To be Argued by:
RICHARD P. AMICO
(Time Requested: 30 Minutes)

APL-2023-00202
New York County Clerk's Index Nos. 159007/13, 590013/14, 590202/14 and 595439/18
Appellate Division–First Department Docket No. 2021-00357

Court of Appeals

of the

State of New York

FELIPE RUISECH and MARTHA RUISECH,

Plaintiffs-Appellants,

– against –

STRUCTURE TONE GLOBAL SERVICES, INC., TISHMAN SPEYER PROPERTIES, L.P. and 200 PARK LP,

Defendants-Respondents,

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

– and –

CBRE INC.,

Defendant-Respondent.

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFFS-APPELLANTS FELIPE RUISECH AND MARTHA RUISECH

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TISHMAN SPEYER PROPERTIES, L.P. and 200 PARK LP,

Third-Party Plaintiffs-Respondents,

– against –

CBRE INC.,

Third-Party Defendant-Respondent.

STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff-Respondent,

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant-Respondent.

TISHMAN SPEYER PROPERTIES, L.P. and 200 PARK LP,

Third Third-Party Plaintiffs-Respondents,

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent.

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QUESTIONS PRESENTED

1. Did the Appellate Division First Department err in reversing the Supreme Court's denial of Defendants' motions for summary judgment as to Plaintiff's Labor Law §241(6) claim, specifically as to violations of 12 NYCRR §23-1.7(d) and §23-1.7(e)(2)?

   Suggested answer: Yes.

2. Did the Appellate Division First Department err in reversing the Supreme Court's denial of Defendants' motions for summary judgment as to Plaintiff's Labor Law § 200 and common negligence claims?

   Suggested answer: Yes.

PRELIMINARY STATEMENT

Plaintiff-Appellant Felipe Ruisech ("Plaintiff"), then 45 years old, suffered career ending injuries from a construction accident on June 2, 2011, when he slipped on leftover debris as he carried a large panel of glass during an office renovation at an office building located at 200 Park Avenue in Manhattan.

Plaintiff was a glazer for A-Val Architectural Metal, III, LLC, and was installing a 10'x4'x1' glass divider panel that weighed more than 500 pounds. As Plaintiff and three co-workers were moving the glass panel from the staging area to the install location, Plaintiff felt his foot slip and slide on construction debris on the floor, causing him to lose his balance. He suffered lumbar and cervical disc bulges and herniations that required an L5-S1 fusion surgery, a rotator cuff tear and partial thickness tears of the right shoulder, and partial thickness tears of the left shoulder requiring arthroscopic surgery. Plaintiff is permanently disabled because of this incident. (R. 248-265)

Plaintiff commenced an action against the owner of the building, the managing agent, and the general contractor of the project alleging violations of Labor Law §§200, 241(6) as well as a claim for common law negligence. The owner and managing agent commenced a third-party action against the tenant on the floor where the work was being performed. The general contractor also brought a second third party action against the Plaintiff's employer. Upon completion of discovery,

all Defendants and third-party Defendants moved for summary judgment on Plaintiff's Labor Law and negligence claims and their own crossclaims related to contractual indemnification.

Defendants-Respondents (Defendants) are as follows:

1. 200 Park – Owner of building
2. Tishman – Managing Agent
3. CBRE – Tenant of the building
4. Structure – General Contractor
5. A-Val – Sub-Contractor and Plaintiff's employer

Supreme Court (Goetz, J.S.C.), by Order dated December 14, 2020, denied Defendants' motions for summary judgment on Plaintiff's Labor Law §241(6) claims as to violations 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2), Labor Law §200 and common law negligence. The court determined that the record contained triable issues of material fact that precluded a grant of summary judgment in favor of Defendants. On appeal, the Appellate Division First Department reversed the order of the Supreme Court and dismissed Plaintiff's claims in their entirety.

Plaintiff respectfully requests that the order of the Appellate Division First Department be reversed, and that Plaintiff's complaint reinstated. The Supreme Court was correct that summary judgment should not have been granted in favor of Defendants. The records contained both issues of fact and issues of law.

Defendants had a non-delegable duty to remove construction debris from the site and surrounding areas and in failing to do so, created a hazardous condition on

which the Plaintiff did slide, suffering injury. Defendants' duty is premised not only on the New York State Labor Law and common law negligence, but also by the specific terms of their contract for site safety and cleanliness. They cannot and should not escape liability for their actions and inactions.

With any routine inspections of the area, they would have been aware of the dangerous conditions prior to the laborers working in the area. Defendants were unable to provide evidence of any inspections of the area where the incident occurred. Failing to inspect, as required by the case law and custom and practice, rendered Defendants legally incapable of establishing that they were free of constructive notice of the dangerous and hazardous condition. Defendants' failure to keep the area, a passageway as defined by the Industrial Code, in a safe and hazard-free condition, as required by statutory and common law, resulted in the Plaintiff's incident and the resulting injuries and damages. In addition, Defendants had a contractual duty to keep the site and surrounding area free of debris "at all times." (R. 1869)

Plaintiff respectfully submits that the order of Appellate Division First Department that reversed the order of the Supreme Court and thereby dismissed Plaintiff's Labor Law §§200, 241(6) and common law negligence claims should be reversed. The Appellate Division First Department erred on application of the law and interpretation of the facts in reversing the order of the Supreme Court. The

Appellate Division's overly restrictive application of the cited Industrial Code sections and their broad interpretation of the "integral to the work" doctrine led to an outcome not previously anticipated or intended by this Court.

STATEMENT OF FACTS

This action arises from a construction site accident that occurred on June 2, 2011, when Plaintiff, a glazer, slipped on debris while carrying a 500-pound panel of glass. He suffered career-ending injuries to his back and shoulders. (R. 458, 466)

The owner and managers of the property, Defendants-Tishman Speyer Properties and 200 Park LP, hired Defendant-Structure Tone Global Services, Inc., to serve as their general contractor over the renovation of office space located at 200 Park Avenue in Manhattan. (R. 461-62, 1103-1222, 1276-1289) Defendant Structure Tone hired A-Val Architectural Metal III, LLC, the Plaintiff's employer, to erect glass barriers within the office space, in addition to other work. (R. 458-459, 467, 472-73)

As part of the General Contractor's agreement with the Defendant-owners, Structure Tone agreed to provide laborers who would,

> at all times keep the Site and surrounding areas free from accumulation of debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work and the Coordination Items.

