SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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SRECKO BAZDARIC AND ZORKA BAZDARIC,

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants.

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Index No. 159433/2015
Case No. 2020-03296

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affirmation of Eileen Kaplan and Brian J. Isaac, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Motion Part at the Courthouse located at 27 Madison Avenue, New York, New York 10010, on the 31st day of May 2022[1], at 10:00 AM, or as soon thereafter as counsel can be heard for an Order:

1. **Pursuant to CPLR §2221(d) granting reargument of this Court's March 31, 2022, order insofar as it reversed the order of the Supreme Court, New York County, dated October 9, 2019, granting plaintiffs' motion for summary judgment on his causes of action under Labor Law §241(6) premised upon 12 NYCRR §23-1.7(d) and §23-1.7(e)(1), and dismissing those causes of action, and upon reargument affirming the order of the Supreme Court, New York County; and**

2. **Pursuant to CPLR Articles §5602 and 22 NYCRR 1250.16(d)(3), granting plaintiffs leave to appeal to the Court of Appeals from the decision and order of this Court dated March 31, 2022, so that the Court of Appeals can rule on whether this Court properly dismissed plaintiffs' causes of action under Labor Law §241(6); and**

3. **Granting any other and further relief the Court deems proper and just.**

[1] Due to May 30, 2022 being Memorial Day, the return date falls on the next business of Tuesday, May 31, 2022.

PLEASE TAKE FURTHER NOTICE, that answering affidavits, if any, are to be served upon the unsigned within seven (7) days prior to the return date of the within application in accordance with CPLR §2214(b).

Dated: New York, New York
April 29, 2022

Yours, etc.

By: 

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TO:

Clerk of the Court

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Index No. 159433/2015
Case No. 2020-03296

AFFIRMATION IN SUPPORT

Eileen Kaplan and **Brian J. Isaac,** attorneys duly licensed to practice law before the Courts of the State of New York hereby affirms the truth of the following under penalty of perjury:

1. We are members respectively of Elefterakis, Elefterakis & Panek and Pollack Pollack Isaac & DeCicco, LLP, special and appellate counsel to Elefterakis, Elefterakis & Panek, attorneys for the plaintiffs-respondents, Srecko Bazdaric ("Srecko") and Zorka Bazdaric ("Zorka") (hereinafter the "plaintiff[s]"). We are fully familiar with the facts and circumstances of this case based upon the file maintained by my office.

2. We submit this affirmation in support of the within application for leave to reargue and/or leave to appeal to the Court of Appeals. Defendants filed and served this Court's March 31, 2022 decision and order with notice of entry on April 4, 2022[1] (**Exhibit A**). The order of this Court reversed, insofar as appealed from by the defendants, the order of the Supreme Court, New York County (Edmead, J.), dated October 9, 2019, which granted the plaintiffs' motion for summary judgment on the cause of action under Labor Law §241(6) premised upon 12 NYCRR §§23-1.7(d)

[1] As stated, the decision and order with notice of entry was served on April 4, 2022. Accordingly, this motion is timely (see 22 NYCRR 1250.16(d)(1)).

and 23-1.7(e)(1), and dismissed those causes of action[2]. Of great import to this motion is the fact that there was a two-judge dissent (Manzanet-Daniels, J.P. and Moulton, J.). The dissent argued, correctly and persuasively, that the trial court properly granted summary judgment to the plaintiff on his Labor Law §241(6) claim[3].

3. Plaintiffs seek reargument because they believe that the dissent properly interpreted the relevant statutes and that the majority misapprehended the facts and the law insofar as it found that the plastic sheeting placed on the escalator on which plaintiff was forced to work was not a foreign substance under 12 NYCRR §23-1.7(d) and that the plastic sheeting was "integral" to the work being performed under both 12 NYCRR §23-1.7(d) and 12 NYCRR §23-1.7(e)(1). If this Court declines to grant reargument, then plaintiffs respectfully seek leave to appeal to the Court of Appeals for that Court to rule on what is a matter of public importance with regard to the breadth and reach of the above regulations. Plaintiffs note that there was a two-judge dissent and if the order dated March 31, 2022, had "finally determined the action" (see, CPLR §5601(a)), plaintiffs would have an appeal as of right to the Court of Appeals. However, as noted in the trial court order,

[2] Annexed hereto as **Exhibit B** is Defendants' Notice of Appeal dated November 6, 2019.

[3] Plaintiff is aware of precedent which holds that where a case is decided by a narrow margin with forceful dissenting opinions, the proper conclusion is that the issue was carefully considered and debated. In Semanchukv. Fifth Ave.& 37th St. Corp., 290 NY 412, 419 [1943], Chief Judge Lehman noted: "The authoritative force of a decision as a precedent in succeeding cases is not determined by the unanimity or division of the court. The controversy settled by a decision in which the majority concur should not be renewed without sound reasons existing here." Nevertheless, both this Court (Rodriguez v. Antillana & Metro Supermarket Corp., 176 AD3d 597 [1st Dep. 2019], rec.&vac.179 AD3d 613 [1st Dept. 2020]) and other Appellate Divisions (Weathers v. Tri State Consumer Ins., 153 AD3d 651 [2d Dept. 2017], vac. & rec., 168 AD3d 785 [2d Dept. 2019] have recalled decisions where the court at issue determined that the decisions contained errors of fact or law. The same principles apply in the Court of Appeals. See, Auqui in Seven Thirty-One LPD Partnership, 21 NY3d 995 [2013], rec., vac. & revsd., 22 NY3d 246 [2013]; K2 Inv. Group v. American Guar. & Liab., 21 NY3d 384 [2013], rec., vac. & revsd., 22 NY3d 578 [2014].

plaintiffs presently have a cause of action under Labor Law §240(1). That claim was not addressed in the motions before the trial court and accordingly the order of this Court is not final[4].

4. The majority of this Court relied on two bases for reversing the order of the trial court. The first was that the heavy-duty plastic covering that was placed on the escalator where Srecko, was required to work while painting the adjoining wall, was not a "foreign substance" as defined by the relevant section of the Industrial Code and therefore the regulation was not violated. The second basis was that the plastic covering was "integral to the work being performed," and therefore, Srecko could not recover under either 23 NYCRR §§23-1.7(d) or 23-1.7(e)(1).

5. In connection with the analysis of whether the plastic covering was integral to the work being performed the majority stated, "nothing in our precedents suggests that a court should determine whether a material at issue is the best (or a poor choice) in making the ultimate determination of whether the material used is integral to the renovation work." (Bazdaric v. Almah Partners LLC, 2022 N.Y. App. Div. LEXIS 2096, *4 [1st Dept. March 31, 2022]). The dissent saw

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[4] To satisfy the finality requirement, an order of the Appellate Division must affirm, or on reversal or modification direct the entry of, an immediately effective judgment or order which completely disposes of the particular action or special proceeding, and not leave any further action to be taken therein. See, Cohen & Karger, The Powers of the New York Court of Appeals [3d ed. §12, pp. 53-54]. Where a complaint consists of only a single cause of action, an order which does not decide all the issues on which the right to relief turns is necessarily non-final, since there is as yet no decision as to whether the plaintiff is entitled to any of the relief he seeks [id., p. 71]. Otherwise stated, where a plaintiff asserts alternative theories of liability in his pleadings, and his or her claim is dismissed insofar as it is predicated on only one of those theories, there is no finality, even though some of the liability theories are resolved. See, Behren v. Papworth, 30 NY2d 532 [1971]; Free Synagogue of Flushing v. Bd. of Estimate, 28 NY2d 515 [1971]; Bartoo v. Buell, 83 NY2d 800 [1994]. An order that settles only "some of the issues involved" in a litigation, even if pleaded in a single cause of action, is not final. See, In Re: Estate of Hillowitz, 20 NY2d 952, 954 [1967]. The use of the doctrine of "implied severance" to seek reversal of decisions and orders that were not actually final while once potentially viable (see, Associated Coal v. Hughes, 46 NY2d 1071 [1979[; Orange & Rockland Utilities v. Howard Oil, 46 NY2d 880 [1979]; Ratka v. St. Francis Hospital, 44 NY2d 604 [1978]) is now generally not followed in any circumstance based on the Court of Appeals decision in Burke v. Crosson, 85 NY2d 10, 17 [1995]. A simple "Shepard's" search citing to Burke will reveal the staggering number of appeals that have been dismissed by the Court of Appeals for lack of "finality" in the wake of the decision.

it completely differently, positing that in determining whether the material at issue was integral to the work being performed the court must consider whether the material was *appropriate* for the actual work. For the reasons set forth below, plaintiffs believe that reargument should be granted and upon reargument the order of the Supreme Court, New York County, should be affirmed, or in the alternative, plaintiffs respectfully request that this Court grant leave to appeal to the Court of Appeals.

