To be Argued by:
C. BRIGGS JOHNSON
(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 Appellate Case 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,

Index No.
159007/13

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

– and –

CBRE INC.,

Defendant-Respondent.

(For Continuation of Caption See Inside Cover)

BRIEF FOR DEFENDANT/THIRD-PARTY DEFENDANT-RESPONDENT CBRE, INC.

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Date Completed: May 8, 2024

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.

Second Third-Party Index No. 590202/14

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.

Third Third-Party Index No. 595439/18

DISCLOSURE STATEMENT

Pursuant to 22 NYCRR Part 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, Defendant-Appellant-Respondent, CBRE, Inc., responds as follows:

That the following companies are parent companies of CBRE, Inc.: CBRE Group, Inc.; CBRE Services, Inc.; CB/TCC Global Holdings Limited; and CB/TCC, LLC (direct); and

That the attached companies are the subsidiaries and affiliates of CBRE, Inc. (See attached Microsoft Excel Spreadsheet).

Report Name: CBRE, Inc. Ownership Holdings
Exported On: 1/6/2023

Entity Name	Security/Interest	%Owned
Austin-Vanguard Properties, Inc.	Common Stock	100.00
Buildingi Software and Services CR, S.R.L.	Shares	100.00
CB Richard Ellis - N.E. Partners, L.P.	Percentage Ownership Interest	100.00
CB Richard Ellis Sports LLC	Percentage Ownership Interest	83.33
CBRE Acquisition, LLC	Percentage Ownership Interest	100.00
CBRE Capital Advisors, Inc.	Common	100.00
CBRE Capital Markets, Inc.	Common	100.00
CBRE Clarion REI Holding, Inc.	Common Stock	100.00
CBRE Consulting USA, LLC	Percentage Ownership Interest	100.00
CBRE Consulting, Inc.	Common	100.00
CBRE Design Collective, Inc.	Common Shares	100.00
CBRE Floored Acquisition LLC	Percentage Ownership Interest	100.00
CBRE Government Services, LLC	Percentage Ownership Interest	100.00
CBRE GWS Licentia, LLC	Percentage Ownership Interest	100.00
CBRE GWS LLC	Units	100.00
CBRE GWS Real Estate Services, Inc.	Common Stock	100.00
CBRE GWS Real Estate Services, LLC	Units	100.00
CBRE Hana Company Holdings, LLC	Percentage Ownership Interest	100.00
CBRE Hawaii, Inc.	Common	100.00
CBRE Holdco, Inc.	Common Stock	100.00
CBRE Investment Management, Inc.	Common	100.00
CBRE Investment Management, LLC	Percentage Ownership Interest	100.00
CBRE Partner, Inc.	Common	51.69
CBRE Redmond Woods Washington, Inc.	Common	100.00
CBRE Security Services, Inc.	Common	100.00
CBRE TCC USLP Co-Invest, LLC	Percentage Ownership Interest	100.00
CBRE Technical Services, LLC	Percentage Ownership Interest	100.00
Environmental Systems, Inc.	Non-voting Common	100.00
Florida Valuation Group, Inc.	Common Stock	100.00
Forum Analytics, L.L.C.	Percentage Ownership Interest	100.00
FS WP Holdco, Inc.	Common Stock	100.00
Full Spectrum Acquisition Corp.	Common Stock	100.00
Insignia/ESG Capital Corporation	Class A Common Stock	100.00
IRC-Interstate Realty Corporation	Common Stock	100.00
KLMK Group, Inc.	Common Stock	100.00
Koll Investment Management, Inc.	Common	100.00
Tax Credit Group Holdings, LLC	Percentage Ownership Interest	100.00
Tax Credit Group II, LLC	Percentage Ownership Interest	100.00
Tax Credit Group, LLC	Percentage Ownership Interest	100.00
TCG Capital Markets, LLLP	Percentage Ownership Interest	100.00
Trammell Crow Company, LLC	Percentage Ownership Interest	100.00
Union Gaming Group, LLC	Percentage Ownership Interest	100.00
Whitestone Research Corporation	Common Shares	100.00

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PRELIMINARY STATEMENT

Defendant-Respondent, CBRE Inc., ("CBRE"), respectfully submits this brief in opposition to plaintiff's appeal from an Order of the Appellate Division, First Department, dated August 16, 2022, and entered by the Clerk on that same date, which dismissed plaintiff's complaint in its entirety (2636-2644).[1] This Court should affirm.

