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

Defendants-Appellants.

----------X

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

REPLY AFFIRMATION

Eileen Kaplan, an attorney duly licensed to practice law in the State of New York, hereby affirms, under the penalties of perjury, the truth of the following statements:

1. I am partner in the law firm of Elefterakis, Elefterakis & Panek, appellate counsel to Devon Reiff, PC, attorneys for the Plaintiffs-Respondents herein (plaintiffs), and as such, I am fully familiar with the facts and circumstances recited herein, based upon the file maintained by our office in the prosecution of this action.

2. I submit this affirmation in *reply* to the defendants' opposition to the instant motion for leave to reargue, and upon reargument, reversal of the Court's March 31, 2022 Decision and Order; or in the alternative for leave to appeal to the Court of Appeals.

3. The defendants in opposition, relentlessly repeat “undisputed” “facts” which can only be described as false. The defendants’ telling of the facts is also inspired by a seeming view of the law, which is disconnected from precedent.

4. Accordingly, the plaintiffs in reply must revisit the evidence in the record, and review again, decisions from the Court of Appeals, and this Court, as to the ‘integral to the work’ defense, and as well, cases construing the term “foreign substance” as used in 12 NYCRR §23-1.7(d).

Review of the record

5. On August 25, 2015, as set forth in the testimony, and the plaintiffs’ response brief, Mr. Bazdaric was working as a painter at a renovation job at 180 Maiden Lane, premises owned by defendant 180 Maiden Lane LLC. Mr. Bazdaric’s employer was the painting subcontractor, non-party Kara Painting (Kara). The general contractor at the job was defendant J.T. Magen & Company (Magen).

6. On the said day, Mr. Bazdaric was assigned to paint the walls by the escalator, and he testified that he did not place the plastic covering on the escalator. (R.117) (“No sir”). He further related that he did not consider the plastic to be protection, and that he did not know who placed the plastic covering. (R.117)(“I am not sure sir. […] We don’t do that. […] I don’t see who did.”) (R.117).

7. Mr. Bazdaric continued to explain: “Jimmy say this way. “Steve, you go to paint this wall and escalator” I say “No problem.” <u>When I see, this escalator</u>

protection, I told him "Jimmy, this no way to work on this." [Jimmy responded with an expletive.] The plaintiff continued to relate Jimmy's comments: "Why you complain?" I say, I got to complain. This is no way to work, this way," and he says, "You have to do it. I go for coffee." […] "You go paint, I go buy coffee." (R. 121)(emphasis added).

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

9. Lucas Calamari, a job superintendent for defendant Magen, also testified. Mr. Calamari recalled the plaintiff's fall on the escalator between the second and third floors. (R.238-239). He did not know that the Kara painters were standing on the escalator steps while trying to paint with rollers on the walls around the escalator. (R.241). Mr. Calamari acknowledged that it would be important for the covering over the escalator steps, while the painters painted, to be secured. (R.

242) ("Yes."). And this was because he wouldn't want slipping or tripping hazards on the steps while the painters were working. (R.242) ("Yes."). He also expected that if a plastic covering were used, it would be a non-slippery type of plastic. (R. 242) ("Yes.")

10. Mr. Calamari further acknowledged that he had observed that when painting needed to be done around escalators, the escalator steps would be protected with wood coverings, as opposed to plastic. (R.243). He also acknowledged that he had seen Kara painters at the job using drop cloths made of cloth, and that drop cloths are less slippery than plastic. (R.243).[1]

11. Critically, Mr. Calamari, readily acknowledged that the plastic was the wrong type of covering for the escalator steps. (R.244). He also readily acknowledged that if he had seen the plastic on the escalator steps *before* Mr. Bazdaric slipped and fell, he would have directed that the plastic be removed, and that a safer covering be placed. (R.244). After the plaintiff's fall, Mr. Calamari spoke to the Kara foreman, and owner, and directed them to change the covering. (R.244) ("Yes, it was removed.")

[1] Mr. Vaughan sows confusion when he states that plaintiffs' 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." (Vaughan Aff. at ¶ 19)(emphasis in original). The plastic sheeting was *not* a drop cloth, as made clear in the above-cited testimony of Mr. Calamari.