6. Plaintiffs believe that an object, even one intentionally placed in a work area, that is antithetical to the work and is dangerous, especially where these facts are *conceded* by defendant's witnesses, cannot comply with 12 NYCRR §23-1.7(d) and §23-1.7(e)(1) as a matter of law.

REARGUMENT

7. Pursuant to CPLR §2221(d), a motion for leave to reargue: 1) must be identified specifically as such; 2) must be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion, but may not include any matters of fact not offered on the prior motion and; 3) must be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry (see, Foley v. Roche, 68 AD2d 558 [1st Dept. 1979] [A motion to reargue is designed to afford a party an opportunity to establish that the Court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law]; William P. Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1st Dept. 1992]).

8. Motions under CPLR §2221 are addressed to the sound discretion of the Court that decided the prior motion and may be granted upon a showing that the Court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision (see, Pro Brokerage.

Inc., v. The Home Ins. Co., 99 AD2d 971 [1st Dept. 1984]; Tadesse v. Degnich, 81 AD3d 570 [1st Dept. 2011].

9. The instant motion is appropriate because it is respectfully submitted that this Court overlooked and/or misapprehended relevant facts and law in connection with its determination of the appeal.

10. In connection with both issues, i.e., whether the plastic covering was a "foreign substance" and whether the covering was "integral to the work being performed," plaintiffs believe that the dissent properly determined that while both the terms "foreign substance" and "integral to the work being performed" are not defined in the Industrial Code, "courts construe words of ordinary import with their usual and commonly understood meaning." (Bazdaric, supra, at *12, quoting, Matter of Walsh v. New York State Comptroller, 34 NY3d 520, 524 [2019]).

11. "The courts in construing statutes should avoid judicial legislation; they do not sit in review of the discretion of the Legislature or determine the expediency, wisdom or propriety of its actions on matters within its powers. A court cannot by implication supply in a statute or provision which it is reasonable to suppose the Legislature intended intentionally to omit. If the words of a statute are free from ambiguity and express plainly, clearly, and distinctly the legislative intent, resort may not be had to other means of interpretation" (McKinney's Statutes, §63, §73, §74, §76, §363).

12. The courts have made it clear that each statutory section has its own purpose, and that one cause of action should not be interpreted to render another "superfluous" or "meaningless;" litigants should not, through the artifice of construction, change regulatory enactments that protect workers into ones that aid contractors in avoiding liability (Rocovich v. Consolidated Edison Co., 78 NY2d 509 [1991]; Albano v. Kirby, 36 NY2d 526 [1975]).

13. In Nostrom v. A.W. Chesterton Co., 15 NY3d 502 [2010], the Court of Appeals stated, "In matters of statutory and regulatory interpretation, 'legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the [enactors]'."

14. The text of a provision is the clearest indicator of the enactors' intent, "and courts should construe unambiguous language to give effect to its plain meaning" (DaimlerChrysler Corp. v. Spitzer, 7 NY3d 653, 660 [2006]). Additionally, inquiry should be made into "the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (ATM One, LLC v. Landaverde, 2 NY3d 472, 477 [2004]).

15. Legally imposed duties cannot be distorted to exonerate a defendant from liability as a matter of law (see, Zipkin v. City of New York, 196 AD2d 865 [2d Dept. 1993]). Here, the evidence is undisputed that the plastic covering on the escalator was not the proper material that should have been used. As the dissent stated: "the defendants conceded that the '[p]lastic sheeting was admittedly a poor choice for the purpose it was used.' (id. at *15-16). The only issue is whether, under the circumstances, the plastic covering was a "foreign substance" as set forth in 12 NYCRR §23-1.7(d) and/or "integral to the work being performed" under both 12 NYCRR §23-1.7(d) and §23-1.7(e)(1).

16. In connection with the issue of whether the plastic covering was a "foreign substance" under 23 NYCRR §23-1.7(d), the dissent noted, "the majority argues that the slippery plastic sheeting is not a 'foreign substance' because the regulation's broad reference to 'any other foreign substance which may cause slippery footing' is limited to conditions such as 'ice, snow, water and grease." (Bazdaric, supra, at *18). The dissent went on to state, "[h]ad the legislature intended to limit 23-1.7(d)'s reference to 'any other foreign substance which may cause slippery

footing' to a narrow class of slipping hazards, contrary to the Industrial Code's overall purpose, it could have referred to 'ice snow, water, grease and any other *similar* foreign substance which may cause slippery footing.'" (id., at. *19[emphasis in original]).

17. The dissent properly noted that this Court has already found that "food" that fell from dirty dishes carried through a hotel kitchen was a "foreign substance" under the regulation when it caused the plaintiff to slip as he descended a ladder and stepped onto the floor (Colucci v. Equitable Life Assur. Soc'y of the United States, 218 AD2d 513 [1st Dept. 1995]). Clearly, if food can be a foreign substance for the purpose of 12 NYCRR §23-1.7(d) plastic which was improperly placed on the escalator should also be considered a foreign substance.

18. The cases relied on by the majority can be distinguished because in those cases the items on which the plaintiff slipped were *properly* installed on the surface where the plaintiff fell but for some reason became unsecured. In Stier v. One Bryant Park LLC, 113 AD3d 551 [1st Dept. 2014]), the facts indicate that the loose masonite on which plaintiff slipped had been installed apparently to protect floors outside of elevators and had been secured by duct tape. (id., at 552; see also, Crousset v. Chen, 102 AD3D 448 [1ST Dept. 2013] [No evidence that masonite that was placed on floor protect the ceramic tiles was slippery]).

19. Kane v. Peter M. Moore Constr. Co., Inc., 145 AD3d 864 [2d Dept. 2016], appears to support the dissent's position. While the Appellate Division, Second Department, found that a dropcloth placed on a staircase was not a "foreign substance" it is unclear from the decision why the dropcloth was on the stairs. If there to protect the stairway from damage and if the dropcloth was the proper protection to cover the stairs, then it was not a foreign substance. In fact, in the instant case, the parties agreed that the proper surface upon which plaintiff should have been

working was a dropcloth or wooden boards. The dissent also noted when distinguishing Kane that the dropcloth may have been integral to the work being performed.

20. The majority also infers that whether the plastic covering can be considered a foreign substance hinge on whether it was integral to the work being performed. "Where . . . the substance naturally results from the work being performed, it is not generally considered a 'foreign substance' under section 23-1.7(d)." (Giglio v. Turner Constr. Co., 190 AD3d 829, 831 [2d Dept. 2021], quoting, Kowalik v. Lipschutz, 81 AD3d 782, 784 [2d Dept. 2011]).

21. In Giglio, the plaintiff whose job was to cut and place tiles in a bathroom was injured when he slipped and fell on a discarded plastic sheet used to package the tiles which had become wet due to spray from a nearby wet saw used to cut the tiles. The Second Department found that the water and plastic sheets were "direct and natural results of the tile work." (Giglio, supra, at 831).

22. In Kowalik, the plaintiff injured himself on a saw when he allegedly slipped on sawdust that was created by the work he was doing. Again, the Second Department found that the sawdust was the natural result of the work being performed (Kowalik, supra, at 784; see also, Cruz v. MTA, 193 AD3d 639 [1st Dept. 2021] [Berm consisting of loose dirt and debris on which plaintiff and his coworker were standing, and which was supporting the water main that they were attaching to beams overhead before excavation could continue did not constitute a slippery condition as contemplated by 12 NYCRR §23-1.7(d)).

23. Clearly in cases where the slippery condition is a "naturally occurring" result of the work being performed the regulation does not apply. Here, however, the plastic covering was not a naturally occurring result of the work. The sheeting was intentionally placed on the escalator to protect the escalator from paint splatters. It was a "foreign substance" placed on the surface of the

escalator and a slipping hazard as conceded by the defendants. Plaintiff submits that an object or instrumentality that is concededly dangerous and contrary to accepted safety protocols at a construction site violate 12 NYCRR §§23-1.7(d) and 23-1.7(e)(1) as a matter of law because the object or instrumentality is actually it is "antithetical" to the plaintiff's work in that scenario. See, Lopez v. New York City Dept. of Envtl. Protection, 123 AD3d 982 [2d Dept. 2014] [Plaintiff entitled to summary judgment on his Labor Law §241(6) cause of action where he was impaled on an uncapped rebar while performing construction work in New York City; rebar was integral to the work, but sharp edges were supposed to be capped on placement]. Based on this logic, the trial court's order and decision in this case should be affirmed on the facts disclosed by the record.