In this personal injury action, plaintiff claims that he injured himself while slipping on concrete dust or particles or granules – they were so small that he never saw them – created by his employer as a part of its ongoing glass installation work at a construction project on the 19th Floor of a building in Manhattan. It went undisputed that plaintiff's employer, A-Val, created these particles when it formed the channels or space in the floor to install the glass.

Defendant 200 Park LP owned the building, and CBRE leased the 19th floor. CBRE hired Structure Tone as the general contractor, which hired plaintiff's employer, A-Val, to perform glass work.

First, plaintiff's leave application to this Court was untimely by one day, depriving this Court of the jurisdiction to entertain the appeal.

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[1] Numbers in parentheses refer to the page numbers of the Record on Appeal.

There is no discretion here. There are no choices. This jurisdictional defect cannot be cured, as the notice of entry e-filed by Structure Tone started plaintiff's right to appeal against *all* parties.

New York's General Construction Law § 20 ("NY GCL"), regarding the computation of time in calculating a deadline, does not "begin[] on day two" or two days after the deadline begins to run (App. Br. at 17). Rather, the statute requires the calculating or counting to begin one day after the deadline begins to run – *i.e.*, the date of "reckoning" – or, "exclusive of the calendar day from which the reckoning is made." NY GCL § 20.

In other words, it is only the day that the *counting* begins – the "reckoning" day; the date the deadline begins to run – that is excluded from the calculation, but the deadline day and day two are included in the calculations; the litigant is not entitled to one extra day after the deadline expires or after the deadline begins to run (*see* Point I, *infra*).

Nevertheless, on the merits, plaintiff, a glazier, testified that when he slipped, he was moving glass and that the glass was to divide a hallway and an interior office after the project finished. Plaintiff attributed his injuries to tiny concrete dust or particles or granules on the floor – or concrete crumbs that he admitted were a necessary

byproduct of the glass installation work still being performed by him and his A-Val co-workers.

It went undisputed that these “minute” (plaintiff’s own words) particles were created by his employer due to the necessary chip or channel work that created the space in the concrete floor for the glass to be installed; that there were no alternative options – that these particles needed to be created, as a part of the ongoing work. It also went undisputed that these particles were so small that plaintiff could not see them; that they were undetectable to the human eye – particles so small that a broom would not have caught them.

Or to put the point another way, the Labor Law § 241(6) claim is meritless because plaintiff’s co-workers created the incidental concrete dust as a part of the ongoing glass installation work. These particles were a necessary byproduct of that work as A-Val *needed* to create channels in the floor to install that glass, and this work created the particles (*see* Point II-A, *infra*).

And the Labor Law § 241(6) claim fails whether these concrete granules or specks were created by A-Val or some other contractor – and regardless of *when* they were created – as tiny or minute concrete particles, or imperfections on an unfinished concrete floor, are a

standard reality for all ongoing construction projects in connection with unfinished floors. This is not a situation that can be avoided on an ongoing project. An unfinished concrete floor can never be completely free of these types of particles (*see* Point II-B, *infra*).

Further, plaintiff erroneously frames the issue before this Court as if randomly placed debris played a role in his accident, such as discarded garbage or materials that had existed for days or weeks or months (*see gen.*, App. Br.). But this is untrue. Plaintiff testified that he slipped on these tiny concrete granulates and not on any debris – that any such debris could not have proximately caused his accident – and he admitted that this so-called debris was integral to his work.

Plaintiff testified that it was standard practice for A-Val to take "debris" or sheetrock from the project and to place it on the ground, so the glass was not directly on the floor – he called it a rug or a cushion for the glass to protect the glass and the floor. Thus, this "debris" was also integral to A-Val's work (*see* Points II-C and II-D, *infra*).

Further, the First Department correctly dismissed plaintiff's Labor Law § 241(6) claim as the industrial code sections relied on by plaintiff are factually inapplicable. This is because: incidental construction particles are not a slipping hazard within the meaning of

Industrial Code § 23-1.7(d); and since plaintiff admitted that he only ever slipped – that he never tripped – defeating the Industrial Code §§ 23-1.7(e)(1) and (e)(2) claims. Further, plaintiff's expert's opinion on the applicability of the codes is irrelevant as that is a pure question of law for this Court to decide (*see* Point III, *infra*).