12. Mr. Calamari recalled that he discussed the plaintiff's fall with others at the site, and that the plastic "wasn't used anymore" (R.245-246), and that "it was removed right away." (R.252).

13. The defendants' repeated assertions in their opposition that *Mr. Bazdaric* placed the plastic, and that it was a "*tool*" for painting are simply fictitious when the above-excerpted testimony is recalled: 1) the plaintiff's repeated and unrebutted testimony that he did not place the plastic; and 2) the plaintiff's repeated and unrebutted testimony indicating that the plastic was a hindrance and a hazard, and that he "did no[t] want to work like that" ("Jimmy, this no way to work on this" "This is no way to work, this way" "I told him I no want to work like that. I have to take order"); and 3) Mr. Calamari's repeated and unrebutted testimony that *he too* regarded the plastic as the wrong covering, and that he directed that it be removed.

***

14. In addition to mischaracterizing the record facts, defense counsel misunderstands the 'integral to the work' defense as articulated by the Court of Appeals, and followed by this Court, until now.[2]

[2] Defense counsel writes confidently but his submission is devoid of real analysis or even citations to legal authorities, or to the record, making his glib words little more than creative writing which seeks to reconstitute the 'integral to the work' defense. Mr. Vaughan often repeats the word "tool" but the testimony reflects that the plastic sheeting was *not* a tool, it was a hazard, and in any event, the integral to the work defense does not rise or fall upon whether something is a "tool."

15. As shown in the sampling of 'integral to the work' decisions reviewed below, in addition to the decisions analyzed by the plaintiffs in their moving affirmation, and by amicus, and in the plaintiffs' response brief, this defense has never meant that defendants are off the hook simply if they *intend* the conditions to be as they are. If this were so, no owner or contractor would *ever* be accountable for any worksite condition, no matter how unsafe, or unreasonable, so long as it could be shown that something was deliberately placed, by *someone*.

The decision and order sought to be reargued, was a departure from settled law, which is impossible to reconcile with precedents.

16. The majority's ruling at bar stated: "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 the work*." *Bazdaric v Almah Partners LLC*, 203 AD3d 643, 644 [1st Dept 2022] [emphasis added]. With these words, the majority held that the intentional placement of the plastic, as such, made it integral to the work, as a matter of law.

17. It is respectfully submitted that, as demonstrated by the submissions of the plaintiffs and amicus, this reasoning and holding is starkly out-of-sync with prior case law, which established that the integral to the work defense bars recovery for the plaintiff if the safeguard sought "would have been *contrary to the objectives* of

the work plan." *Salazar v Novalex Contr. Corp*., 18 NY3d 134, 139-140 [2011] [emphasis added]; see also, *Tropea v Tishman Constr. Corp*., 172 AD3d 450 [1st Dept 2019] (securing the cable tray against falling would not have been contrary to the purpose of the work).

18. The correct application of 'integral to the work' concepts is vividly seen in a trilogy of recent demolition cases decided in this Court.

19. In *Ragubir v. Gibraltar Mgt. Co., Inc*., 146 AD3d 563, 564 [1st Dept 2017] this Court reversed the lower court's denial of the plaintiff's motion for summary judgment under LL §§ 240(1) and 241(6) where demolition was underway at the premises, and a roof collapsed onto the plaintiff. The *Ragubir* Court's reasoning, citing *Salazar*, is illuminating: "Where use of such a safety device would defeat or be contrary to the purpose of the work, however, no liability will attach for the failure to provide such a device […] Here [the owner] acknowledged that demolition of the structure was to occur bay by bay, that plaintiff was in a different bay 40 feet from where the excavator operated […] and that he was not expecting the roof of the adjoining bay to collapse." *Id*. at 564. Since the roof that collapsed onto the plaintiff was "not the intended target of demolition at the time of the collapse" this Court held that the plaintiff was entitled to summary judgment on his §240(1) claim -- securing the roof against collapse would not have defeated or been contrary to the work.