24. The majority at bar concluded that 12 NYCRR §23-1.7(e)(1) applied to the facts but held that the plastic sheeting was integral to the work being performed. The majority also implied that even if it concluded that the plastic sheeting was a "foreign substance" under 12 NYCRR §23-1.7(d), the regulation still would not apply because the sheeting was "integral" to the work being performed. Here, plaintiff is entitled to summary judgment because the unsafe placement of the plastic sheeting on the escalator created a tripping hazard which caused plaintiff's accident. This sheeting placed on the escalator violated the very essence of §1.7(e)(1). There is nothing in the plastic sheeting that was "integral" to the work plaintiff was performing, i.e., painting, especially where the defendants *conceded* that the plastic sheeting was not the proper or safe method of covering the escalator to protect it from paint splatter.

25. It is beyond cavil that the placement of the plastic sheeting created a dangerous tripping hazard and was not an "integral" part of the painting plaintiff was performing. In fact, the placement of the sheeting on the escalator was *antithetical* to defendants' nondelegable duty to provide a safe workplace. See, Lopez, supra. Importantly, the sheeting had nothing to do with

plaintiff's work; the sheeting was merely there to protect the escalator. Therefore, it is a distortion to argue that the sheeting was "integral to the work" within the meaning of §23-1.7(e)(1). Significantly, as conceded by defendants, the escalator should have been covered by a dropcloth or wooden boards.

26. The sheeting, at bar, was not a permanent structure but was placed on the escalator merely to protect it from paint splatter. The sheeting was slippery and should not have been used as a covering for the escalator where plaintiff was required to work (see, Fonck v. City of New York, 198 AD3d 874 [2d Dept. 2021] [Pipe and "vapor barrier" over which the plaintiff tripped were not obstructions, but rather had been intentionally installed and were a "permanent and an integral part of what was being constructed."]). In contrast, here, the sheeting was admittedly placed on the escalator despite the fact that plaintiff and defendants agreed that the proper work surface was a dropcloth or wooden boards.

27. Giza v. New York City School Constr. Auth., 22 AD3d 800, 801 [2d Dept. 2005], is instructive. In that case the Second Department affirmed the denial of defendant's motion for summary judgment to dismiss plaintiff's Labor Law §241(6) claim premised on §1.7(e)(2) on the ground that a triable issue of fact exists as to whether a warped piece of plywood that allegedly caused plaintiff's accident was an integral part of his work or was material which created a tripping hazard as defined in §23-1.7(e)(2). The language of the trial court is apropos (2004 NY Slip Op 30006(U)):

> Plaintiff did not merely trip over a piece of plywood. He tripped over a piece of plywood that was warped to the point that its edge was elevated three inches above the surface of the parking lot. **It was the warped nature of the plywood that presented the tripping hazard, and while the work might have required the use of plywood, it did not require the use of warped plywood.**

28. The same can be said here. While the work plaintiff was performing may have required use of a covering for the escalator to prevent paint splatters, the evidence establishes that the proper covering was a dropcloth or wooden boards and not plastic sheeting. Like the warped plywood in Giza, the plastic sheeting created a tripping hazard under §23-1.7(e)(1). It was a flagrant violation of the Industrial Code and defendant's accountability is established as a matter of law. Importantly, the plastic sheeting was not only not necessary for the work plaintiff was performing but was counterproductive to that work as it concededly created a tripping/slipping hazard.

29. In Lois v. Flintlock Constr. Servs., LLC, 137 AD3d 446, 448 [1st Dept. 2016], this Court found that the plastic tarp over which plaintiff tripped was not integral to the work being performed by plaintiff at the time of the accident because there was an inference raised that the tarp had been placed there by other companies. Here, plaintiff testified that he did not place the plastic sheeting on the escalator and objected when he was told to work on the plastic. Defendants conceded that the plastic sheeting was dangerous and antithetical to the safety practices in place at the site. Accordingly, plaintiff's Labor Law §241[6] claim is not only actionable but deserving of summary judgment in his favor, as both the majority and the dissent found below, based on the violation of two concrete commandments of the Industrial Code.

30. In Krzyzanowski v. City of New York, 179 AD3d 479, 480 [1st Dept. 2020], this Court held, "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 §23-1.7(e)(1), or (e)(2), should be dismissed (cit.)." Moreover, the Court in Krzyzanowski found a question of fact as to whether the wooden boards (possibly Masonite) were "a protective covering that had been purposefully installed on the floor as an integral part of the renovation project" (id., at 481). In contrast, here,

the plastic sheeting was not integral to the work plaintiff was performing, i.e, painting. He did not place the sheeting on the escalator and objected its presence.

LEAVE TO APPEAL TO THE COURT OF APPEALS

31. Plaintiffs seek leave to appeal to the Court of Appeals so that the Court of Appeals may rule on whether the majority's analysis of the law was correct. There are two issues that the Court of Appeals must review. The first is whether material that is intentionally placed on a surface upon which a worker is required to perform his job can be considered a "foreign substance" if it creates a slipping hazard under 12 NYCRR §23-1.7(d). The second issue is whether such material, which was undisputedly the wrong material for the work being performed, can be considered integral to such work under both 12 NYCRR §23-1.7(d) and 12 NYCRR §23-1.7(e)(1), when it should never have been present to begin with.

32. The reasons why plaintiffs believe the dissent presented the proper analysis and why the plaintiff is entitled to summary judgment on his Labor Law §241(6) claim has been set forth extensively in the above discussion as to why reargument should be granted.

33. As the Courts have noted on many occasions "the purpose of the Labor Law is the protection of workers from injury, and the statute 'is to be construed as liberally as may be for the accomplishment of that purpose'" (McCarthy v. City of New York, 173 AD3d 1165, 1165-1166 [2d Dept. 2019], quoting, Saint v. Syracuse Supply Co., 25 NY3d 117, 124 [2015]). As this Court stated in Cutaia v. Board of Mgrs. of the Varick St. Condominium, 172 AD3d 424, 425 [1st Dept. 2019], "our directive is to construe the statute 'as liberally as may be for the accomplishment of the purpose for which it was thus framed.'" (quoting, Zimmer v. Chemung County Performing Arts, Inc., 65 NY2d 513, 521 [1985]; see also, Mananghaya v. Bronx-Lebanon Hosp. Ctr., 165 AD3d 117 [1st Dept. 2018]).

34. The dissent properly points out that the majority has given an extremely narrow and circumscribed meaning to the terms "foreign substance" and "integral to the work being performed." As the dissent noted, the defense that material is integral to the work being performed should only apply when "it was necessary to perform the work in the manner that it was done. Where the material being used is "impractical and contrary to the very work at hand," the integral to the work defense should not be applied (Bazdaric, supra, at *15). The dissent also observed that "while the phrase 'foreign substance' is not defined in the Industrial Code, courts 'construe words of ordinary import with their usual and commonly understood meaning" (Matter of Walsh v. New York State Comptroller, 34 NY3d 520, 524 [2019] [internal quotation marks and citation omitted]). As the plastic sheeting was a physical material not normally present on an escalator, it constitutes a 'foreign substance' within the meaning of Industrial Code 23-1.7(d) (see, Velasquez v. 795 Columbus LLC, 103 AD3d 541, 542 [1st Dept. 2013])." (Bazdaric, supra, at *12).

35. This Court should grant leave to appeal to the Court of Appeals as the issue before it is one of statutory construction and "one of considerable importance" (see, In re Estate of Hart, 24 NY2d 158 [1969]; Corbett v. Scott, 215 AD 763 [1st Dept. 1925], affd., 243 NY 66 [1926]), bearing upon the right of a plaintiff to receive compensation under Labor Law §241(6) premised upon 12 NYCRR §23-1.7(d) and §23-1.7(e)(1). This is exactly the type of dispute where this Court has granted leave to appeal to the Court of Appeals in similar situations where there was a dispute among the Justices as to the meaning of statutory language (see, Felukaj v. Goldman Sachs & Co., 53 AD3d 422 [1st Dept. 2008], revd., 12 NY3d 316 [2009]; Raes Pharm., Inc. v. Perales, 170 AD2d 378 [1st Dept. 1991], leave to appeal granted, 173 AD2d 1107, affd., 79 NY2d 988 [1992]; James Howden & Co. v. American Condenser & Engineering Corp., 195 AD 882 [1st Dept. 1921]; see

also, Matter of Juarez v. New York State Off. Of Victim Servs., 36 NY3d 485 [2021]; Kurcsics v. Merchants Mut. Ins. Co., 49 NY2d 451 [1980]).

36. In Runner v. NYSE, 13 NY3d 599 [2009], the Court of Appeals, in an opinion by then Chief Judge Lippman, declared that courts had been construing the Labor Law too narrowly in violation of its underlying legislative intent. As noted in Zimmer v. Chemung Co., supra at 521, the Legislature enacted the Labor Law to place "ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor." See, 1969 NY Legis. Ann. at p. 407. Construction workers as a rule are "scarcely in a position to protect themselves from accident" (Koenig v. Patrick Constr., 298 NY 313, 318 [1948]). This principle constitutes established law that has been recognized by the Court of Appeals for over a century. See, Quigley v. Thatcher, 207 NY 66 [1912].

