Yes. (242).

Mr. Calamari acknowledged that he had observed that when painting needed to be done around escalators, the escalator steps would be protected with wood coverings, as opposed to plastic. (243). He also acknowledged that he had seen Kara painters at this site, using drop cloths made of cloth, rather than plastic, and that drop cloths are less slippery than plastic (243).

Mr. Calamari recalled that after the plaintiff's fall, he saw the plastic covering on the escalator:

Q. In your opinion, was that the wrong type of covering for the escalator steps?

A. Yes.

Q. Had you seen that before Srecko had his accident, would you direct Cem or Mustafa to take the plastic off and put more safer covering on those steps?

A. Yes.

Q. Did you talk to Cem after the accident or Mustafa and direct them to change the covering on the steps?

A. Yes, it was removed. (244)

Mr. Calamari recalled that he discussed the plaintiff's fall with others at the site: "I'm sure, yes. I imagine that is what happened and we probably removed it and it wasn't used anymore." (245-246). Indeed, Mr. Calamari recalled that he directed that the plastic covering be removed from the escalator steps, and that "it was removed right away." (252). Mr. Calamari reviewed the accident report that he completed, and he confirmed, that when he wrote on the report "[the plaintiff] was walking up, he slipped on the plastic protection on the floor" he meant that the plaintiff slipped on the escalator steps. (255).

The plaintiff commenced this action in Supreme Court, New York County, and after issue was joined (33-58), and discovery and party depositions were completed (59-78, 79-216, 218-265), the plaintiff filed a Note of Issue (265-271) summary judgment practice ensued.

The parties' motions for summary judgment

The plaintiff moved for summary judgment based on his Labor Law §241(6) and § 200 causes of action. (15-271, 289-302). The defendants cross-moved for summary judgment seeking dismissal of plaintiff's §241(6) and § 200 causes of action. (272-288, 303-306).

The order appealed from.

After a clear, and careful recitation of the relevant facts, and after excerpting §23-1.7(d), the Supreme Court proceeded with its analysis:

> 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 [Plaintiff] was using the escalator as a "working area" rather than a passageway.
>
> Defendant's arguments as to the situs of the accident is unpersuasive. Plaintiff was obliged to walk along the escalator to reach is 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 regulation.
>
> 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.
>
> Plaintiff contends that the plastic constituted a slippery condition. Plaintiff relies on his own testimony, as well as that of J.T. Magen's superintendent Lucas Calamari (Calamari). Calamari testified that drop cloths are less slippery than plastic, and that, in his opinion, the plastic covering the escalator at the time of Plaintiff's accident was the wrong type of protection (NYSCEF doc. No. 46).
>
> Here, there is no issue of fact as to whether the plastic covering was a slippery condition. That it was installed to protect the escalator from paint does not absolve Defendants from liability for permitting Plaintiff to work on a surface with a slippery condition covering it. While there is a question of fact as to whether Kara Painting of J.T. Magen installed the plastic, this does not affect the question of Defendant's liability under section 241(6), as the responsibility to provide a safe workplace under the statute is nondelegable.
>
> 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. (8-10).

The Supreme Court then analyzed 12 NYCRR 23-1.7(e)(1), and 12 NYCRR 23-1.7(e)(2). After correctly determining that "[b]oth provisions are sufficiently specific to serve as a predicate to section 241(6) liability" Judge Edmead continued,

> As discussed above, the subject escalator was both a passageway and a working area under the Industrial Code. However, under *Aragona* and *Capuano*, 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 under 12 NYCRR 23-1.7(e) (1), as courts traditionally upheld the distinction, drawn in the Industrial Code, between slipping hazards and tripping hazards.
>
> However, Plaintiff argues that the more recent precedent urges a less technical approach. Plaintiff cites to *Lois v. Flintlock Constr. Servs., LLC* (137 AD3d 446 [1st Det 2016]) and *Serrano v. Consolidated Edison Co. of N.Y. Inc*. (146 AD3d 405 [1st Dept 2017]) for the proposition that "whether the accident is characterized as a slip and fall or trip and fall is not dispositive as to the applicability of that regulation" (*Lois*, 137 AD3d at 447-448). (10).