General Contractor's Agreement, p. 15 ¶16(a) (emphasis added). (R. 1869)

Instead, on June 2, 2011, Plaintiff slipped on construction debris left over from channels cut into concreate floor while he and three co-workers were moving the 500 pound 10'x4'x1" panel of interior wall glass. (R. 466, 479, 484, 487) As

Plaintiff's foot slipped and slid on the debris, he lost his balance, feeling a sharp pain in his spine and shoulder. (R. 497-99, 635-647) While the glazers were able to keep the glass panel from tipping over, Plaintiff nevertheless suffered career ending injuries to his cervical and lumbar spine as well as bilateral shoulders. (R. 248-264) The Plaintiff struggled but finished the rest of the day. (R. 568-571) The Plaintiff was unable to return to work the next day. Id. He has been totally disabled from work since the date of his accident. (R. 248-264)

Plaintiff's expert reviewed the materials exchanged between the parties as well as the deposition transcripts. (R. 1870-1878) Ernest J. Gailor, P.E., an engineer with 42 years of construction experience concluded that the Defendant-owners and general contractor breached their duty under Industrial Code §23-1.7(d)(e)(1)(2) and such breach of non-delegable duty was a substantial factor in causing Plaintiff's injury. (R. 1870-1878)

Plaintiff's expert further concluded that Structure Tone, specifically, did not keep any logs, journals, or records of having inspected the area where the accident took place or of having cleared any of the construction debris that had accumulated on the floor. (R. 1873)

Plaintiff submitted, among other things, the following evidence at the Supreme Court and Appellate Division First Department:

Plaintiff's Testimony

Plaintiff testified that he worked as a glazer for A-Val Architectural. (R. 427) He did glass installation interior and exterior at all heights including setting and caulking. (R. 427, 441) He was injured on June 2, 2011, at 1:00 pm on the 19th floor of 200 Park Place. (R. 458)

They were installing glass divider panels between the hallway and the offices. (R. 427, 467) The panels were 10'x4'x1" and had to be carried by multiple workers using suction cups. (R. 486-87) Plaintiff and four co-employees were told to lift a piece or "unit" of glass that weighed 500 pounds. (R. 479, 426) "We picked up the piece of glass and we moved it – we moved it to where we were going to install the glass. There was a lot of things in the way here. We had cables hanging down, there was debris all over the place. (R. 489) "When I lifted up the glass and when I went to install the glass, you've got to take a step forward – away from you or where you are installing the glass and there was something on the ground, it must have been pebbles, and it must have been something that when I put my foot down, my foot slipped and that is when I felt something, like something happened." (R. 499)

"There was debris all over the floor. It was an unfinished floor." (R. 500) The rocks or pebbles covered a ten-foot square area. (R. 502) It was made from cement from the flooring…concrete debris. (R. 503) The debris was cleared by the laborers

for Structure Tone. (R. 504) He had to tell Structure Tone laborers to remove garbage, debris, rocks, dirt, from the areas where they were working. (R. 505-06)

Structure Tone – General Contractor, Brian Orsini

The Defendant-Structure Tone's representative, Brian Orsini, testified that he was the Construction Superintendent for Structure Tone at the time of the accident. (R. 1045) Structure Tone Laborers maintained the job cleanliness on the site, making sure the job was clean. (R. 1044, 1047) They had less than a dozen laborers working on the site. (R. 1047, 1059) Orsini walked the site daily. (R. 1049, 1059) If he observed debris on the floor, he would correct the condition. (R. 1050) He has no recollection of the work being performed on the 19th floor on the date of the accident (R. 1050-51) He would not document inspections or conditions that needed to be corrected. (R. 1050, 1056) Four floors were under renovation on June 2, 2011. (R. 1053)

There was no documentation of the work Structure Tone maintenance laborers performed on the construction site. (R. 1054) Structure Tone laborers were tasked with cleaning up behind the trades and cleaning the debris off the floor. (R. 1054, 1048) The Structure Tone laborers were responsible for cleaning up the debris on the floor. (R. 1054, 1057) There was no written description for how Structure Tone laborers were required to perform their work. (R. 1055) The Contract at Page 15, paragraph 16 states:

> General Contractor shall at all times keep the Site and surrounding areas free from accumulation of debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work and Coordination Items. (R. 1869)
>
> It's understood that Structure Tone is obligated to keep the floor free from accumulation of debris.

(R. 1053, 1058) The Structure Tone laborers were employed to comply with this term of the contract. (R. 1059, 1053) Structure Tone was solely responsible for clearing debris. (R. 1074, 1050)

CBRE – Director of Facilities, Sheldon Franco

Sheldon Franco, Director of Facilities for CBRE testified that he dealt with Structure Tone, the general contractor, on a regular basis during the project. (R. 1278) He answered "no," CBRE did not do any sort of inspections at the jobsite, stating that he thought safety inspection was the responsibility of the General Contractor, Structure Tone. (R. 1284-85)

Affidavit of Ernest Gailor, P.E.

Plaintiff submitted the affidavit of Ernest Gailor, P.E., a professional engineer, duly licensed to practice in the States of New York, Vermont, New Jersey, New Hampshire, Connecticut, and Florida. Mr. Gailor has been in practice for over 42 years and has concentrated his practice in the fields of construction safety, design, and management. He has been a Senior Forensic Engineer for

Harlan-McGee Associates and Harlan-McGee of North America for 35 years. (R. 1870-1876)

Mr. Gailor reviewed all the pertinent records including the deposition testimony of the parties, exhibits produced in discovery and Construction Project Agreement Between CB Richard Ellis, Owner, and Structure Tone, Inc., General Contractor. Mr. Gailor concluded that Defendants' motion for summary judgment must be denied because:

> a. The defendant-general contractor specifically assumed the duty to at all times keep the Site … free from accumulation of debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work. The defendant-general contractor breached its duty by allowing construction debris to accumulate and cause the plaintiff to slip and sustain injuries.
>
> b. The defendant-owners and general contractor had a non-delegable duty under 23-1.7(d) not to "permit any employee to use a floor, passageway…which is in a slippery condition." The Defendants breached that duty by failing to remove a slippery substance, construction debris, from the floor and passageway where the plaintiff and his co-workers were carrying a 500-pound glass panel;
>
> c. The defendant-owners and general contractors owed a non-delegable duty under §23-1.7(e)(1)(2) keep all passageways and floors free from accumulations of dirt and debris. The defendants breached that duty, causing the plaintiff to sustain injuries while carrying a 500-pound glass panel.