37. Importantly, the Court of Appeals has declined to construe Industrial Code regulations narrowly where to do so would contravene the very purpose of the Labor Law, even where the proposed interpretation was textually and grammatically viable. See, St. Louis v. Town of N. Elba, 16 NY3d 411 [2011]; Misicki v. Caradonna, 12 NY3d 511 [2009]. The Appellate Divisions has done likewise. See, Gonzalez v. City of New York, 304 AD2d 709 [2d Dept. 2003] [A cart with "no handles" could be a violation of 12 NYCRR §23-1.2(8)(a) which provides that carts having "damaged" handles or loose parts are not to be used, though defendant protested that the cart had no handles; the Appellate Division specifically held that a cart having no handles could be the functional equivalent of a cart having damaged handles]. Here, defendants' representatives admitted the plastic sheeting that caused plaintiff's accident was the wrong material for the diagonal work area of the escalator steps where plaintiff was injured.

38. Finally, the issues presented for review in the Court of Appeals with respect to this case are plainly "leaveworthy" under the Court's rules 22 NYCRR §500.22(b)(4) as well as its common law (Sciolina v. Erie Preserving Co., 151 NY 50, 53-54 [1896], since they are of public concern and involve significant issues of law that are subject to different rulings of different courts. The split in this Court's decision shows that there is disagreement about the scope of the Labor Law and the Industrial Code provisions under consideration.

39. Under older precedent, the "right reserved to apply to the court or a judge to allow an appeal was intended primarily to provide for exceptional cases where public interests or the interests of jurisprudence might be endangered by permitting the decision to go unchallenged…The mere existence of errors in rulings on the trial, to the prejudice of the appellant, does not alone warrant the granting of a certificate…Where the questions have a public aspect, then different considerations apply…Where the supposed error relates to a question of constitutional law, or the construction of a statute, or where the point is one upon which there is a conflict of decisions between different Appellate Divisions, or where it relates to a principle or question of evidence which, if permitted to pass uncorrected, will be likely to introduce confusion into the body of the law from the frequent recurrence of the occasions where the questions will arise, then, in these and perhaps similar cases, the public interest and the interest of jurisprudence will justify and, perhaps, require the granting of a certificate" (Sciolina, supra). Plaintiff has clearly met that standard at bar, as evidenced from this Court's opinion.

40. But Cohen & Karger note that more recently the Court of Appeals possesses "a duty to see justice done in every case no matter how brought before it…A party moving for leave to appeal will ordinarily be successful if he [could] show reversible error in the determination below, regardless of the breadth or importance of the question presented" (Cohen & Karger,

Powers of the New York Court of Appeals, supra, at 355). In 1967, Chief Judge Fuld wrote that," Although we should devote ourselves primarily to questions of significance in the development and clarification of the general body of law, we may not shirk our responsibility to remedy plain injustice in individual controversies, even though the immediate decision may not have any impact on the State's jurisprudence" (Fuld, The Court of Appeals in the 1960s, 39 NY St. BJ, 99, 101 [1967]). Of course, it is plainly beneficial for the applicant to also demonstrate that the decision has "significant statewide import, not merely that the decision is 'wrong, unfair or questionable'" (Matter of Seawright v. Board of Elections in the City of New York, 35 NY3d 227, 252 [2020]).

41. Indeed, just yesterday, the Court of Appeals handed down significant Labor Law decisions in three cases. See, Healy v. EST Downtown LLC, 2022 N.Y. LEXIS 875 [April 28, 2022]; Cutaia v. Board of Mgrs. of the 160/170 Varick St. Condominium, 2022 N.Y. LEXIS 877 [April 28, 2022]; Bonczar v. American Multi-Cinema, Inc., 2022 N.Y. LEXIS 876 [April 28, 2022]. The decision in Cutaia was decided by a razor thin 4-3 vote. Accordingly, this case is especially amenable to Court of Appeals review, and plaintiffs submit that this Court should grant them leave to appeal to the Court of Appeals, in the event reargument is denied, based on the following question:

42. Was the March 31, 2022 order of this Court correctly decided?

WHEREFORE, for the reasons set forth above, it is respectfully submitted that this Court grant reargument, and upon reargument, the order of this Court dated March 31, 2022, be reversed and the order of the Supreme Court, New York County, be affirmed, or in the alternative, that plaintiffs be granted leave to appeal to the Court of Appeals.

Dated: New York, New York
April 29, 2022

By: Eileen Kaplan
Eileen Kaplan, Esq.

Brian J. Isaac, Esq.

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

----------x

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.

----------x

Index No.: 159433/15

Case No.: 2020-03296

ORDER WITH NOTICE OF ENTRY

COUNSELORS:

PLEASE TAKE NOTICE, that annexed hereto is a true copy of the Order dated March 31, 2022, and duly filed and entered in the office of the Clerk of the Court, Supreme Court of the State of New York, Appellate Division, First Department on March 31, 2022.

Dated: New York, New York
April 4, 2022

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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Oing, Moulton, Scarpulla, Shulman, JJ.

14578 SRECKO BAZDARIC et al.,
Plaintiffs-Respondents,

-against-

ALMAH PARTNERS LLC, et al.,
Defendants-Appellants.

Index No. 159433/15
Case No. 2020-03296

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Richard Imbrogno of counsel), for appellants.

Elefterakis, Elefterakis & Panek, New York (Eileen Kaplan of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 9, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment as to liability on their Labor Law § 241(6) cause of action and denied defendants' cross motion for summary judgment dismissing the § 241(6) cause of action, reversed, on the law, without costs, plaintiffs' motion denied and defendants' cross motion for summary judgment dismissing the § 241 (6) cause of action granted.

Plaintiff tripped and fell on a heavy-duty plastic covering that was placed on the stairs of an escalator to protect it from dripping paint while plaintiff was painting. In support of his claim under Labor Law § 241(6), plaintiff alleged that defendants violated Industrial Code Section 12 NYCRR 23-1.7 (d) (the regulation) which states:

"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."

Initially, we find that the covering intentionally placed on the escalator to protect it from dripping paint does not constitute a foreign substance under the regulation. 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.'" 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991) (*Circuit City Stores, Inc. v Adams*, 532 US 105, 114-115 [2001]); *see 242-44 E. 77th St., LLC v Greater N.Y. Mut Ins. Co.,* 31 AD3d 100, 103-104 [1st Dept 2006])["the meaning of a word in a series of words is determined by the company it keeps"] [internal quotations omitted]).

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 (*see Stier v One Bryant Park LLC*,113 AD3d 551, 552 [1st Dept 2014] [unsecured piece of masonite floor covering is not a slipping hazard contemplated by this regulation], citing *Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]; *see also Kane v Peter M. Moore Constr. Co., Inc.,* 145 AD3d 864, 869 [2d Dept 2016] [the plaintiff's slip and fall because of a drop cloth placed on the staircase was not caused by the defendant's failure to remove or cover a foreign substance under the regulation]; *cf., DeMercurio v 605 W. 42nd Owner LLC*, 172 AD3d 467 [1st Dept 2019] [triable issue as to whether a cleaning agent, "green

dust," and not the protective brown paper floor covering, was the foreign substance which caused the slipping hazard implicating the regulation]).

Further, it is not disputed that the covering was intentionally placed on the escalator to protect it from paint. In other words, the covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work. Therefore, even if the regulation arguably 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 23-1.7(d).

The integral to work 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" (*Krzyzanowski v City of New York*, 179 AD3d 479, 481 [1st Dept 2020]). In straining to find that the integral to the work defense is inapplicable here, the dissent focuses exclusively on plaintiff's and a foreman's testimony concerning whether the use of the covering was the best choice to protect the escalator while plaintiff was painting. However, nothing in our precedents suggests that a court should determine whether the material at issue is the best (or a poor) choice in making the ultimate determination of whether the material used is integral to the renovation work.

To the extent that the dissent's reasoning injects into the analysis consideration of the propriety of the material being used to determine the applicability of the integral to the work defense, that approach is not supported by our precedent (*see Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592 [1st Dept 2013]; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010]). Thus, for example, in *Johnson*, the plaintiff tripped over a piece of plywood that had been purposefully laid over the sidewalk to protect it while unloading materials at a construction worksite. We held that such

purposeful use of the plywood constituted an integral part of the work and affirmed dismissal of the Labor Law § 241(6) claim. Similarly, in *Rajkumar*, the plaintiff tripped over brown construction paper that was purposefully laid over newly installed floors to protect them while performing interior decorating work. Under those circumstances, we held that the paper covering constituted an integral part of the floor work on the renovation project.