Judge Edmead thereafter held that 12 NYCRR 23-1.7(e)(2) was not applicable. (11) [2] The Supreme Court concluded though that "12 NYCRR 23-1.7(e)(1) "contains a catchall for "any other … conditions which could cause tripping." As the plastic covering was a condition that could cause tripping, and it did cause Plaintiff to fall, 12 NYCRR 23-1.7(e)(1) was violated." (11).

In light of the foregoing, the Supreme Court held, inter alia, that the branch of plaintiff's motion seeking partial summary judgment as to the defendants' liability under Labor Law §241(6) was granted. (13).

[2] Plaintiff has not cross-appealed and offers no argument as to the applicability of 23-1.7(e)(2).

POINT I

THE SUPREME COURT'S DECISION AND ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFFS AS TO DEFENDANTS' LABOR LAW §241(6) LIABILITY WAS CORRECT AND SHOULD BE AFFIRMED

The Supreme Court perfectly recited the standards for summary judgment under CPLR §3212 in general, and as well, the principles to be considered for summary judgment under Labor Law § 241(6), and the plaintiff can do no better than to excerpt from the Supreme Court's decision:

> "Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact', and the opponent fails to rebut that showing" (*Brandy B. v. Eden Cent. School Dist*., 15 NY3d 297, 302 [2010], quoting *Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "*regardless of the sufficiency of the opposing papers* "" (*Smalls v. AJI Indus., Inc*., 10 NY3d 733, 735 [2008] quoting *Alvarez*, 68 NY2d at 324). (7) (emph. in original).

The Supreme Court then turned to Labor Law §241(6):

> Labor Law §241(6) provides, in relevant part:
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

> It is well settled that this statute requires owners and contractors and their agents "to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v. Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501-502 [1993], quoting Labor Law 241[6]). While this duty is nondelegable and exists "even in the absence of control or supervision of the worksite" (*Rizzuto v. L.A. Wenger Contr. Co*., 91 NY2d 343, 348-349 [1998]), "comparative negligence remains a cognizable affirmative defense to a section 241(6) cause of action" (*St. Louis v. Town of N. Elba*, 16 NY3d 411, 414 [2011]).
>
> To maintain a viable claim under Labor Law §241(6), plaintiffs must allege a violation of a provision of the Industrial Code that requires compliance with concrete specifications (*Misicki v. Caradonna*, 12 NY3d 511, 515 [2009]). The Court of Appeals has noted that '[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborer against hazards in the workplace" (*St. Louis*, 16 NY3d at 416). (8)
>
> ***

This Court has not hesitated to affirm the grant of partial summary judgment under LL §241(6) when a sufficiently specific, and applicable Industrial Code section is violated, and the said violation is a cause of the plaintiff's injuries. See e.g., *Bain v. 50 West Development, LLC*, 191 A.D.3d 496 (1st Dep't 2021) ("plaintiff is entitled to partial summary on his 241(6) claim"); *Capuano v. Tishman Constr. Corp*., 98 A.D.3d 848 (1st Dep't 2012)("The motion court properly granted plaintiff's motion for summary judgment as to liability on the Labor Law §241(6)

claim."). Judge Edmead's grant of partial summary judgment under Labor Law §241(6), and § 23-1.7(d) and § 23-1.7(e)(1) should likewise be affirmed.

