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

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SRECKO BAZDARIC AND ZORKA BAZDARIC,

Plaintiffs-Respondents,

-against-

ALMAH 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

AFFIRMATION

Thomas G. Vaughan, an Attorney admitted to practice before the Courts of the State of New York makes this Affirmation pursuant to CPLR Rule 2106:

1. I am associated with Marshall Dennehey Warner Coleman and Goggin as a Senior Counsel. MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN represent the defendants – appellants ALMAH PARTNERS LLC, ALMAH MEXX LLC, 180 MAIDEN LANE LLC, DOWNTOWN NYC OWNER LLC, and J.T. MAGEN & COMPANY INC, (hereafter referred to collectively as the "Defendants").

2. I am familiar with the evidence adduced in support of the plaintiffs – respondents initial pleading, the proceedings held in the motion court, and the present procedural posture of this litigation.

3. I submit this Affirmation in Opposition to the plaintiffs' – respondents' (hereafter referred to as the "Plaintiffs") motions to Re- Argue this Court's Order of March 31, 2022 [pursuant

to CPLR Rule 2221], and for Leave to Appeal to The Court of Appeals, [pursuant to CPLR Section 5602].

4. My advocated opposition is simple: The majority decision of the Appellate Division, First Department, upon which the Order of March 31, 2022 is based, is correct and the dissenters and the Plaintiffs' renowned appellate counsel seek to judicially expand a statutory liability statute; New York State Labor Law Section 241(6).

THE PLAINTIFFS' CLAIM OF 'MISAPPREHENSION'

5. The concept, "misapprehended", is a requisite predicate for a Rule 2221 motion to Re-Argue a prior application to the Court.

6. The Plaintiffs specifically assert, as they must, that the majority *missed*, or overlooked, or ignored, compelling doctrinal precedent which favors the Plaintiffs' position that Labor Law Section 241(6) applies to the facts of the Bazdaric litigation.

7. There is no support for the Plaintiffs' advocated position.

8. The majority of this Court examined and considered eleven (11) relevant precedents and properly determined that none of these precedents supported the Plaintiffs' proposition that **purposefully** laid plastic sheeting constituted a "foreign substance" within the purview of Labor Law Section 241(6). Obviously, the majority of this Court rejected the Plaintiffs' advocated position after careful study.

9. There was no misapprehension by this Court and the Plaintiffs' motion pursuant to Rule 2221 must be denied.

PLAINTIFFS SEEK JUDICIAL LEGISLATION

10. Despite Counsels' nicely worded 'disavowal' of advocating for "judicial legislation" (paragraph "11" of the Isaac/Kaplan Affirmation dated April 29, 2022), judicial expansion of Labor Law Section 241(6) is their clear objective.

11. The seemingly undisputed salient facts of the Bazdaric litigation are: Plaintiff Srecko Bazdaric, or his co-worker, placed plastic sheeting on the escalator, where Mr. Bazdaric was to paint adjoining walls, in order to protect the escalator equipment from paint splatter. This was a method of work chosen and deliberately implemented by Mr. Bazdaric's employer [Kara Painting and Wallpapering Corp., hereafter "Kara Painting"] and quite likely by Srecko Bazdaric himself. The placement of the plastic sheeting on the escalator was intentional. The placement of the plastic sheeting was purposeful – to protect the escalator from inadvertent but likely paint splatter. In hindsight, the use of the plastic sheeting was a mistake. It was an ill advised choice of work methods and equipment by Srecko Bazdaric or his co-worker.

12. It is not disputed that the hazard of which the Plaintiffs complain was, in actuality, an intentional act by Mr. Bazdaric or his co-worker in the furtherance of Kara Painting's work. The plastic sheeting was an intentionally chosen *tool* to achieve a work objective: painting. The placement of plastic sheeting was, without rational question, integral to Mr. Bazdaric's work as a painter.

13. It has been determined that the general contractor defendant, J.T. Magen, had no notice of Kara Painting's arguably ill advised choice of work methods and equipment (*tools*) prior to Srecko Bazdaric's slip and fall.

14. The Plaintiffs advocate that the statutory liability afforded by Labor Law Section 241(6) should be expanded to include liability for an inappropriate choice of a tool by a subcontractor as a violation of 12 NYCRR Sections 23.1.7(d) and 23.1.7(e)(1), a transgression not defined in, or mentioned in, or contemplated by, either Code provision.

15. The Plaintiffs urge this Court to **expand** the definitions of "foreign substance" to include a poor choice of tool by a subcontractor, in this case a plastic sheet to perform as a 'drop cloth', and to expand the definition of a tripping hazard to include a purposefully placed tool.

16. Expansion of a statute's purview, even if the expansion is laudable, is not this Court's job.

17. The Plaintiffs' motions should be denied.

THE PLASTIC SHEETING WAS INTEGRAL TO SRECKO BAZDARIC'S WORK

18. Plaintiffs' Counsel, skilled as they are, make an intellectually silly argument to blunt this Court's determination that the plastic sheeting was a necessary part of Srecko. Bazdaric's work.

19. Counsel argue that a drop cloth is *antithetical* to a painter's work. Counsel are apparently suggesting, as Attorneys, that a drop cloth is an unnecessary painters' tool. They provide no support for this argument.

20. Moreover, Counsel have advocated that the plastic sheeting was an inappropriate tool, not an unnecessary tool.

21. This seems inherently contradictory.

22. Notwithstanding Counsel's unsupported claim that the plastic sheeting was antithetical to Srecko Bazdaric's work, the undisputed fact is that Bazdaric or his co-worker intentionally placed the plastic sheeting on the escalator to protect it from paint splatter. Obviously they, the painters, did not believe it was antithetical to the work being performed.

23. The issue sought to be litigated by the Plaintiffs is not whether the plastic sheeting was integral to Mr. Bazdaric's work – it was; the issue now advocated by the Plaintiffs is whether the Defendants should be legally responsible for the selection of a tool (or work method) integral to the work of a subcontractor.

24. Labor Law Section 241(6) was never intended to apply to an intentional selection and usage of a tool by a subcontractor.

25. The Plaintiffs' motions should be denied.

WHEREFORE, the Defendants respectfully ask this Court to deny the plaintiffs' motions. This Court did not misapprehend the applicable law. If Labor Law Section 241(6) is to be expanded to include an owner's liability for a subcontractor's work methods, or choice of tools, the New York State Legislature must do so, not this Court.

Dated: New York, New York
May 19, 2022

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN

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By: _____
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