There is nothing in these cases, or in any of our cases applying the integral to the work defense, indicating that the defendant must make an additional showing that "there was something intrinsic about the material in relation to the work." Indeed, it is hard to imagine how plywood (*Johnson*) or brown paper covering (*Rajkumar*) is "intrinsic" material in relation to protecting floors from renovation/construction work.

Additionally, the Supreme Court and the dissent incorrectly find liability pursuant to Industrial Code Section 23-1.7(e)(1). This section is inapplicable for the same reasons stated above with respect to Industrial Code Section 23-1.7 (d), namely that the plastic covering was an integral part of the work being performed (*see Savlas v City of New York*, 167 AD3d 546, 547 [1st Dept 2018] [steel plates covering openings into lower level of building project held integral part of construction, precluding violations of Code section 23-1.7(e)]; *Conlon v Carnegie Hall Society, Inc.*, 159 AD3d 655 at 655 [1st Dept 2018] [section 241(6) claim based on violation of section 23-1.7(e)(1) dismissed where plaintiff injured installing sheetrock in stairwell when he tripped and fell over extension cord deemed an integral part of the work]). Moreover, section 23-1.7(e)(1) is not applicable because, here, the escalator was not serving as a "passageway" but rather was a work area (*see Conlon*, 159 AD3d at 655-66 [section 23-

1.7(e) inapplicable as staircase was not serving as a "passageway" but was instead a "working area"]).

Further, the dissent attempts to distinguish *Johnson* and *Rajkumar* based on the fact that these cases were decided under 12 NYCRR 23-1.7(e)(2) rather than 12 NYCRR 23-1.7(e)(1). However, in *Kyrzanowski*, we specifically held that "'the integral to the work defense' . . . equally applies to Industrial Code § 23–1.7(e)(1), as well as § 23–1.7(e)(2)" (*Krzyzanowski,* 179 AD3d at 480).

Here, 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 (*cf. Krzyzanowski*, 179 AD3d at 481 [factual issue exists as to whether protective covering purposefully installed on the floor is an integral part of the renovation project where no renovation work was occurring during the month of the accident]).

All concur except Manzanet-Daniels, J.P. and Moulton, J.
who dissent in a memorandum by Moulton, J. as follows:

MOULTON, J. (dissenting)

I respectfully dissent.

The majority interprets a statute designed to protect workers' safety in a way that imperils workers' safety. According to the majority, if a material -- in this case slippery plastic sheeting -- was "intentionally placed" to advance the work, then it is "integral to the work" and therefore not a "foreign substance" or a "condition[]which could cause tripping" barred by Labor Law § 241(6) and Industrial Code §§ 23-1.7(d), 23-1.7(e)(1). To be sure, the plastic sheeting in this case was a non-porous covering that was "intentionally placed" to protect the escalator from paint spots. However, it provided no protection to the painter. To the contrary: the plastic sheeting introduced to the worksite a slippery condition that caused plaintiff's injuries.

Plaintiff Srecko Bazdaric alleges that he was injured while working as a painter at a construction renovation project in lower Manhattan. On the day of the accident, he was instructed by his foreman to paint the walls around an escalator between the second and third floors. The escalator had been taken out of service and was stationary. Bazdaric testified that a heavy-duty plastic sheeting covered the landing and the steps of the escalator. When he saw the plastic, Bazdaric, an experienced painter, told his foreman: "this is no way to work on this." The foreman responded with an expletive and went on to state: "why you complain?" and that "[he had] to do it" that way.

Bazdaric testified that the accident occurred when he was in the middle of the escalator. He walked down the escalator to get to the middle, where he was told to start. He placed buckets of paint two steps away from where he was working, leaving room between himself and the buckets. Bazdaric then took one step, slipped on the plastic sheeting, and fell. His back hit one of the paint buckets behind him. The back of his

head, his neck, and his shoulder struck the escalator steps. After Bazdaric yelled for help his foreman appeared two to three minutes later. Although Bazdaric explained to his foreman that he was hurt and in pain, the foreman responded that he would be fine. Bazdaric went back to painting after buying Advil on his break. He explained that he went back to work despite his pain because he was afraid to lose his job. He alleges that he has been unable to work since that day.

Lucas Calamari, who was employed as a project superintendent by the general contractor J.T. Magen & Company, testified at his deposition to the following facts. Calamari was employed by Magen for six years as a project superintendent and for three years as a superintendent. At this project, he had the authority to direct the subcontractors to stop any work that he deemed unsafe. Calamari confirmed that he observed plastic sheeting on the escalator steps after the accident. After the accident he spoke with the foreman, and directed that the plastic covering be removed. Calamari, who recalled previously working with painters who painted around escalators, did not know that painters at this job were standing on plastic sheeting to paint the walls around the escalators. Had he observed this, Calamari testified, he would have directed that the plastic sheeting be removed and replaced with a safer covering. If plastic was used, he would expect that it would be held securely and be made of a non-slippery version of the material. Calamari described previously seeing wood protection on escalator steps to protect against paint spills and splatters. He also observed painters working for Bazdaric's employer using drop cloths that were made from cloth and not plastic. Thus, in his opinion, the plastic sheeting used was the wrong type of material for the diagonal work area of the escalator steps.

After discovery, plaintiffs moved for summary judgment on liability under Labor Law §§ 200 and 241(6). Defendants cross-moved for dismissal of those causes of action. Supreme Court granted plaintiffs' motion under Labor Law § 241(6) predicated on violations of 12 NYCRR 23-1.7(d) and (e)(1). The court granted defendants' cross motion to the extent of dismissing plaintiffs' Labor Law § 200 claim and plaintiffs' Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(e)(2). Plaintiffs did not appeal the dismissal of those claims.

Supreme Court granted plaintiffs' motion under Labor Law § 241(6), concluding that Bazdaric's and Calamari's unrebutted testimony established that defendants violated 12 NYCRR § 23-1.7(d) and (e)(1) and that defendants' violations proximately caused Bazdaric's injuries.

Defendants appealed.

Section 241(6) imposes a nondelegable duty on "owners and contractors 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]). Because a violation of Labor Law § 241(6) obviates the need for a plaintiff to demonstrate that a defendant exercised supervision or control over the worksite, a plaintiff must show the violation of a specific and applicable Industrial Code regulation to "benefit from the reduced burden of proof applicable to causes of action asserted under Labor Law § 241 (6)" (*id.* at 502, 505).

Supreme Court correctly found that plaintiffs established that defendants violated § 23-1.7(d) as a matter of law. That regulation provides:

> "(d) Slipping hazard. 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."

All necessary elements are present in this case. The escalator was both a "passageway" and "elevated work area" within the meaning of that regulation because Bazdaric was obliged to walk down the escalator to reach the area in the middle of the escalator to perform his work (*see Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642, 643 [1st Dept 2013] [the permanent staircase where the plaintiff allegedly slipped was a "passageway" within the meaning of Industrial Code § 23-1.7(d) because it "was the sole means of access to the work site, and it was not an open area accessible to the general public"]; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008] [a makeshift ladder covered in slippery mud and placed on sloped ground as a ramp was a "passageway" under Industrial Code § 23-1.7(d) where "the ramp, which is alleged to have been unsafe, provided a means of access to different working levels"]). Further there is no issue of fact that the plastic covering was a "slippery condition."

Finally, while the phrase "foreign substance" is not defined in the Industrial Code, courts "construe words of ordinary import with their usual and commonly understood meaning" (*Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 [2019] [internal quotation marks and citation omitted]). As the plastic sheeting was a physical material not normally present on an escalator, it constitutes a "foreign substance" within the meaning of Industrial Code § 23-1.7(d) (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 542 [1st Dept 2013]).·

Supreme Court also correctly found liability under Industrial Code § 23-1.7(e)(1). That section 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."

Again, all the necessary elements are present in this case. The plastic sheeting was a condition in a "passageway" that "could cause tripping." The use of the word "tripping" and the absence of the word "slipping" in this section is of no moment. While a chimerical distinction between the two terms has sometimes turned up in the case law (*see e.g. Velasquez* at 541) the more recent authority abandons it; whether Bazdaric slipped and fell or tripped and fell was not dispositive (*Lois v Flintlock Constr. Servs., LLC* (137 AD3d 446, 448 [1st Dept 2016]; *see also Serrano v Consolidated Edison Co. of N.Y. Inc.* (146 AD3d 405, 406 [1st Dept 2017] [applying Industrial Code § 23-1.7 (e)(2)]).