20. The *Ragubir/Salazar* analysis has been followed by this Court in recent cases. See, *Leveron v Prana Growth Fund, L.P.* 181 AD3d 449 [1st Dept 2020] ("securing the sidewalk shed against collapse would not have been contrary to the purpose of the undertaking. The three or four sections that collapsed onto plaintiff when 'everything slipped apart" were not the intended target of the demolition at the time of the accident"); *Hyatt v Queens W. Dev. Corp*., 194 AD3d 548, 549 [1st Dept 2021]("Here too, securing the tower scaffolding would not have hindered the purpose of breaking down scaffolding, as the tower scaffolding was not integral to the context and purpose of the work.")

21. In this case, as has been stressed by plaintiffs, and amicus in the briefing thusfar, the plaintiff and defense witnesses *agreed* that the plastic covering was a hazard. Accordingly, it is difficult, if not impossible, to understand how the plastic could, simultaneously, be integral to the work, and no less, as a matter of law, with no issues of fact remaining. There has been no showing whatsoever by defendants, as was their burden under *Salazar* and progeny, that using a different covering – a drop cloth made of cloth, or wooden boards would have been contrary to the work. Indeed, the opposite is true: Mr. Calamari stated plainly and repeatedly that wood boards, or a cloth drop cloth should have been used.

22. The majority's ruling at bar is irreconcilable with *Salazar* and this Court's own prior decisions as discussed in the plaintiffs' response brief, and the submissions on this motion.

***

23. Defendants' accusation (another) that plaintiffs seek "judicial legislation" – calls to mind the old saying: "*the pot calls the kettle black*."

24. First, it is Mr. Vaughan who advocates for a new 'integral to the work' rule – a defense as wide and deep as the Pacific Ocean – anything intentionally placed by anyone at the worksite will immunize defendants from liability. Under this new rule, defendants will rarely if ever, be held accountable under LL §241(6).

25. The defendants also seem to argue that holding a hazardous plastic to be a "foreign substance" within the meaning of §23-1.7(d), would constitute a 'judicial expansion' of liability. In truth, it is the defendants who are seeking a judicial contraction of liability under §241(6), and the Industrial Code provisions under review. The problems with the defendants' arguments are at least, three-fold.

26. First, while the majority marshalled a rule of statutory construction to support its opinion, the dissenters *also* properly invoked rules of statutory construction to support their view.

27. Second, this Court has already held that substances other than, and dissimilar to, the enumerated "ice" "snow" "water" or "grease" were foreign

substances within the meaning of §23-1.7(d). See e.g., *Colucci v Equitable Life Assur. Socy*, 218 AD2d 513, 514 [1st Dept 1995] (§23-1.7(d) applied to a slip and fall on "food"); *Lopez v. City of New York Tr. Auth*., 21 AD3d 259 [1st Dept 2005] (§23-1.7(d) applied to a slip and fall on "debris").

28. The final and perhaps most important problem with a cramped construction of "foreign substance" which cannot encompass a hazardous plastic, is that this Court and the Court of Appeals have repeatedly reminded that "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." *Saint v Syracuse Supply Co*., 25 NY3d 117, 124 [2015]; see also *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"); *Mananghaya v Bronx-Lebanon Hosp. Ctr*., 165 AD3d 117 [1st Dept 2018] (same). Accordingly, in view of the fact that Labor Law provisions receive an expansive construction, Justice Moulton in dissent was eminently correct when he stated that "our case law does not support the majority's unduly narrow interpretation of the regulation." (*Bazdaric v Almah Partners LLC*, 203 AD3d 643, 653 [1st Dept 2022]).

WHEREFORE, for the reasons set forth above, it is respectfully requested that the Court grant reargument, and upon reargument, the Decision and 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; and for such other and further relief as this Court deems necessary and proper.

Dated: Brooklyn, New York
May 30, 2022

Eileen Kaplan, Esq.

Index No.: 159433 Year 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-

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

Defendants-Appellants.

REPLY AFFIRMATION

ELEFTERAKIS, ELEFTERAKIS & PANEK
Attorneys for Plaintiffs-Respondents
80 Pine Street, 38th Floor
NEW YORK, NEW YORK 10005
(212) 532-1116