Finally, the First Department correctly dismissed the Labor Law § 200 and common-law negligence claims against CBRE as plaintiff fell over concrete granulates or dust created through the means and methods of his employer's ongoing work – the particles were inherent to that work – and CBRE never had the authority to, nor did it ever: direct, supervise, or control any aspect of the project, nor did it provide any of the materials, tools, or equipment (*see* Point IV-A, *infra*).

Additionally, those claims are still unavailing against CBRE as CBRE never created nor had notice of the insignificant concrete particles. It is undisputed that: A-Val created this condition; CBRE had no employees present on the project to have noticed the condition; plaintiff testified that he never complained to CBRE about the condition; and there is insufficient evidence in the record to allow an inference on constructive notice (*see* Point IV-B, *infra*).

COUNTER-QUESTIONS PRESENTED

1. Was plaintiff's leave application untimely, depriving this Court of the jurisdiction to entertain this appeal?

The First Department never reached this question. This Court should, and answer, "yes."

2. Was the Labor Law § 241(6) claim properly dismissed were the construction particles or dust involved in the accident were created as a necessary byproduct of that ongoing work?

The First Department answered, "yes." This Court should affirm.

3. Is plaintiff's Labor Law § 241(6) claim meritless where the industrial codes relied upon him are factually inapplicable?

The First Department answered, "yes." This Court should affirm.

4. Were the Labor Law § 200 and common-law negligence claims properly dismissed against CBRE where the concrete particles were inherent in plaintiff's work, and CBRE had no authority over the project; and where CBRE did not create or have notice of those particles?

The First Department answered, "yes." This Court should affirm.

COUNTER-STATEMENT OF THE FACTS

The background

Plaintiff claims that on June 2, 2011, at approximately 1 PM, he injured himself while slipping slightly forward on tiny (or in his word "minute") concrete particles or crumbs or dust or granulates during an ongoing construction project (the 19th Floor of a building located at 200 Park Avenue in Manhattan ["the project"]) (458, 466). He may have called them "pebbles", but he admitted that this incidental concrete matter was so small that he never saw it (500-02).

At that time, defendant 200 Park LP ("200 Park") owned the building, and CBRE leased the 19th floor (1276, 1277-1278, 1280, 1289). CBRE hired defendant Structure Tone Global Services, Inc. ("Structure Tone") as the general contractor (461-462, 1103-1222, 1238), which hired plaintiff's employer, A-Val Architectural Metal III, LLC ("A-Val"), to perform glass installation work (458-459, 467, 472-473).

Mr. Bryan Orsini testified that he was employed by Structure Tone as the construction superintendent for the project (1044-1045), and that CBRE hired Structure Tone to demolish, *inter alia*, the 19th floor and to rebuild it in accordance with CBRE's wishes (1068).

Plaintiff, a glazier, testified that when he injured himself, he was moving glass within *open* office space and that the glass was to divide a hallway and an interior office after the project was done (485, 616).

Plaintiff's responsibilities included "all types of glass installations," and caulking: "[e]verything that has to do with glass" (441, 466). Plaintiff installed "huge panels of glass" that weighed "up to 500 pounds" (466).

Plaintiff's action is only predicated upon the alleged violation of Labor Law §§ 241(6) and 200, and common-law negligence principles (120-138).

The underlying accident

When plaintiff injured himself, he was lifting a piece of glass "that weighed about 500 pounds," and he had previously told A-Val that he needed at least five men to install it (479, 484, 487). The glass was one of eight glass pieces "laying down up against [a] wall" (485).

Before the glass was installed, it needed to be moved about ten feet from where it was laid and brought to the installation location (486). At first, five individuals moved the glass by hand (with suction cups) – all of them standing on one side of the glass: one in the front, one in the back, and three in the middle (487-489).

After the glass was moved to the installation area, they stood the glass up, and A-Val took one of the five glaziers away, leaving four individuals to install the glass (489-491).

The glass was to be installed into a track or channel on the floor by the four remaining workers, including plaintiff (490-491). That track was made of aluminum, and it was created by A-Val workers (491-492, 501). When plaintiff and the three others lifted the glass, right before installation, two of them had trouble lifting it (497). At that point, plaintiff testified that:

> [t]he glass was coming down on me and [it] was going to crush me; me, myself, and the men [next] to me. So[,] I used all my strength in my body to prevent [the glass] from falling on me.