The majority erroneously concludes that the integral to the work defense bars plaintiffs' reliance on Industrial Code §§ 23-1.7(d), 23-1.7(e)(1) based on a flawed definition of the defense that insulates a defendant for "purposeful" use of a material regardless of whether the material is integral to the work. If a material was "intentionally placed," the majority reasons, then it was "integral to the work" and will not run afoul of the two Industrial Code sections at issue herein. This framing of the defense ignores the necessity of showing that there was something intrinsic about the material in relation to the work, i.e., whether it was part of a structure being worked on, whether it was part of the work performed by the plaintiff, or whether it was specifically designed for the task of painting on a stepped diagonal worksite.

The integral to the work defense is derived from our case law. In determining whether the defense applies in this case we are guided by the principle that "[t]he

Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]).

Although the integral to the work concept is not specifically defined in any one case, a review of our case law illustrates the proper application of the defense, which is consistent with the commonly understood meaning of the word "integral" (*see* Merriam-Webster Online Dictionary [https://www.merriam-webster.com/dictionary/integral] [definition includes "essential to completeness" or "formed as a unit with another part"]).

The defense has been applied to conditions that caused slipping or tripping when the condition was part of the building structure.[1] The defense has also been applied when the condition is that which the plaintiff was charged with removing.[2]

The cases most arguably analogous to the one at bar are those that concern a product "specially designed and required" for the task (*see Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 789-790 [2d Dept 2008] [Labor Law § 241(6) claim was properly dismissed where the wet plastic upon which the plaintiff slipped was "specially designed and required to collect the accumulation of asbestos fibers during asbestos

[1] S*ee e.g. O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006] [Labor Law § 241(6) claims were properly dismissed because the permanently placed electrical pipe embedded in a poured concrete floor over which the plaintiff tripped was integral to the work], *affd* 7 NY3d 805 [2006]); *Letterese v A&F Commercial Bldrs., L.L.C.*, 180 AD3d 495, 495 [1st Dept 2020] [Labor Law § 241(6) claim was properly dismissed because the affixed rebar dowel over which plaintiff tripped was integral to the work].

[2] S*ee Castillo v Big Apple Hyundai*, 177 AD3d 473, 474] [1st Dept 2019] [Labor Law § 241(6) claim should have been dismissed because the safe over which the plaintiff tripped was integral to his work of removing debris from the premises in connection with demolition work]), or, installing (*see Spencer v Term Fulton Realty Corp.*, 183 AD3d 441, 442 [1st Dept 2020] [Labor Law § 241(6) claim was properly dismissed where the cart that the plaintiff was pushing got stuck on iron rods causing the plaintiff to fall where the rods were integral to the plaintiff's work of passing the rods to workers for incorporation into the concrete superstructure].

removal, and that safety regulations required the asbestos fibers to be constantly wet so as to prevent them from filling the air"]).

The common theme in all of these cases is that the defense applies when it was necessary to perform the work in the manner that it was done (*see e.g. Salazar v Novalex Contr. Corp.*, 18 NY3d 134 [2011]). In *Salazar*, the plaintiff fell after his foot got stuck inside a hole at the bottom of a trench as he was raking freshly poured concrete (*id.* at 138). The Court of Appeals reversed this Court and affirmed Supreme Court's dismissal of the plaintiff's Labor Law § 241(6) claim, as well as the plaintiff's Labor Law § 240 (1) claim, based on the integral to the work defense (*id.* at 139-140). The defense was applicable to both causes of action, the Court reasoned, because covering the hole would be "impractical and contrary to the very work at hand" and "inconsistent with filling it, an integral part of the job" when "the very goal of the work is to fill that hole with concrete" (*id.*).

Here, defendants do not argue that it was necessary to perform the work using the plastic sheeting. Notably, in their cross motion below defendants conceded that the "[p]lastic sheeting was admittedly a poor choice for the purpose it was used." Moreover, the proposed alternative of covering the escalator steps with boards or a cloth drop cloth would not be inconsistent with the painting work performed. In fact, it would be consistent with how the work was previously performed according to Calamari's unrebutted testimony. The unsafe plastic covering was not a necessary part of the structure, it was not a condition that Bazdaric was charged with removing or installing, and it was not specially designed and required for the task at hand. Contrary to defendants' argument, the fact that someone intentionally placed the plastic covering on

the escalator with the goal of protecting the escalator - - but not the worker - - does not make the plastic covering integral to the work.

The majority's flawed definition of the defense is noticeably built upon a misreading of *Rajkumar v Budd Contr. Corp.* (77 AD3d 595 [1st Dept 2010]) and *Johnson v 923 Fifth Ave. Condominium* (102 AD3d 592 [1st Dept 2013]).

Both *Rajkumar* and *Johnson* were decided under 12 NYCRR 23-1.7(e)(2) which applies to, among other things, "scattered tools and materials."[3] That regulation is not at issue here because Supreme Court dismissed the corresponding claim and plaintiffs did not appeal the dismissal. The references in *Rajkumar* and *Johnson* concerning whether the material was "purposefully laid" were made in the context of rejecting the plaintiff's argument that Industrial Code § 23-1.7(e)(2) applied because the plaintiff tripped over "loose or scattered material" (*Rajkumar*, 77 AD3d at 595-596; *Johnson*, 102 AD3d at 593). Thus, the cases stand for the proposition that where the condition is "purposefully laid" it cannot be considered "scattered" material under Industrial Code § 23-1.7(e)(2) (*see Rajkumar*, 77 AD3d at 595-596 ["[h]ere the plaintiff did not trip over loose or scattered material, but rather, over brown construction paper that was purposefully laid over newly installed floors to protect them. Such paper covering constituted an integral part of the floor work on the renovation project and could not be construed to be a misplaced material over which one might trip"]).

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[3] 12 NYCRR 23-1.7 (e)(2) provides:
"(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."

Krzyzanowski v City of New York (179 AD3d 479 [1st Dept 2020]), also cited by the majority, further illustrates the point. The fact that a material is purposefully used to protect the work does not obviate the need to show that the material is integral to the work (*Krzyzanowski*, 179 AD3d at 481 [the defendants did not establish their entitlement to summary judgment because the evidence was "insufficient to establish as a matter of law that the boards were a protective floor covering *integral to the work being done*"] [emphasis added]).

Contrary to the majority's assertion, I am not suggesting that we determine what material is *best* suited for the work in deciding whether the material is integral to the work. Rather I do not see how plastic sheeting can possibly be considered integral to the work where the uncontroverted evidence demonstrates that it was dangerously unsuited for the work.

The majority also invokes the maxim ejusdem generis, which posits that "when a list of two or more descriptors is followed by more general descriptors, the otherwise wide meaning of the general descriptors must be restricted to the same class, if any, of the specific words that precede them" (Robert A. Katzmann, Judging Statutes 50 [2014]). Specifically, the majority argues that the slippery plastic sheeting is not a "foreign substance" because the regulation's broad reference to "any other foreign substance which may cause slippery footing" is limited to conditions such as "ice, snow, water and grease."

While maxims can provide stable rules of construction, they should not be used mechanically to advance an interpretation of statutory language that runs athwart a statute's fundamental purpose. "The Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in

the workplace" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]). Had the legislature intended to limit § 23-1.7(d)'s reference to "any other foreign substance which may cause slippery footing" to a narrow class of slipping hazards, contrary to the Industrial Code's overall purpose, it could have referred to "ice, snow, water, grease and any other *similar* foreign substance which may cause slippery footing" (emphasis added).

Additionally, the case cited in support of the maxim by the majority, *Circuit City Stores v Adams* (532 US 105 [2001]), notes that "[c]anons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction" (*id.* at 115). Here such a maxim exists, pointing in a contrary direction. It is well-established that every sentence in a statute should be given meaning and every provision in a statute should be read in harmony (2A N. Singer Sutherland on Statutes and Statutory Construction § 47:6 at 305 [7th ed 2014]). The majority overlooks the fact that the first sentence in § 23-1.7(d) provides that "[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." To read this sentence in harmony with following sentence containing the phrase "any other foreign substance which may cause slippery footing," that later phrase must be given a broad interpretation, not a narrow one.

In addition, our case law does not support the majority's unduly narrow interpretation of the regulation. For example, when we concluded that § 23-1.7(d) applied to a slip and fall on "food" in *Colucci v Equitable Life Assur. Socy*, we emphasized the language "any other foreign substance which may cause slippery footing" (218 AD2d 513, 514 [1st Dept 1995]). We also, for example, found that § 23-

1.7(d) applied to a slip and fall on "debris" which is certainly unlike ice, snow, water, or grease (*see Lopez v City of New York Tr. Auth.*, 21 AD3d 259 [1st Dept 2005]).