The Agreement between the Owner (Ellis) and Structure Tone stated on page 15, paragraph 16 that the "General Contractor shall at all times keep the Site and surrounding areas free from accumulation of debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work and Coordination Items". Structure Tone could not produce a witness that could testify about the work performed or the conditions of the job site on June 2, 2011, and they did not maintain any logs, journals or records which could establish when they inspected the area where the accident took place. They therefore could not prove that they had cleared any of the construction debris that accumulated on the floor in the area where the plaintiff fell.

The defendant-general contractor was negligent in fulfilling its duty to "keep the Site and surrounding areas free from accumulation of debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work" at all times" according to Page 15 paragraph 16 of the Agreement with the Owner. The provision is clear. It was understood by the Structure Tone to be its duty to the Owner and the other trades. There is no proof that Structure Tone had complied with the duty it assumed. Although the defendant hired laborers, it did not keep records of the work those laborers performed. Moreover, the laborers were required to keep the site free from debris <u>at all times</u>. It was incumbent upon the Structure Tone

laborers to clean the floors before the dangerous work of moving 500-pound glass panels started.

The general contractor owed a duty to the laborers working on the site; that it failed to fulfill that duty by not keeping the site free from the accumulation of debris arising from the performance of the work; that the grinding out of concrete to form channels to place the glass panels created debris which should been removed from the floor before the plaintiff and his co-workers walked across it and he sustained injuries. Structure Tone's negligence was a substantial factor in causing the Plaintiff's injuries.

Defendant-owner Tishman Speyer Properties and 200 Park, L.P., CBRE, Inc., and Structure Tone owed a nondelegable duty to the plaintiff under the Industrial Code. The applicable codes that apply to this work are found in 12 N.Y.C.R.R. §23-1.7(d) and (e)(1)(2) which state in relevant part:

> 1. d) *Slipping hazards*. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, … which is in a slippery condition, … any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> 2. (e) *Tripping and other hazards*.
>
>> (1) *Passageways.* All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp

> projections which could cut or puncture any person shall be removed or covered.
>
> (2) *Working areas.* The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulation of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Defendants breached the non-delegable duty set forth in the above regulations by failing to provide a working site with safe footing. The area where the Plaintiff was injured was a "floor, passageway or walkway" within the meaning of the regulation. He was required to carry the panel from a staging area through a narrow area to place the panel in a channel cut into the concrete. The glass panels formed barriers and walkways for the new tenant. In addition, the Plaintiff described the construction debris as rocks and pebbles which was created when the channels were cut into the concrete. The construction debris reduced the friction between the floor and the plaintiff's work boots. Thus, such construction debris comes under the definition of a "foreign substance which may cause slippery footing." The Plaintiff slipped while stepping onto the spoils and lost his balance which caused his injuries. Defendant-owners and the defendant-general contractor breached their non-delegable duty to comply with Industrial Code §23-1.7(d).

Further, Section 23-1.7(e)(2) requires that all owners and general contractors keep floors where persons work free from accumulation of dirt and debris. This

regulation mirrors the duty imposed upon the general contractor in the Construction Agreement. The defendants failed to keep the floor free from the construction debris which caused the plaintiff to slip. Defendant-owners and general contractor breached the non-delegable duty of Industrial Code §23-1.7(e)(2) and that such breach constituted a substantial factor in causing the Plaintiff's injuries.

Defendant owners and general contractor breached the duty owed to the Plaintiff set forth in §23-1.7(e). The area where the Plaintiff was injured was a passageway and the concrete spoils constituted a slipping hazard. The concrete spoils also constituted a tripping hazard as well. Nevertheless, the accumulation of construction debris failed to provide safe footing for the Plaintiff which is the core intent of the regulations cited above. Whether the Plaintiff slipped or tripped, the failure to remove the concrete spoils constituted a breach of the duty imposed upon the defendants under §23-1.7(e)(1) and such a breach was a substantial factor in causing the Plaintiff's injuries.

ARGUMENT

POINT I: THE APPLICATION FOR LEAVE TO APPEAL WAS TIMELY

This case involves an appeal by Plaintiff of an order of the Appellate Division First Department dated August 16, 2022, which reversed an order of Supreme Court, New York County (Goetz, J.), entered December 14, 2020, which denied Defendants' motions for Summary Judgment which were seeking to dismiss Plaintiff's claims under Labor Law §§200, 241(6) and common law negligence.

A Notice of entry with a copy of the Order from the Appellate Division First Department was filed by counsel for Defendants on August 17, 2022, via NYSCEF. On September 16, 2022, Plaintiff filed and served via NYSCEF a motion to reargue and/or for leave to appeal to the Court of Appeals with the Appellate Division First Department. The Appellate Division issued an Order denying Plaintiff's motion on November 22, 2022. A copy of the order with Notice of entry was filed by counsel for Structure Tone on November 22, 2022, via NYSCEF (Supreme Court docket). A copy of the order with Notice of entry was filed by counsel for 200 Park and Tishman Speyer on November 23, 2022, via NYSCEF (Supreme Court docket). No Notice of entry was ever filed on behalf of Defendant CBRE. Plaintiff thereafter filed a motion for leave to appeal to this

Court. The application for leave to appeal was granted by an Order dated December 14, 2023.

According to the New York General Construction Law §20, when calculating a deadline, the calculation excludes the day where the "reckoning is made" and begins on day two. CPLR §5513(b) sets the deadline to file a motion for leave to appeal to the Court of Appeals at thirty days from the date of service of the notice of entry of the order being appealed from. In this case, the time to file the motion for leave to appeal began to run on November 23, 2022, for defendant Structure Tone, on November 24, 2022, for defendants 200 Park and Tishman, and the time never began to run as to defendant CBRE. The motion for leave to appeal was timely filed.

It is also important to note that the Appellate Division First Department does not allow for the filing of a Notice of Entry on the NYSCEF for the Appellate Division, but instead requires that a Notice of Entry be filed on the docket of the trial court. That rule necessitates the filing of a Notice of Entry on the trial court docket of NYSCEF even though the motion was filed, heard and decided by the Appellate Division. The potential for a missed docket entry looms large in situations like this one. This quirk in the e-filing system clearly undermines the "notice" portion of a Notice of Entry.