(497, 644, 646-647). Plaintiff continued,

> When I lifted up the glass and when I went to install the glass...there was something on the ground, it must have been pebbles, it must have been something that when I put my foot down, my foot slipped [a few inches forward on the concrete floor, towards the channel] and that was when [his 'upper body jolted backwards', and he used all his strength to prevent the glass from coming down on him and his co-workers, allegedly causing his injuries].

(499, 635-637, 640-45).

Plaintiff had seen these minuscule concrete particles or dust or crumbs or flecks – what he termed "small, little rocks" – before the accident: "[t]here was debris all over the floor. It was an unfinished [concrete] floor," which included the area in question (500, 502, 556-557).

However, plaintiff did nothing to clean the area near and around the installation of the glass beforehand because it was "not [his] job" (501); nor did he ever complain about the particles (826); nor did he have any idea how long the flecks he slipped on were present (370-371).

The concrete dust or particles were created by A-Val workers as a necessary byproduct of their ongoing glass installation work

Plaintiff testified that the concrete particles were the result of the track or channel work (or "chip" work) performed by other A-Val workers in the area where the glass was to be installed (490-492, 501--504). The channel was necessary because it created the space in the floor that allowed the glass to be installed (*id.*).

CBRE had no authority to, nor did it ever: direct, supervise, or control the project's work; nor did CBRE provide any tools, materials, or equipment

Plaintiff never spoke to anyone from CBRE on the relevant date (474-475), and no CBRE employees were present that day (801). This makes sense because plaintiff testified that CBRE never directed the means or methods of plaintiff's work, nor did anyone from CBRE ever tell plaintiff how to do his work (801, 820). Plaintiff also never complained to anyone from CBRE on any aspect of the project (801).

Plaintiff only received his work instructions from A-Val's "glass foreman" (462). A-Val gave plaintiff instructions each day at the project, such as the area where he would work (462-463, 469-470). In fact, plaintiff acted as a foreman for A-Val, directing his and the other glaziers work (470-471). On the day of and the day after his accident, plaintiff received his work instructions from another A-Val foreman (568-571, 582, 677-679).

Sheldon Franco was employed as CBRE's director of facilities at the time of the accident (1276). Franco testified that CBRE was never involved in, nor present for, the supervision or overseeing of any of the project (1288). Indeed, CBRE never performed any safety or any other

inspections for the project because that was Structure Tone's responsibility (1284-1285).

Mr. Orsini of Structure Tone confirmed that CBRE never provided any equipment for the project, nor did CBRE ever direct the manner and method of any of the work (1069). Instead, every contractor – *e.g.*, plaintiff and A-Val – was responsible for providing their own tools and equipment (1071).

Plaintiff's expert's affidavit lacked probative value as the applicability of an industrial code is a question of law for the Court to decide

Plaintiff's engineer opined on the applicability of Industrial Code sections 23-1.7(d) and 23-1.7(e)(2), and whether the defendants owed plaintiff a legal duty (1874-1876), even though those are legal questions that only the Court can decide.

CBRE's Motion

In its summary judgment motion, CBRE argued that plaintiff's common-law negligence and Labor Law § 200 claims failed because his accident arose out of the means and methods of the work – A-Val's work created the dust – and because CBRE never had the authority to,

nor did it ever: direct, supervise, or control the work; nor did CBRE ever provide any of the tools, materials, or equipment (2391-2393).

Those claims additionally failed because CBRE never created or had notice of this condition since: A-Val created it; CBRE had no one present on the project to have created or noticed it; neither plaintiff nor anyone else ever complained about the concrete crumbs; and because plaintiff had no idea how long the condition existed (2393).

CBRE also proved the that the Labor Law § 241(6) claim lacked merit because: (a) the glass installation process that created the dust was integral or inherent to the work; (b) none of the industrial code provisions plaintiff relied on applied; and (c) even if they applied, their alleged violation did not proximately cause the accident (2394-2396, 2550-2551).