The majority cites cases, such as *Kane v Peter M. Moore Constr. Inc.* (145 AD3d 864 [2d Dept 2016]) that conclude, without explanation, that § 23-1.7(d) is inapplicable. In addition, the cases do not find that § 23-1.7(d) is inapplicable on the basis that the condition at issue is dissimilar to ice, snow, water, or grease. It may be that the reasoning behind those cases is based on the defendants' and the majority's argument that the condition cannot be considered a "foreign substance" because it was an integral part of the work. The problem with that reasoning, as discussed above, is that in this case the uncontroverted evidence demonstrates that the plastic sheeting was indisputably not integral to the work because it was the wrong material for the job.

DeMercurio v 605 W. 42nd Owner LLC (172 AD3d 467 [1st Dept 2019]), cited by the majority, illustrates this point. The motion court held that the brown paper and the cleaning agent green dust upon which the plaintiff allegedly slipped was not a "foreign substance" because both substances were integral to the work (*see DeMercurio v 605 W. 42nd Owner LLC,* 2018 WL 8732213, *5 [Sup Ct, NY County 2018]). The motion court noted that the brown paper was intentionally used to protect the wood floor and the cleaning agent was intentionally used to prevent dust from rising (*id.*).

We reversed the motion court's dismissal of plaintiffs' Labor Law § 241 (6) claim predicated on § 23-1.7(d) and concluded that the alleged presence of green dust on the floor "created a triable issue as to whether a 'foreign substance' created a slippery condition on the floor, in violation of this Code section, and whether such condition caused plaintiff's accident" (172 AD2d at 467). Although not explicitly noted in the decision, the general contractor's superintendent testified at his deposition that the

green dust was intended to be cleaned up before the paper was put down and therefore, should not have been present. Thus, as *DeMercurio* illustrates, it is improper to grant summary judgment under a Labor Law § 241 (6) claim predicated on § 23-1.7(d) when it cannot be said, as a matter of law, that the condition is integral to the work.

The Labor Law seeks to foster workplace safety. Today's decision undermines that purpose. For the foregoing reasons, I would affirm the decision below.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 31, 2022

Susanna Molina Rojas
Clerk of the Court

AFFIDAVIT OF E-MAIL SERVICE

STATE OF NEW YORK)
: S.S.
COUNTY OF NEW YORK)

Mari-Ann B. Brownell, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age, am employed by Marshall, Dennehey, Warner, Coleman & Goggin, 88 Pine Street, 21st Floor, New York, New York 10005 and reside in Middlesex County, New Jersey.

On April 4, 2022, I served the annexed **ORDER WITH NOTICE OF ENTRY** on all parties appearing on NYSCEF:

SACKS & SACKS, LLP Attorneys for Plaintiffs-Respondents 150 Broadway, 4th Floor New York, NY 10038 (212) 964-5570 Attn.: Kenneth Sacks, Esq. Email: ken@sacks-sacks.com Attn: Scott N. Singer, Esq. Email: scott@sacks-sacks.com	ELEFTERAKIS, ELEFTERAKIS & PANEK Attorneys for Plaintiffs-Respondents 80 Pine Street New York, New York 10005 (212) 532-1116 Attn: Eileen Kaplan, Esq. Email: ekaplan@elefterakislaw.com Attn: Oliver R. Tobias, Esq. Email: oliver@elefterakislaw.com

at the e-mail address(es) noted above designated by said attorney(s) for that purpose. **Due to the COVID-19 Pandemic, no copies were sent via regular mail**.

Mari-Ann B. Brownell

Mari-Ann B. Brownell

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

----------x

SRECKO BAZDARIC and ZORKA BAZDARIC, **Index No.: 159433/15**

Plaintiffs-Respondents, **Case No.: 2020-03296**

-against-

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

Defendants-Appellants.

----------x

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ORDER WITH NOTICE OF ENTRY

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MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

Attorneys for Defendants-Appellants

Wall Street Plaza, 88 Pine Street, 21st Floor
New York, New York 10005
Tel: (212) 376-6400

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

SRECKO BAZDARIC and ZORKA BAZDARIC,

Index No.: 159433/15

Plaintiffs,

NOTICE OF APPEAL

-against-

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

Defendants.

----------x

PLEASE TAKE NOTICE, that defendants **ALMAH PARTNERS LLC, ALMAH MEZZ LLC, 180 MAIDEN LANE LLC, DOWNTOWN NYC, OWNER, LLC and J.T. MAGEN & COMPANY INC.** ("DEFENDANTS"), by their attorneys MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department from a Decision and Order of the Supreme Court, New York County entered on October 9, 2019. **DEFENDANTS** hereby appeal from such parts of said Order that granted a portion of plaintiffs' motion seeking summary judgment as to DEFENDANTS' liability under Labor Law § 241 (6) and denied a portion of DEFENDANTS' motion for summary judgment dismissing all of the plaintiffs' averred claims.

Dated: New York, New York
November 6, 2019

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN
Attorneys for Defendants

By: Thomas G. Vaughan

Thomas G. Vaughan, Esq.
88 Pine Street, 21st Floor
New York, NY 10005
(212) 376-6400

LEGAL/125976486.v1

SACKS & SACKS, LLP
Attorneys for Plaintiffs
150 Broadway, 4th Floor
New York, NY 10038
(212) 964-5570
Attn.: Devon Reif, Esq.
Email: Devon@sacks-sacks.com

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

SRECKO BAZDARIC and ZORKA BAZDARIC,

- against -

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

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 10/09/2019	Entered: 10/09/2019
Judge (name in full): Carol R. Edmead	Index No.: 159433/2015
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Defendants, Almah Partners LLC, Almah Mezz LLC, 180 Maiden Lane LLC, Downtown NYC Owner LLC, and J.T. Magen & Company, Inc., hereby appeal from such parts of the Decision and Order of the Hon. Carol R. Edmead, dated and entered on October 9, 2019 that granted a portion of plaintiff's motion seeking summary judgment as to Defendants' liability under Labor Law § 241 (6) and denied a portion of Defendants motion for summary judgment on all of plaintiffs' averred claims.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether the court erred in its application of Labor Law § 241(6). Whether the court erred in granting in part the plaintiff's motion for summary judgment under Labor Law § 241(6). Whether the court erred in denying the defendants' motion for summary judgment which advocated that the Labor Law provisions averred in the plaintiffs' Complaint were not applicable.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Srecko Bazdaric	Plaintiff	Respondent
2	Zorka Bazdaric	Plaintiff	Respondent
3	Almah Partners LLC	Defendant	Appellant
4	Almah Mezz LLC	Defendant	Appellant
5	180 Maiden Lane LLC	Defendant	Appellant
6	Downtown NYC Owner, LLC	Defendant	Appellant
7	J.T. Magen & Company, Inc.	Defendant	Appellant
8			
9			
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Devon Reif, Esq. - Sacks & Sacks, LLP			
Address: 150 Broadway, 4th Floor			
City: New York	State: New York	Zip: 10038	Telephone No: 212-964-5570
E-mail Address: Devon@sacks-sacks.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name: Thomas G. Vaughan, Esq. - Marshall Dennehey Warner Coleman & Goggin			
Address: Wall Street Plaza, 88 Pine Street, 21st Floor			
City: New York	State: New York	Zip: 10005	Telephone No: 212-376-6400
E-mail Address: tgvaughan@mdwcg.com			
Attorney Type: ■ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

SRECKO BAZDARIC and ZORKA BAZDARIC,

Plaintiff,

-against-

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

Defendants.

----------X

Index No. 159433/2015
Motion Seq. No. 002

DECISION AND ORDER

Hon. Carol R. Edmead

In a Labor Law action, Plaintiff Srecko Bazdaric (Plaintiff, or Bazdaric) moves, pursuant to CPLR 3212, for partial summary judgment as to liability on his Labor Law §§ 241 (6) and 200 claims. Defendants Almah Partners LLC, Almah Mezz LLC, 180 Maiden Lane LLC (180 Maiden), Downtown NYC, Owner, LLC, and J.T. Magen & Company Inc. (J.T. Magen) (collectively, Defendants) oppose and cross-move for summary judgment dismissing Plaintiff's complaint.

BACKGROUND

On August 25, 2019, Plaintiff was employed as a painter with nonparty Kara Painting, which was contracted to do work on a renovation project at 180 Maiden Lane in lower Manhattan. Plaintiff was instructed by his foreman at Kara Painting to paint the walls and ceilings around the escalator connecting the second and third floors of the building (Bazdaric tr at 36, NYSCEF doc No. 44). JT Magen was the general contractor on the project.

The escalator was protected from paint by "heavy duty plastic" (*id.* at 38). Plaintiff stated that the plastic was not laid by Kara Painting and speculated that it was laid by the general

contractor on the project (*id.*). Plaintiff also stated that Kara Painting had drop cloths on the premises (*id.* at 39-40). Plaintiff testified that he complained about the plastic protection, but that he was told not to complain by his foreman:

> "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 is no way to work on this.' He say, 'You fucking guy.' That's what he tell me. '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.' "

(*id.* at 42).