If the purpose of a Notice of Entry is to put your adversary on notice of an order and start the appeal deadline clock running, is that end best served in this manner? It is Plaintiff's contention that his motion for leave to appeal to this Court was timely filed under the rules as described above. Nonetheless, the inconsistent docketing of Notices of Entry in the various Appellate Divisions, especially in the case of Orders of the Appellate Courts, leaves open the possibility of a party missing their deadline without having ever been aware that the deadline was approaching. That runs contrary to the orderly and fair application of the law.

POINT II: PLAINTIFF'S LABOR LAW 241(6) CLAIM SHOULD NOT HAVE BEEN DISMISSED

The Supreme Court properly denied Defendants' motions for summary judgment on Plaintiff's Labor Law §241(6) claim (as to violations 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2)), Plaintiff's §200 and common law negligence claims. The Appellate Division improvidently applied its discretion in reversing the trial court order and, in so doing, reached conclusion of law that conflict with the plain meaning of the statutes, contract between the parties and the controlling case law.

The standard on a motion for summary judgment is well settled. The proponent of summary judgment must demonstrate through proof, in admissible form, the absence of all triable issues of material fact to be entitled to judgment as a

matter of law. Alvarez v. Prospect Hospital 68 N.Y.2d 320 (1986); Zuckerman v. The City of New York, 49 N.Y.2d 557 (1980). Unless the movant establishes entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied. Loveless v. American Ref-Fuel Company of Niagara, LP, 299 A.D.2d 819 (4th Dept. 2002) (citing Alvarez v. Prospect Hospital, supra). The failure to make such a showing necessitates a denial of the motion regardless of the sufficiency of the opposing papers. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985).

Summary judgment is a drastic remedy and should not be granted where there is any question of fact. Birnbaum v. Hyman, 43 A.D.3d 374 (1st Dept. 2007) (citing Millerton Agway Cooperative Inc. v. Briarcliff Farms, Inc., 17 N.Y.2d 57 (1966).

The New York State Labor Law creates specific non-delegable duties on the part of property owners and contractors in situations that would otherwise be evaluated under ordinary principles of negligence had that not occurred at a construction site. Labor Law § 241(6) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * * *
>
> 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work … shall comply therewith.

It is settled that Labor Law §241(6) applies to violations of "specific, positive command[s]" of the Industrial Code. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993). The case at bar involves Industrial Code Rule No. 23, relating to "Protection in Construction, Demolition and Excavation Operations." 12 NYCRR 23-1.1.

Industrial Code Rule 23 sets forth regulations pursuant to the Commissioner's "Finding of fact":

> The board finds that the trades and occupations of persons employed in construction, demolition and excavation operations involve such elements of danger to the lives, health and safety of such persons … as to require special regulations for their protection in that such persons are exposed to the following:
> **(a)** The hazards of falling and of falling objects and materials.
> **(b)** The hazards associated with the operation of vehicles and of construction, demolition and excavation machinery and equipment.
> **(c)** The hazards of fire, explosion and electricity.
> **(d)** The hazards of injury from the use of and contact with dangerous tools,
> machines
> and materials.
> **(e)** The hazards incidental to the handling and movement of heavy materials.

12 NYCRR 23-1.2 (emphasis added).

The regulations identify the hazards that endanger "the lives, health and safety" of those so employed. Slipping, tripping, and other hazards are explicitly designated by Rule 23 as risks that materialize from, among other things, "accumulations of dirt and debris:"

> 12 NYCRR 23-1.7(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> 12 NYCRR 23-1.7(e) Tripping and other hazards. (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.

Appellate Courts have defined areas that are not passageways with respect to the code. Generally, open lots or parking lots, outdoor areas, and common areas remote from the worksite are not covered. Morra v. White, 276 A.D.2d 536 (2d Dept. 2000) (holding 23-1.7(d) inapplicable to an open lot at the construction site); Constantino v. Kreisler Borg Florman General Const. Co., Inc., 272 A.D.2d 361 (2d Dept. 2000) (concluding that a path formed by workers traveling back and forth between the parking lot and the building under construction was not a passageway);

Bruder v. 979 Corp. 307 A.D.2d 980 (2d Dept. 2003) (holding a staircase was not a passageway within the meaning of 23-1.7(d) because it was in an open and common area which was remote from the work site).

In Temes v. Columbus Centre LLC., 48 A.D.2d 188 (1st Dept. 2010), the Court concluded that the open area of a basement floor was considered a floor within the meaning of 23-1.7(d) when the plaintiff slipped on ice on the floor of the basement of a newly constructed building when he was returning from the men's room and walking across the area. Id.

Similarly in Whalen, the plaintiff slipped and fell on an icy stairway leading to the worksite. The stairway was considered a passageway. Whalen v. City of New York, 270 A.D.2d 340 (2d Dept. 2000). The court used the broad language from a First Department case that said responsibility "extends to the entire site . . . in order to ensure the safety of laborers going to and from the points of actual work." Sergio v. Benjolo, 168 A.D.2d 235, 236 (1st Dept. 1990).

In a Fourth Department case, the Plaintiff slipped on a spot of grease as he was reporting for work pursuant to directions issued by the employer, which required workers to park their vehicles in a parking lot and report for work at a guard shack by using a designated pathway or walkway. Zito v. Occidental Chemical Corp., 259 A.D.2d 1015 (4th Dept. 1999).

In Conklin v. Triborough Bridge & Tunnel Auth., 49 A.D.3d 320 (1st Dept. 2008), the Court determined that a ramp was a passageway when plaintiff slipped on mud that was partially covering a makeshift ladder being used as a ramp to enter the employer's shanty. The ladder was partially covered in a slippery substance and the ramp was the sole means of access to the shanty. The plaintiff slipped on mud covering the ramp. Id.

Labor Law §241(6) indisputably imposes a non-delegable duty of reasonable care upon all owners and "contractors" to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, areas in which construction, excavation or demolition work is being performed. Rizzuto v. L.A. Wenger Cont. Co., 91 N.Y.2d 343 (1998). In Rizzuto, the Court of Appeals stated that:

> "[w]e have repeatedly recognized that section 241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained *due to another party's negligence* in failing to conduct their construction, demolition or excavation operations so as to provide for the reasonable and adequate protection of the persons employed therein." If proven that the Industrial Code has been violated, "the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault." Id.

Plaintiff Felipe Ruisech worked in the construction industry; the inherent dangers of which account for extensive statutory and regulatory protections afforded workers in New York State. Plaintiff lost his career and is permanently

disabled because he was deprived of those protections, and he is without a remedy at law because the Appellate Division extended a rule of this Court beyond its intended reach.