A. The Supreme Court correctly found that 12 NYCRR § 23-1.7(d) was applicable, and here violated.

The Supreme Court's conclusion that §23-1.7(d) was applicable, and violated was correct and should be affirmed for the reasons set forth by the Supreme Court:

> 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 [Plaintiff] was using the escalator as a "working area" rather than a passageway.
>
> Defendant's arguments as to the situs of the accident is unpersuasive. Plaintiff was obliged to walk along the escalator to reach is 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 regulation.
>
> 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.
>
> Plaintiff contends that the plastic constituted a slippery condition. Plaintiff relies on his own testimony, as well as that of J.T. Magen's superintendent Lucas Calamari (Calamari). Calamari testified that drop cloths are less slippery than plastic, and that, in his opinion, the plastic

> covering the escalator at the time of Plaintiff's accident was the wrong type of protection (NYSCEF doc. No. 46).
>
> Here, there is no issue of fact as to whether the plastic covering was a slippery condition. That it was installed to protect the escalator from paint does not absolve Defendants from liability for permitting Plaintiff to work on a surface with a slippery condition covering it.

In addition to the lower court's analysis, the plaintiff submits here additional record facts and amplified analysis as grounds for affirming the Supreme Court's grant of partial summary judgment on the basis of § 23-1.7(d).

1. The plastic covering on the escalator was a "foreign substance" under § 23-1.7(d), as a matter of law.

The phrase "foreign substance" is not defined in the Industrial Code's definitional section. (See, 12 NYCRR § 23-1.4) .

The Court of Appeals has "long held that the statutory text is the clearest indicator of legislative intent, and that a court "should construe unambiguous language to give effect to its plain meaning" (*Matter of Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 524 (2019) (citing *Nadkos, Inc., v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 N.Y.3d 1, 7 (2019)); *Colon v. Martin*, 35 N.Y.3d 75, 78 (2020); *Matter of Lemma v. Nassau Co. Police Officer Indem. Bd*, 31 N.Y.3d 523 (2018); *Peyton v. New York City Bds of Standards and Appeals*, 36 N.Y.3d 271 (2020).

"In the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as use guideposts in determining the meaning of a word or phrase" (*Walsh*, 34 N.Y.3d at 524, citing *Nadkos*, 34 N.Y.3d at 7). Further, a statute "must be construed as a whole and [ ] its various sections must be considered together and with reference to each other" *Walsh*, 34 N.Y.3d at 524, citing and quoting, *Matter of New York County Lawyers' Assn v. Bloomberg*, 19 N.Y.3d 712, 721 [2012]); see also *Colon v. Martin*, 35 N.Y.3d 75, 78 (2020).

The word "foreign" means "strange" or as used with its antonym, "not native" and the word "substance" means "material" or "matter." Taken together, and read with the rest of § 23-1.7(d), this phrase means material which is not native to the "floor, passageway, walkway, scaffold, platform or other elevated working surface." By the plain meaning of "foreign substance" the plastic covering is encompassed within the words of § 23-1.7(d) – it is surely a "foreign substance" to the escalator – it was not part and parcel of the escalator itself.

This conclusion is reinforced when § 23-1.7(d) is "construed as a whole and … its various sections [are] considered together and with reference to each other" (*Walsh*, 34 N.Y.3d at 524). With § 23-1.7(d), the Legislature is plainly providing that an employer shall not permit anything slippery on a "floor, passageway,

walkway, scaffold, platform, or other elevated working surface" which is not native to, and part of the said surface, for the simple reason that slippery surfaces are unsafe.

The Supreme Court correctly observed: "The Court of Appeals has noted that '[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborer against hazards in the workplace" (citing *St. Louis v. Town of N. Elba*, 16 NY3d at 416)." (8). Construing the slippery plastic covering atop the escalator to be a "foreign substance" under the circumstances presented here, is a rational interpretation of § 23-1.7(d), which furthers the remedial purpose of protecting workers against hazards in the workplace.

Defendants urged below and they argue here that the covering was not a "foreign substance" within the meaning of § 23-1.7(d) because it was "intentionally placed" on the escalator. This argument has no legal support and is akin to saying that if an unkind prankster decided to put snow on the escalator, it would not be a "foreign substance" because it was "intentionally placed." Judge Edmead correctly rejected the defendants' "placed" contentions (9), and this Court should as well.