Plaintiff stated that he ultimately followed orders (*id.* at 43). As he set up to work on the middle of the escalator, he "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 (*id.* at 43). J.T. Magen's accident report suggested that it was Kara Painting that had installed the plastic protection, and stated that all trades should be told that "any protection installed on the floors must be secured and properly installed" (NYSCEF doc No. 45).

Plaintiff filed his complaint on September 14, 2015, alleging that defendants are liable for his injuries. Specifically, the complaint alleges that Defendants are liable pursuant to Labor Law §§ 240 (1) and 241 (6), as well as common-law negligence and Labor Law § 200. Moreover, Plaintiff Zorka Bazdaric alleges that Defendants are liable to her for loss of her husband's services.

In their cross motion, Defendants do not address Labor Law § 240 (1). Nor do they contest their status as Labor Law defendants. Instead, Defendants argue that Plaintiff's claims under Labor Law § 200 must be dismissed, as Defendants did not have supervisory control over Plaintiff's work and that Plaintiff's claims under Labor Law §

241 (6) must be dismissed as they have not violated any Industrial Code regulations. Plaintiff argues that it is entitled to summary judgment on his Labor Law § 200 claim, as J.T. Magen had constructive notice of a dangerous condition, *i.e.*, the plastic covering and negligently failed to remedy it. As to section 241 (6), Plaintiff argues that Defendants have violated three Industrial Code regulations: 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2).

DISCUSSION

"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 NY2d 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).

I. 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 laborers against hazards in the workplace" (*St. Louis*, 16 NY3d at 416). Here, Plaintiff alleges that Defendants violated 12 NYCRR 23-1.7 (d), 12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2).

12 NYCRR 1.7 (d)

12 NYCRR 23-1.7 (d) is entitled "Protection from general hazards; Slipping hazards. It provides:

> "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"

This provision is sufficiently specific to serve as a predicate to liability under the statute (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008] [sustaining the plaintiff's section 241 [6] claim, as a makeshift ramp was a "passageway" under the statute and the plaintiff alleged that it was covered in a slippery substance]).

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 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 dropcloths 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 or J.T. Magen installed the plastic, this does not affect the question of Defendants' 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. The Court, for the sake of completeness, will also analyze the other two Industrial Code violations on which Plaintiff grounds his application for summary judgment as to liability under section 241 (6).

12 NYCRR 23-1.7 (e) (1) and 12 NYCRR 23-1.7 (e) (2)

12 NYCRR 23-1.7 (e) is entitled "Protection from general hazards; tripping and other hazards," and it provides:

> (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.

Both provisions are sufficiently specific to serve as a predicate to section 241 (6) liability (*see e.g., Capuano v Tishman Constr. Corp.*, 98 AD3d 848 [1st Dept 2012]*; Aragona v State of New York*, 74 AD3d 1260 [1st Dept 2010]). As discussed above, the subject escalator was both a passageway and a working area under the Industrial Code. However, under *Argaona* 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 more recent precedent urges a less technical approach. Plaintiff cites to *Lois v Flintlock Constr. Servs., LLC* (137 AD3d 446 [1st Dept 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).

Under *Lois* and *Serrano*, the analysis focuses on the nature of the hazard, rather than the precise nature of the accident. Here, the plastic covering does not fall under types of tripping hazards prohibited by 12 NYCRR 23-1.7 (e) (2). Thus, that regulation does not apply. However, 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 as it did cause Plaintiff to fall, 12 NYCRR 23-1.7 (e) (1) was violated.

III. Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed" (*id.*).

Here, Plaintiff's accident was caused by a material involved with his work. Thus, in order to prove Defendants' liability under this statute, Plaintiff must show supervisory control. Plaintiff testified that his foreman directed him. Defendants submit an affidavit from Cen Cetin (Cetin), a

Kara Painting employee who states that he was Plaintiff's foreman on the date of the accident, and that "Plaintiff made the decision to use plastic sheeting instead of canvas drop cloths and he actually placed the plastic sheeting over and on the escalator" (NYSCEF doc 50, ¶ 8).[1]

Plaintiff disputes this characterization, but he does not argue that anyone but Kara Painting directed his work. As defendants did not have supervisory control over Plaintiff's work, his claims under Labor Law § 200 must be dismissed.

[1] The Court notes that this testimony does not raise a question of fact as to whether Plaintiff was the sole proximate cause of his own accident, as there is no testimony that Plaintiff was directed to use dropcloths instead of plastic, and refused to do so (see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010] [A worker is recalcitrant, and the sole proximate cause of his own injuries, when safety devices are "readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident"].)

CONCLUSION

Accordingly, it is

ORDERED that the branch of Plaintiff's motion seeking partial summary judgment as to Defendants' liability under Labor Law § 241 (6) is granted; and it is further

ORDERED that the branch of Plaintiff's motion seeking summary judgment as to his claims under Labor Law § 200 is denied; and it is further

ORDERED that Defendants' motion for summary judgment is granted only to the extent that Plaintiff's claims under Labor Law § 200 are dismissed; and it is further

ORDERED that the Clerk of the Court is respectfully requested to enter judgment accordingly, and the remaining claims are severed and continue against the Defendants; and it is further

ORDERED that the counsel for Plaintiff is to serve a copy of this decision, along with Notice of Entry, on all parties within 10 days of entry.

Dated: October 9, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: S.S.
COUNTY OF NEW YORK)

INDEX NO.: 159433/15

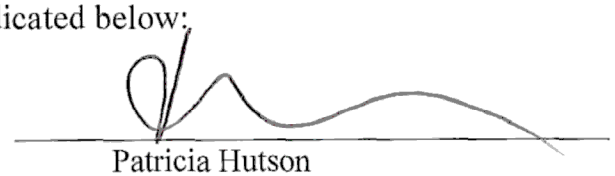
Patricia Hutson, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age, am employed by Marshall Dennehey Warner Coleman & Goggin, Wall Street Plaza, 88 Pine Street, 21st Floor, New York, NY 10005, Attorneys for defendants and I reside in Bronx County, NY.

On November 6, 2019, I served a true copy of the within **Notice of Appeal, Informational Statement – Civil, Decision/Order and Affidavit of Service upon**.

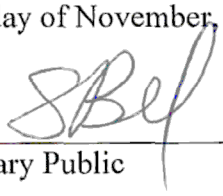
SACKS & SACKS, LLP
Attorneys for Plaintiffs
150 Broadway, 4th Floor
New York, NY 10038
(212) 964-5570
Attn.: Devon Reif, Esq.
Email: Devon@sacks-sacks.com

By mailing same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal service by first class mail, addressed to the last known address of the addressees indicated below:



Patricia Hutson

Sworn to before me this
6th day of November, 2019



Notary Public

SHARON LaFRANCE BELLAMY
Notary Public State of New York
No. 01BE5028344
Qualified in Kings County
Commission Expires October 21, 2020

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

Danielle Henderson being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in Kings County in the State of New York. I served a true copy of the annexed ***Plaintiffs' Motion to Reargue and for Leave to Appeal to the Court of Appeals*** on April 29, 2022 via NYSCEF, addressed to the last known address of the addressee as indicated below:

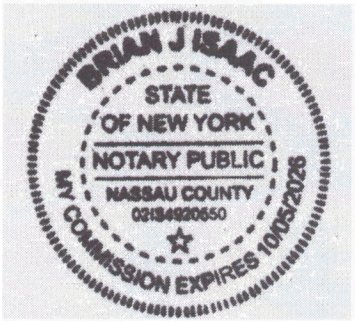
Thomas J. Vaughan, Esq.
Marshall Dennehey Warner Coleman & Goggin
88 Pine Street, 21st Floor
New York, New York 10005
TGVaughan@mdwcg.com

Danielle Henderson

Danielle Henderson

Sworn to before me this
29th day of April 2022

NOTARY PUBLIC



Index No. 159433/2015 Case No. 2020-03296
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

SRECKO BAZDARIC AND ZORKA BAZDARIC,

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants.

NOTICE OF MOTION

ELEFTERAKIS ELEFTERAKIS & PANEK
Attorneys for Plaintiffs-Respondents
80 Pine Street, 38th Floor
New York, New York 10005
-and-
POLLACK POLLACK ISAAC & DECICCO, LLP
Special and Appellate Counsel to Elefterakis Elefterakis & Panek
Attorneys for Plaintiffs-Respondents
225 Broadway, 3rd Floor
New York, New York 10007
(212) 223-8100

To:
Attorney(s) for

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contention contained in the annexed document are not frivolous.

Dated: *April 29, 2022* *Signature*: _____

Print Signer's Name: _____