In O'Sullivan v. IDI Const. Co., 7 N.Y.3d 805 (2006), this Court held that the plaintiff's Labor Law §241(6) cause of action, based on the Industrial Code regulations at 12 NYCRR 23-1.7 (e) (1) and (2), failed because the tripping hazard (electrical pipe or conduit) was "an integral part of the construction."

The Appellate Division First Department improvidently applied its discretion in this case when it determined that the concrete debris that caused Plaintiff to slip and/or trip was integral to the work being done by Plaintiff at the site. The Court's expansive definition of "integral" to the work would essentially cause the exception to swallow up the situations underlying it.

The case law on this issue is expansive and would all mitigate in favor of Plaintiff in this case. It is also important to distinguish between materials integral to the work and debris left behind during the work process. In Lester v. JD Carlisle Dev. Corp., MD., 156 A.D.3d 577, (1st Dept. 2017), "loose granules on the roof surface that caused plaintiff to slip were not integral to the structure or the work but were an accumulation of debris from which § 23–1.7(e)(2) requires work areas to be kept free." Id. (internal citations omitted) (granting plaintiff summary judgment on § 23–1.7(e)(2)).

Again, in Singh v. Young Manor, Inc., 23 A.D.3d 249, (1st Dept. 2005), this Court classified "debris" as loose material, holding that Industrial Code (12 NYCRR) § 23–1.7(e)(2) was applicable where plaintiff stepped on a nail near a pile of debris in the work area that had been permitted to accumulate for several days, and found no merit to defendant's contention that the hazard must be viewed as having been an integral part of plaintiff's work removing wood paneling. Id.

Likewise in Tighe v. Hennegan Const. Co., 48 A.D.3d 201 (1st Dept. 2008), 23-1.7(e)(2) was applicable where "debris accumulated as a result of the demolition—. . .was not inherent in the work being performed by plaintiff, an electrician, at the time of the accident." Id.

In a recent decision in Bazdaric v. Almah Partners, LLC, NY Slip Op 00847 Decided February 20, 2024, this Court determined that a plastic cover used to protect an elevator during painting was a foreign substance and/or debris as defined by law and not integral to the work. The plastic sheet is like the pebbles on the ground in this case - it is debris and not integral to the work.

Compare these cases to those like Rajkumar v. Budd Contracting Corp., 77 A.D.3d 595, 595–96, (1st Dept. 2010), where the Court explained, "subdivision (e)(2) of Industrial Code § 23–1.7(e) pertains to such tripping hazards as dirt, debris and scattered tools and materials in a work area," and not to items purposefully laid. Id. (holding brown construction paper "purposefully laid" over new floors was an

integral part of the floor work and not a "misplaced material over which on might trip."); Hammer v. ACC Constr. Corp., 193 A.D.3d 455, (1st Dept. 2021) ("The Labor Law § 241(6) claim premised on Industrial Code (12 NYCRR) § 23–1.7(e)(2) was correctly dismissed since the loop of electrical wire on which plaintiff tripped was an *integral and permanent* part of the construction").

In Johnson v. 923 Fifth Ave. Condo., 102 A.D.3d 592, 593 (1st Dept. 2013), 12 NYCRR 23–1.7(e)(2) was not applicable where plaintiff did not trip over *loose or scattered material*. He tripped over a piece of plywood that had been *purposefully laid* over the sidewalk to protect it and that therefore constituted an integral part of the work.

In the instant case, while the trial court held that issues of fact were present, the Appellate Division decided as a matter of law that the debris on which the Plaintiff slipped was "an integral part of the construction work," despite that accumulations of "debris" is one of the hazards from which the code expressly seeks to protect workers.

That holding is inconsistent with the reasoning underlying the "integral part of the construction" exception, and it extends the exception so far beyond this Court's decision in O'Sullivan that it subsumes the regulations entirely. The Appellate Division's decision below applies in expansive view of the "integral to the construction" exception for defense to the industrial code regulations at issue,

which goes beyond the Court of Appeals decision in O'Sullivan., an application that should be rejected by this Court.

The Appellate Division's holding not only defeats specific industrial code regulations designed to promote the safety of construction workers, but it also usurps the fact-finding function of a jury on such matters as what constitutes "debris," "foreign substance," "slippery condition," and "passageway." This case involves questions of law that affect innumerable workers in the construction industry and that have significant public importance. Injuries to construction workers have a negative societal impact, just as the prevention of injuries provides a benefit to society.

The scope of public importance and impact is greater still in this case, because the key contracting party (general contractor Structure Tone) was allowed to elude responsibility for the hazardous condition and consequent injury by the Appellate Division, despite its assumption of a contractual duty to "at all times keep the Site and surrounding areas free from [the] accumulation of debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work and Coordination Items" (R. 1869) Allowing the words of a contract to lack meaning undermines both the sanctity of contract and the reliability of the English language.

Additionally, although the issue was raised on appeal, the Appellate Division did not address the general contractor's express assumption of duty for the precise condition protected against by the Industrial Code, which was the indisputable cause of Plaintiff's injuries. The failure to enforce the general contractor's express assumption of duty to the Plaintiff (evidenced by the construction contract itself) deprived Mr. Ruisech of the protections of Labor Law §200, in addition to those of Labor Law §241(6), effectively shifting all responsibility to the State and social institutions.

Further, the Appellate Court inexplicably ignored the affidavit of Plaintiffs' engineering expert – and/or determined the weight rather than legal sufficiency of the evidence – when deciding that the spoils of the concrete work did not constitute "an existing defect or dangerous condition of the property." Thus, the Court did not require the Defendants to meet their evidentiary burden on a motion for summary judgement, since the court did not require Defendant Structure Tone to demonstrate that it did not have actual or constructive knowledge of the condition that caused Plaintiff's injuries.

Factually, it is undisputed that at the time he was injured, the Plaintiff and his coworkers were attempting to install a 500-pound glass room divider as part of an interior office renovation. A different group of workers had prepared the floor for installation by carving a channel into the concrete floor and placing into the

channel a metal frame, into which Plaintiff's crew would insert the glass panel. The first crew had finished, leaving the concrete spoils behind. No one had cleared the concrete spoils before Plaintiff's crew was due to make the installation. It was upon the debris left behind that Plaintiff slipped. It is within this context, the Appellate Division First Department found that such "accumulations of dirt and debris" were "an integral part of the construction," despite that such dirt and debris are, by definition, substances that must be discarded to reduce the risk of harm to human beings.