2. The plastic covering was not "integral to the work" of painting while standing on an escalator step; it was a hindrance and a hazard, as a matter of law

With their "intentionally placed" contentions, it seems that defendants are also arguing that the plastic was "integral to the work." See, App. Br. p. 7 ("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 defendants did directly posit in their brief that the plastic was "integral to the work" (App. Br. p. 12-14), but their "placed" argument is also inspired by this idea.

But as the lower court correctly observed, the plaintiff, and the defendants' witness Mr. Calamari both repeatedly and specifically testified that the plastic covering was not, under the circumstances, the correct covering for the escalator! The plaintiff complained about the plastic, and Mr. Calamari testified that when he learned of the plaintiff's slip and fall, he directed that the plastic be removed. If all agree that the plastic was improperly placed, the plastic cannot at the same time, be "integral to the work."

The conclusion here that the plastic covering was a "foreign substance" and not at all "integral to the work" is borne out in appellate division decisions. For example, and in stark contrast to the facts of this case, in *O'Sullivan v. IDI Const. Co., Inc*., 28 A.D.3d 225 (1st Dep't 2006), *aff'd* 7 N.Y.3d 805 (2006), cited by the defendants, the plaintiff tripped over a "protruding pipe" and the "record [was]

clear" that "the protruding pipe was an integral part of the floor on which [the plaintiff] was working. Indeed, plaintiff conceded that the conduit he tripped over appeared to be permanent." *O'Sullivan v. IDI Const. Co., Inc*., 28 A.D.3d at 226. Accordingly, since the apparently permanent pipe was an "integral part of the floor" it was not surprising that this Court dismissed, and the Court of Appeals affirmed this Court's grant of summary judgment to the defendants because inter alia, "the injury-producing object is an integral part of what is being constructed." *Id*.

In *O'Sullivan* the plaintiff based his Labor Law §241(6) claim under § 23-1.7(e)(1) and (e) (2), but "integral to the work" principles are the same under § 23-1.7(e) or § 23-1.7(d), the section discussed here.

For example, in *Galazka v. WFP One Liberty Plaza Co., LLC*, 55 A.D.3d 789 (2d Dep't 2008), *lv denied*, 12 N.Y.3d 709 (2009) the Second Department affirmed the Supreme Court's grant of summary judgment to the defendants dismissing the plaintiff's LL claim under §241(6), § 23-1.7(e) (2), and § 23-1.7(d) because "the wet plastic upon which the injured plaintiff slipped was an integral part of the asbestos removal project on which the injured plaintiff was working (*Galazka*, 55 A.D.3d at 789-790 (citing *O'Sullivan*, 7 N.Y.3d at 806)." The *Galazka* Court continued, "[t]he moving defendants submitted evidence that the plastic was specially designed and required to collect the accumulation of asbestos fibers during asbestos removal, and that safety regulations required the asbestos fibers to be constantly wet so as to

prevent them from filling the air. As such, the wet plastic and asbestos fibers were neither a "foreign substance" as defined by 12 NYCRR 23-1.7(d) [internal citations omitted], nor "debris" within the meaning of § 23-1.7 (e)(2)."

Though this case also concerns a "plastic" cover, the thorough, and particularized showing by the *Galazka* defendants, as to the special design of the plastic for the asbestos work underway, and the need for the plastic for safety, is the exact opposite of the evidence before the Court here, where both the plaintiff and Mr. Calamari testified that the plastic cover used was wrong for the job, and unsafe.

Another more recent Second Department decision, which is in the same vein as *Galazka* is *Lopez v. Edge 11211, LLC,* 150 A.D.3d 1214 (2d Dep't 2017), where this Court affirmed the grant of summary judgment to defendants, dismissing plaintiff's §241(6) claim, where the plaintiff a tile setter was injured on unsecured rosin papers placed where the tile work was being performed. In so holding, the *Lopez* Court explained; "[t]he defendant also established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law §241(6) cause of action, premised upon a violation of 12 NYCRR 23-1.7(d), by establishing that the protective rosin paper upon which the plaintiff slipped was an integral part of the tile work (citations omitted). As such, the rosin paper does not constitute a "foreign substance" within the meaning of 12 NYCRR 23-1.7(d) (citing *O'Sullivan v. IDI Constr. Co., Inc*. supra)."