As mentioned above, the general contractor assumed a duty in the construction contract itself to "keep the Site and surrounding areas free from accumulation of debris" occasioned by the work. At a minimum, such a contractual provision created an issue of fact regarding the general contractor's liability. Inexplicably, the appellate court found no duty on the part of Structure Tone, only "a general level of supervision that is not sufficient to warrant" a finding of liability.

The First Department's order herein is in direct conflict with its previous decisions in: Pereira v. New Sch., 148 AD3d 410, 412 (1st Dept. 2017) (the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site); Tighe v Hennegan Constr. Co., Inc., 48 AD3d 201, 202 (1st Dept. 2008) (demolition debris was not

integral to electrician's work); Lester v JD Carlisle Dev. Corp., 156 AD3d 577, 578 (1st Dept. 2017) ("loose granules on the roof surface that caused plaintiff to slip were not integral to the structure or the work [citations omitted] but were an accumulation of debris from which § 23-1.7 (e) (2) requires work areas to be kept free"); Singh v. Young Manor, Inc., 23 A.D.3d 249, 249 (1st Dept. 2005) (nail near a pile of accumulated waste was "debris," not an integral part of plaintiff's work removing wood paneling).

Also relevant to the test is whether Plaintiff created or was in the process of cleaning the debris which caused his fall. In Pereira v. New Sch., 148 A.D.3d 410, 412, (1st Dept. 2017) the Court denied Defendant's motion for summary judgment on 23-1.7(e)(2) where "the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site . . . . Plaintiff did not work with concrete and concrete was not a part of his responsibilities in constructing the tables and forms used to hold the rebar and other ironwork in place. Id. (emphasis added).

Similarly, in Singh v. Manhattan Ford Lincoln, Inc., 188 A.D.3d 506, 507 (1st Dept. 2020), this Court found triable issues of fact existed as to whether the debris on which plaintiff slipped was integral to his work: "Specifically, issues exist as to whether plaintiff was engaged in the same debris removal . . which caused it to accumulate by the dumpster where he slipped." Id. (emphasis added).

Understanding the difference, Defendants' cited cases are easily distinguishable. In Ghany v. BC Tile Contractors, Inc., 95 A.D.3d 768, 769 (1st Dept. 2012), the Plaintiff tripped over the very debris he was assigned to clean up. This Court found Industrial Code § 23-1.7 (e) (2) was inapplicable, "since the demolition debris resulted directly from the ongoing work being performed, which plaintiff had been assigned to clean up, and thus constituted an integral part of that work." Id. (emphasis added).

In Torres v. Triborough Bridge & Tunnel Auth., 193 A.D.3d 665 (1st Dept. 2021), this Court also concluded that Industrial Code § 23–1.7(e)(2) was inapplicable, "since the demolition debris resulted directly from the ongoing work being performed, which plaintiff had been assigned to clean up, and thus constituted an integral part of that work." Id. (emphasis added).

The cited Fourth Department case, Harris v. Rochester Gas & Elec. Corp., 11 A.D.3d 1032, 1033 (4th Dept. 2004), does not even invoke 23-1.7(e)(2). CBRE relies on Harris to for the premise that "the accumulation of concrete debris in the work area was an unavoidable and inherent result of [the] work at a[n] ongoing [construction project.]" Id. But Harris makes no mention of Industrial Code 23-1.7(e)(2) because it is not about a slipping or tripping hazard – Harris is a case where the plaintiff fell while using his jackhammer on a cylindrical dome, and the question

was whether Industrial Code 23-3.3-(l), not 23-1.7(e)(2), was applicable, as it related to safe footing requirements.

CBRE also attempts to use Cabrera v. Sea Cliff Water Co., 6 A.D.3d 315, 316 (1st Dept. 2004) for the premise that accumulated debris during an ongoing construction project is unavoidable and inherent and therefore outside of the realm intended by 23-1.7(e)(2). But Cabrera, like the cases above, instead represents the distinguishable situation of debris that Plaintiff falls on when he is the very one tasked with cleaning it up:

> Where plaintiff was in the very process of sweeping up the dust he and his fellow workers had just created, there is no basis for imposing liability against defendants for his slip and fall.

Id. Also cited is Bond v. York Hunter Const., Inc., 270 A.D.2d 112, aff'd, 95 N.Y.2d 883 (1st Dept. 2000) where again, the plaintiff fell descending from the very vehicle he was operating; Cooper v. Sonwil Distribution Ctr., Inc., 15 A.D.3d 878, 879 (4th Dept. 2005), where plaintiff "tripped over demolition debris created by him;" and Salinas v. Barney Skanska Const. Co., 2 A.D.3d 619, 622 (2d Dept. 2003) where again "plaintiff testified that he tripped over demolition debris created by him."

"Accumulations of dirt and debris," are "integral" to nothing, have no use, and are simply waste products. The presence of debris anywhere will only be eliminated and discarded. This case calls for a direct and plain application of 12 NYCRR 23-1.7 (e)(2). The Court misapprehended its own decisional precedent in

finding that "the pebbles {cause of plaintiff's accident} were debris that were an integral part of the construction work."

The Court further misapprehended the nature of the Defendants' evidentiary burden on a motion for summary judgement when it did not require defendant Structure Tone to demonstrate that it did not have actual or constructive knowledge of the condition which led to Plaintiff's accident and overlooked the undisputed evidence that defendant structure tone owed a duty to the injured Plaintiff to remedy the specific condition at issue.

In addition, the Appellate Division predicated its decision, in part, upon the identification of Industrial Code section 23-1.7(e)(II) as pertaining to "passageways," when that regulation pertains to "working areas." The Defendants herein claim that the area where the plaintiff was injured should not be considered a "passageway" just as parking lots, outdoor areas and remote work sites and thus the Labor Law would not apply. However, the area where the Plaintiff was injured was located inside of office space being renovated. The glass panels were being erected formed passageways and walkways between the cubicles and offices. The Plaintiff was forced to carry the glass panel through a narrow area. It is clear from the description that this part of the job site was a floor, passageway, or walkway rather than an open area. Given the fact that the Plaintiff's expert interprets the construction debris as a foreign substance which would cause slippery footing, the

Court should deny the motions and find a factual issue on whether the Defendants satisfied their duties under the Industrial Code.

Even if this Court accepts the extremely narrow definition of "passageway" as set forth above, it should find that the Defendants breached its non-delegable duty to keep such area free from dirt and debris under §23-1.7(e)(1). The area where Plaintiff was injured was not kept free from construction debris and represented a tripping hazard to the Plaintiff. The analysis is less complicated by the definition of what is a passageway considering the regulation requires the removal of all dirt and debris from floors where persons work. Thus, the Court should deny that branch of the joint motions for summary judgment on the plaintiff's Labor Law §241(6) cause of action.

Finaly, Supreme Court correctly held that, contrary to CBRE's contention, it may be held liable under Labor Law § 241(6) because the term "owner" within the meaning of the law "encompasses 'a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit.'" (citing Zaher v. Shopwell, Inc., 18 A.D.3d 339 (1st Dept. 2005). As a tenant with rights to the property, CBRE "fulfilled the role of an owner by retaining Structure Tone for the renovation of the demised space." (R. 23)

POINT III: PLAINTIFF'S LABOR LAW §200 CLAIM SHOULD NOT HAVE BEEN DISMISSED

Unlike other sections of the Labor Law, "section 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352 (1998); *see* Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876, 877 (1993)). Thus, where, as here, "a plaintiff's injuries stem not from the manner in which the work was being performed[] but, rather, from a dangerous condition on the premises, [an owner or] general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (Keating v. Nanuet Bd. of Educ., 40 A.D.3d 706, 708 (2d Dept. 2007); *see* Lane v. Fratello Constr. Co., 52 A.D.3d 575 (2d Dept. 2008)).

Labor Law § 200 states, in pertinent part, as follows:

> 1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

Labor Law § 200 (1).

There are two broad categories of § 200 claims: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. (R. 29) (citing Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 143–44 (1st Dept. 2012). Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it. (R. 29) Mendoza v Highpoint Assoc., IX, LLC, 83 A.D.3d 1, 9 (1st Dept. 2011). Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work. (R. 29) Cappabianca, supra.

Defendants, as the parties seeking summary judgment dismissing those claims, are required to "establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises." Perry v. City of Syracuse Indust. Dev. Agency, 283 A.D.2d 1017 (4th Dept. 2001).

The Supreme Court properly applied the dangerous condition test under Labor Law §200 when it denied Defendants' motions for summary judgment. Defendants, as the parties seeking summary judgment dismissing those claims, are required to "establish as a matter of law that they did not exercise any supervisory control over

the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises" (Perry v. City of Syracuse Indus. Dev. Agency, 283 A.D.2d 1017, 1017 (4th Dept. 2001); *see generally* Hennard v. Boyce, 6 A.D.3d 1132, 1133 (4th Dept. 2004)).

In Mulcaire v. Buffalo Structural Steel Constr. Corp., 45 A.D.3d 1426 (4th Dept. 2007), the court there rejected the contention that the defendant was a construction manager without supervision and control of the work and thus that it was not an owner, contractor, or an agent for purposes of liability under Labor Law §240 (1) and §241 (6). The Court stated "An entity is a contractor within the meaning of Labor Law § 240(1) and § 241(6) if it had the power to enforce safety standards and choose responsible subcontractors" (Outwater v. Ballister, 253 A.D.2d 902, 904 (3d Dept. 1998)), and an entity is a general contractor if, in addition thereto, " 'it was responsible for coordinating and supervising the … project' " (Bagshaw v. Network Serv. Mgt., 4 A.D.3d 831, 833 (4th Dept. 2004)). In addition, "[t]he entity's right to exercise control over the work denotes its status as a contractor, regardless of whether it actually exercised that right" (Milanese v. Kellerman, 41 A.D.3d 1058, 1061 (3d Dept. 2007)). There, the defendant had the contractual authority to enforce safety standards and to hire responsible contractors, and that the defendant was also responsible for coordinating and supervising the project and the Court determined

that the defendant was an entity subject to liability under Labor Law § 240 (1) and §241 (6).

In Quigley v. Port Auth. of N.Y. & N.J., 168 A.D.3d 65 (1st Dept. 2018), The Court confirmed the defendants' motion seeking dismissal of the common law negligence and Labor Law §200 claims was properly denied because the defendants did not satisfy their initial burden of showing that they did not create or have knowledge of the dangerous condition that caused the accident since the evidence did not establish who left the pipes the plaintiff fell on in front of the shanty for several weeks prior to the accident, and defendants did not provide any evidence to show the last time they inspected the work site. Id. *see* Ladignon v. Lower Manhattan Dev. Corp., 128 A.D.3d 534 (1st Dept. 2015). The Court there determined that there was an issue of fact that prevented the employers' motion to dismiss the employee's Labor Law §241 (6) claim predicated on 12 N.Y.C.R.R. §23-1.7(e)(2) because it remained questionable whether the spot where the fall occurred was a "working area" since the workers at the site routinely traversed the area adjacent to the shanty as their only access to equipment and arguably was an integral part of the work site. Id. *Citing*, Smith v. Hines GS Props., Inc., 29 A.D.3d 433 (1st Dept. 2006).

In the instant case, the owner imposed upon the general contractor, and the general contractor accepted the duty to keep the work site free from the accumulation of construction debris "at all times." (emphasis added). This contractual duty sets

this case apart from every other typical Labor Law §200(1) claim. The contract required the general contractor to remove such debris as work was being performed. Defendant was contractually obligated to inspect the work site and remedy any dangerous or defective conditions which would constitute hazards within the meaning of the contractual obligation. Structure Tone has failed to put forth any evidence that it conducted inspections or performed the work under the agreement. The workers did not prepare inspection logs or document cleanup work despite Structure Tone having assumed the duty by contract to provide a reasonably safe place to work and breached that duty owed to the plaintiff and other tradesmen.

The Defendants' proof is woefully insufficient to sustain their burden under the law. The Courts have repeatedly defined the duty owed to conduct reasonable inspections to satisfy the burden that there was no constructive notice of a defective condition. It is not enough to merely say "I didn't see it". The defendant must demonstrate that it was either not visible or apparent or in the alternative, that it conducted reasonable inspections to discover the presence of such defects on its property. Otherwise, this Court has imputed a question of fact on the issue constructive notice.

In Quinn v. Holiday Health & Fitness Centers of New York, Inc., 15 A.D.3d 857 (4th Dept. 2005) the Court stated the following:

> As the defect in question was not visible and apparent, the lack of proof of recent inspections of the area is irrelevant.