As in *Galazka*, the rosin paper in *Lopez* may have been "slippery" but it was a specific material which was exactly keyed to the work being performed, and so it was correctly held to be "integral to the work." The plastic placed in this case was not especially designed for the work – the witnesses testified that a drop cloth or a wood covering, was the correct covering for escalator steps.[3]

Another illustrative case in the same vein as *O'Sullivan*, *Galazka* and *Lopez* is *Gist v. Central School Dist. No. 1*, 234 A.D.2d 976 (4th Dep't 1996). In *Gist*, the plaintiff laborer was employed by a contractor hired by the defendant to replace a roof at one of defendant's school buildings. Mr. Gist was injured while "carrying a pail of hot tar across an area of the new roof where two-ply felt paper and a water sealant" had been applied when the plaintiff "skidded" on the sealant, causing the hot tar to splash onto his arm." *Id*. at 977. The Fourth Department reversed the denial of defendants' motion for summary judgment dismissing plaintiff's claim under Labor Law §241(6), and §23-1.7(d) because "[t]he water sealant upon which

[3] For this reason, the facts of this case are wholly distinguished from the facts of *Cumberland v. Hines Ints. Ltd. P'ship*, 105 A.D.3d 465, 466 (1st Dep't 2013), cited by the defendants. In Cumberland, the pipe and pipe fittings, were not "debris," under § 23–1.7(e)(2) because they were "consistent with" the work being performed in the room. In this case, all agreed that the plastic covering was improper, and so it was inconsistent with the work of standing on an escalator step and painting seven to nine feet above on the wall. *Verel v. Ferguson Elec. Const. Co.,* 41 A.D.3d 1154, 1157 (4th Dep't 2007), another case cited by the defendants is inapposite for the same reason -- the electrical pipe[s] or conduit[s] that plaintiff tripped over [were] an integral part of the construction." Here, the sheet was a hazard, and not a help, and Mr. Calamari had it removed as soon as he learned about the plaintiff's fall.

plaintiff slipped does not constitute a foreign substance within the meaning of that regulation but is an integral part of the new roof that was being constructed."

In *O'Sullivan, Galazka, Lopez*, and *Gist*, the facts were unequivocal -- the injury-producing objects were "integral to the work" as a matter of law, and so defense motions were correctly granted. There are other cases however, where there is a question of fact as to whether the substance is a "foreign substance" – in other words, the defendant is not entitled to summary judgment dismissing the plaintiff's claim, but the plaintiff is also not entitled to partial summary judgment under Labor Law §241(6) cause of action, premised upon a violation of 12 NYCRR 23-1.7(d).

Cappabianca v. Skanska USA Bldg, Inc., 99 A.D.3d 139 (1st Dep't 2012), is a prime example of a decision in which there was a question of fact under § 23-1.7(d). The *Cappabianca* plaintiff slipped on water which sprayed from a stationary "wet saw" that he was operating to "cut bricks" and he contended that the saw "malfunctioned" by spraying water "all over" instead of directing the water into an attached tray as it was designed to do. The defendants contended that "wet saws always spray water onto the floor." *Id*. at 147. This Court reinstated the plaintiff's claim under §241(6), and §23-1.7(d), because there were issues of fact as to whether as the plaintiff alleged, the saw sprayed because it malfunctioned, or because the saws always spray water onto the floor. *Id*.

In *Stasierowski v. Conbow Corp*., 258 A.D.2d 914, 915 (4th Dep't 1999), the plaintiff also raised a factual issue which precluded summary dismissal on his §241(6) claim predicated on §23-1.7(d) because the plaintiff roofer raised an issue of fact "whether he slipped on a stringer of hot tar that blew from a spigot" and the tar under the circumstances, was not an integral part of the roof.