> "[C]onstructive notice will not be imputed where the defect is latent, i.e., where, as here, the defect is of such a nature that it would not be discoverable even upon a reasonable inspection. The failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect"

In a similar case from the Fourth Department that follows this rationale, the Court upheld the denial of summary judgment in instances, as here, the defendant fails to demonstrate that it did not have constructive notice as a matter of law. In Walter v. United Parcel Service, Inc., 56 A.D.3d 1187 (4th Dept. 2008), the defendant's motion for summary judgment was denied and later affirmed by this Court. The defendant's own motion papers raised a question of fact whether it had constructive notice of the condition that resulted in the plaintiff's fall.

In Zemotel v. Jeld-Wen, Inc., 50 A.D.3d 1586 (4th Dept. 2008), the Court again upheld the denial of summary judgment sought by a defendant property owner that failed to establish that it did not have constructive notice of a defective condition in accordance with Quinn.

In Ferguson v. County of Niagara, 49 A.D.3d 1313 (4th Dept. 2008), the plaintiff slipped and fell on water in a locker room. The defendant moved for summary judgment on the basis that it did not have actual or constructive notice of the condition before the fall. The lower court denied the defendant's motion and this Court affirmed. This Court explained that "[d]efendants failed to meet their "initial burden of establishing that [they] did not create the [allegedly] dangerous condition

that caused plaintiff to fall and did not have actual or constructive notice thereof…The failure of defendants to meet their burden requires denial of the motion, "regardless of the sufficiency of the opposing papers".

In Parietti v. Wal-Mart Stores, Inc., 140 A.D.3d 1039 (2d Dept. 2016), the Supreme Court's denial of a summary judgment motion in favor of defendants was reversed based upon a showing that store employees had walked through the specific area where plaintiff fell within minutes of the fall and the dangerous condition did not exist. This evidence was key because, as this Court stated, "[m]ere reference to general cleaning practices…is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question." (*citing* Mahta v. Stop & Shop Supermarket, Co., LLC, 129 A.D.3d 1037 (2d Dept. 2015)).

In Mercedes v. City of New York, 107 A.D.3d 767 (2d Dept. 2013), a student slipped and fell on juice and papers on a staircase at her school. This Second Department reversed the Supreme Court's grant of summary judgment in favor of defendants because "merely submitting testimony of general inspection or cleaning practices, and providing no evidence regarding any particularized or specific inspection or stair cleaning procedure in the area of plaintiffs fall on the date of accident" was insufficient to satisfy defendants' burden of proof. The school's former custodial engineer testified about his general inspection practices upon

opening the school building in the morning and provided work schedules for the janitorial staff but couldn't establish when the staircase in question was last inspected or cleaned.

In Sesina v. Joy Lea Realty, LLC, 123 A.D.3d 1000 (2d Dept. 2014), the defendant provided details about the building's general cleaning procedures, but no specifics about the vestibule where plaintiff fell. The Court reversed the Supreme Court's grant of summary judgment in favor of defendant because, once again, the defendant failed to establish when the area where plaintiff was injured was last inspected or cleaned.

In Schiano v. Mijul, Inc., 79 A.D.3d 726 (2d Dept. 2010), a restaurant owner moved for summary judgment on the issue of notice. Plaintiff had slipped on a greasy substance while walking through the restaurant's "drive-thru". Defendants produced evidence of the restaurant's daily cleaning practices, but "provided no evidence regarding any particularized or specific inspection or cleaning procedure in the area of the plaintiff's fall on the date of accident." Once again, the controlling case law makes it quite clear that specific proof is needed to satisfy defendants' burden of proof – evidence that does not exist in the record before this Court.

Structure Tone, specifically, faced a similar issue in a separate, but recent case, Pawlicki v. 200 Park, L.P., 199 A.D.3d 578 (1st Dept. 2021) where plaintiff carpenter was injured on a job stepping on a grille covering an opening in the floor.

The grille was unsecured by screws, despite the presence of preexisting screw holes, and was covered by construction paper, believed to have been placed for dust protection. Plaintiff's foot slipped down into the exposed opening when the grille caved in. The Court held that Structure Tone failed to establish *prima facie* that they neither created the dangerous premises condition by covering the unsecured grille with paper nor had notice of the grille's unsecured condition.

Similarly, in Dirschneider v. Rolex Realty Co. LLC, 157 A.D.3d 538, 538–39 (1st Dept. 2018), the plaintiff sustained injuries to his foot while helping to transport a 600–pound, 14–foot–long steel I-beam down a staircase. This Court held that Plaintiff's Labor Law § 200 and common-law negligence claims were incorrectly dismissed at the trial court level:

> To the extent plaintiff's claim is based on allegations that his fall was due to the defective condition of the premises [ ] defendants can be held liable for plaintiff's injuries only if they created or had notice of the dangerous conditions on the premises . . . . Even [defendants] established a prima facie entitlement to summary judgment on these claims, plaintiff raised an issue of fact through his testimony that there was debris in the form of chopped concrete, pieces of wire, and trim studs on the steps, that there was no handrail, and that the lighting was dim.

Id. (emphasis added).

Here, there has been no evidence that the Defendants had inspected the area or that any inspection procedures were in place to warrant a lack of constructive notice. The Plaintiff's expert has explained in his affidavit that the failure to inspect

for dangerous conditions such as the concrete debris the Plaintiff fell violates normal custom and practice on a construction site. The debris posed an elevated risk to the glazers given the weight and difficulty of installing the glass in the area.

Defendants collectively owed a non-delegable duty to eliminate all hazards that would cause unsafe footing under the Industrial Code and the defendant-Structure Tone was contractually bound to provide laborers to remove debris from the construction areas. The are clearly questions of fact as to whether Defendants are liable for causing the Plaintiff's injuries sustained after he lost his footing carrying a 500-pound panel of glass.

CONCLUSION

As demonstrated above, there are issues of fact regarding the Defendants' liability to Plaintiff under Labor Law § §200, 241(6), the construction contract which delegated the responsibility to clean the floor where the Plaintiff slipped to the general contractor, as well as general negligence. For the reasons stated herein, Plaintiff-Appellant respectfully requests that the Order of Appellate Division First Department, which reversed the decision of the Supreme Court which had denied Defendants' motions for summary judgment as to Plaintiff's Labor Law 241(6) claims (specifically as to violations 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2)) and Labor Law § 200, be reversed.

Dated: March 20, 2024
Rochester, New York

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: March 20, 2024

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 21, 2024

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Sworn to before me on March 21, 2024

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