In this case, in contrast to *Cappabianca* and *Stasierowski*, the plaintiff did more than raise an issue as to whether the plastic was a "foreign substance" within the meaning §23-1.7(d); he showed that it was a "foreign substance" as a matter of law because here, inter alia, the defense could not, and did not raise an issue since their own witness Mr. Calamari acknowledged that plastic covering was improper.

Accordingly, since there was no evidence that a) the plastic was not "foreign" to the escalator; b) that it was not slippery; and that c) it was integral to the work, or to the elevator itself, the plaintiff's cross-motion was properly granted.

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Krzyzanowski v. City of New York, 179 A.D.3d 479 (1st Dep't 2020) cited and discussed by the defendants, while arising under §23-1.7(e)(1) and (e)(2), and not §23-1.7(d) has strong parallels to, for example, *Cappabianca* because neither the defendant nor the plaintiff could eliminate issues as to whether or not the plywood boards were "integral to the work."

In *Krzyzanowski*, the plaintiff "tripped on wooden boards that were laying on the floor. He described the boards as being loose, overlapping and unsecured." Id. at 480. An extended excerpt from *Krzyzanowski* is warranted:

> Notwithstanding the availability of this [integral to the work] defense, defendants have not established their entitlement to summary judgment. Although STV's project manager and plaintiff each testified that the boards were lifted and replaced each day, plaintiff stated he did not know why they had been placed and the project manager stated they might have been placed as a protective floor covering. The project manager also testified, however, that there was no renovation work being done in November 2015, when plaintiff's accident occurred. The deposition testimony of plaintiff and STV's project manager only established that the boards (possibly Masonite), were removed and replaced each day, but not why they were placed or what condition they were in. This testimony is insufficient to establish as a matter of law that the boards were a protective floor covering integral to the work being done.

Krzyzanowski, 179 A.D.3d at 481 (2020)

The record in *Krzyzanowski*, like *Cappabianco*, was equivocal – on the one hand, the plywood boards were, in a general sense, a part of the work underway, but a question was raised as to why the particular boards that the plaintiff tripped on were there, and there was a question as to the boards' condition. *Id.* In this case, as noted above, and shown with the parties' testimony, all agree that the unsecured plastic covering was not only the wrong covering for the escalator, but a hazard, which Mr. Calamari had removed as soon as he learned of the plaintiff's fall. Accordingly, there is no question of fact as to whether the plastic is "integral to the work" – it is not, as a matter of law.

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Defendants try to make a point of distinguishing *Conklin v. Triborough Bridge & Tunnel Auth*., 49 A.D.3d 320 (1st Dep't 2008), a case relied upon by the lower court but their arguments miss the mark. The slippery plastic covering here is perfectly analogous to the mud on a ramp in *Conklin* – it is slippery, it is "foreign" to the escalator, and it is not "integral to the work." See also, *Velasquez v. 795 Columbus LLC*, 103 A.D.3d 541, 542 (1st Dep't 2013)("As the mud was not part of the floor and not an integral part of plaintiff's work, it constitute a "foreign substance" that caused slippery footing").

The defendants also emphasize that §23-1.7(d) "only applies to the factual scenarios encompassed by its terms" (App. Br. at p. 8) but they forget that the Legislature included a *catchall* "and any other foreign substance" may apply to a broad range of material from "a stringer of hot tar" (*Stasierowski*) to "mud" (*Conklin; Velasquez*) to a "plastic covering" as in this case.

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The defendants continue to argue here that "plaintiff was not working on any of the areas listed in [§23-1.7(d)]." (App. Br. at 7). Judge Edmead correctly rejected this argument and it is plainly without merit since the testimony showed that "the escalator was both a passageway and an elevated work area, both of which are covered under this regulation." (9). As the Supreme Court observed, "plaintiff was

obliged to walk along the escalator to reach is [sic] the area in the middle of the escalator where he was attempting to perform his work. (9). This was shown in the testimony, as excerpted above; the plaintiff was asked at this deposition: "Had you taken any steps on the escalator before you fell?" and he answered: "I walk down, I take the steps like to middle escalator. I walk down before accident." (132).

In *Rossi v. 140 West JV Manager LLC*, 171 A.D.3d 668 (1st Dep't 2019), this Court also concluded that an area was both a "work area" and a "passageway" under §23-1.7(e)(1) and (e)(2), and an excerpt from *Rossi* is warranted: "Summary judgment on the issue of liability was properly granted in this action where plaintiff was injured when he tripped and fell over construction debris at the work site. The area where plaintiff fell was, by definition, a passageway, as he tripped over Vanquish's demolition debris along the only route he could take to return to his work area with a ladder (*Lois v. Flintlock Constr. Servs., LLC*, 137 A.D.3d 446, 447 (1st Dep't 2016); see also *Harasim v Eljin Constr. of N.Y., Inc*., 106 A.D.3d 642, 643 (1st Dep't 2013); 12 NYCRR 23-1.7(e)(1)). Moreover, Vanquish left demolition debris on a floor where plaintiff was required to pass in the course of his work within the definition of a working area (*Canning v. Barneys N.Y.*, 289 A.D.2d 32, 34 (1st Dep't 2001); 12 NYCRR 23-1.7(e)(2))."

The Supreme Court's decision and order granting the plaintiff summary judgment as to the defendants' liability under Labor Law §241(6), and §23-1.7(d) was perfectly correct, and should be affirmed.

B. The Supreme Court correctly found that 12 NYCRR § 23-1.7(e)(1) was applicable, and here violated.

The defendants' main argument as to the inapplicability of § 23-1.7(e)(1) is that the plaintiff testified that he "slipped" and according to the defendants, this section only applies to "tripping" hazards. The Supreme Court rejected this argument, and this Court should as well.

First of all, the *title* of this section "Protection from general hazards; tripping and other hazards" expressly encompasses hazards other than tripping hazards. By using the words "general hazards" and "other hazards" the Legislature is especially providing that this section does not relate only to "tripping" hazards but to "general hazards" and "other hazards" as well. [4] It is beyond cavil that a "tripping" hazard falls within the ambit of "general hazards" or an "other hazards." (See, discussion supra, related to statutory construction, and plain language).

[4] Lest defendants argue that the word "tripping" in the title refers to (e)(1) and that "other hazards" refers to (e)(2), there is the first part of the title "Protection from general hazards" which inescapably applies to both subsections.

Second, the express language of § 23-1.7(e)(1) itself contemplates a range of hazards, which may not all lead to "tripping." For example, § 23-1.7(e)(1) lists "dirt" but it is difficult to see how "dirt" could cause "tripping" and not "slipping."

Lastly, as argued by the plaintiff below, this Court has recognized for years that the fact that a plaintiff "slips" rather than "trips" "does not render 12 NYCRR 23-1.7(e) inapplicable. See e.g, *DeMaria v. RBNB 20 Owner, LLC*, 129 A.D.3d 623 (1st Dep't 2015); see also, *Lois v. Flintlock Constr. Services, LLC*, 137 A.D.3d 446, 447-448 (1st Dep't 2016) ("Viewed in the light most favorable to plaintiff, his testimony that he fell while walking on a two- or three-foot space between two large piles of debris, and that he was required to pass through that area in order to access the window being repaired, established that the accident occurred in a "passageway" within the meaning of Industrial Code § 23-1.7(e)(1). Whether the accident is characterized as a slip and fall or trip and fall is not dispositive as to the applicability of that regulation (citing *DeMaria v. RBNB 20 Owner, LLC,* supra)); *Serrano v. Consolidated Edison Co. of New York Inc*., 146 A.D.3d 405 (1st Dep't 2017)(same).

Defense arguments related to "integral to the work" and § 23-1.7(e)(1) have been addressed above.

CONCLUSION

For the foregoing reasons, the Order appealed from should be affirmed; and for such other and further relief as this Court deems necessary and proper.

Dated: Brooklyn, New York
August 11, 2021

Respectfully submitted,
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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j) the foregoing brief was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc. is 6,837.