Plaintiff opposed, arguing that Industrial Code sections 23-1.7(d) and 23-1.7(e)(2) applied despite his concession and discussion of case law demonstrating that open areas – like the area where plaintiff fell – were not covered by those section (1858-1861).[2]

Plaintiff also referenced the report of his expert engineer regarding the alleged Industrial Code violations (1855, 1861), even

[2] CBRE adopts and incorporates by reference all arguments submitted by Structure Tone on this appeal regarding the passageway argument.

though the applicability of the Codes is purely a legal question reserved for the Court.

Plaintiff opposed CBRE's motion on Labor Law § 200 and common-law negligence grounds, mistakenly arguing that he slipped on a dangerous condition, when the evidence showed that he slipped on a necessary byproduct of the means and methods of the work (1862-1868). In reply, CBRE reiterated the same arguments (2456-2470).

The Motion Court's Order

The Motion Court denied CBRE's motion under Labor Law § 241(6). The Court held that the tiny concrete dust – the dust created by A-Val during the in-progress glass installation work – was not integral to the work because that work "had already been completed" (26-28), even though the glass installation work was ongoing.

The Court further held that, on plaintiff's negligence and Labor Law § 200 claims, that the accident "arose out of an alleged dangerous premises condition, not the means and methods of the work," and that defendants failed to demonstrate that they lacked notice of the concrete particles as they never submitted evidence of an inspection of that area (30-31).

CBRE's appeal, and the First Department's decision and order

CBRE raised the same arguments that it made in the Motion Court to the Appellate Division, First Department. The First Department accepted those arguments, and then dismissed plaintiff's complaint.

The First Department noted that plaintiff's accident occurred while he tried to install the glass, when he "stepped forward to place the glass into the track, he stepped on 'minute' pebbles near the track." (2639).

Then, the Court dismissed the Labor Law § 241(6) claim because: the tiny or minute concrete particles did not render the floor "'a "slippery condition"' nor a "'foreign substance that may cause slippery footing'" within the meaning of Industrial Code § 23-1.7(d); and the open area where plaintiff fell was not a passageway within the meaning of Industrial Code § 23-1.7(e)(2) (2639).

Further, the Labor Law § 241(6) claim also failed since:

> the pebbles were debris that were an integral part of the construction work. The integral to the work defense applies to things and conditions that are an integral part of the construction, not just the specific task a

> plaintiff may be performing at the time of the accident.

(2639).

Later, the Court dismissed the Labor Law § 200 and negligence claims against CBRE because the evidence was "uncontroverted" that CBRE "did not create the [tiny concrete particles], nor did they have notice of [those particles]", and since CBRE established that it "had no control over the means and methods plaintiff used in performing the work." (2639-40). The Court noted that the "pebbles were not an existing defect or dangerous condition of the property, but rather were created by plaintiff's employer's work and the manner in which it was performed" (2640).

ARGUMENT

POINT I

PLAINTIFF'S LEAVE APPLICATION WAS SERVED ONE DAY LATE, DEPRIVING THIS COURT OF THE JURISDICTION TO ENTERTAIN THE APPEAL

Plaintiff's leave application was served one day late, depriving this Court of the jurisdiction to entertain this appeal. There is no discretion to decide an untimely leave application. There are no choices or alternatives. On this point, CBRE adopts and incorporates by reference all the arguments raised by Structure Tone in its pending motion to dismiss, and in Structure Tone's brief.

CBRE adds that it is undisputed that *plaintiff* initiated this action in the Motion Court through NYSCEF; that he consented to receive all filings through NYSCEF in the First Department and in the Motion Court, and that plaintiff received all such filings and notifications in both Courts. Thus, the only issue here is whether plaintiff's math is correct. It is not.

Plaintiff's leave application was untimely because, as he admits, he was served with notice of entry of the Order denying his motion to reargue and for leave to appeal to this Court on November 22, 2022. That started the clock on plaintiff's right to appeal against *all* parties, and he had thirty days from that date to *serve* a motion to this Court

seeking leave to appeal (*see* CPLR §§ 5513(a) and (b)). As the Second Department has explained:

> The amendment to CPLR 5513(a) expressly provides for the commencement of the time to appeal as running from service of the order or with written notice of entry by 'a' party. In interpreting statutes, courts look first to the statutory text as the clearest indicator of legislative intent…Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning…With that all in mind, the language of CPLR 5513(a) as to who serves notice of entry is not limited to the 'prevailing party,' or to 'the appealing party,' or to 'the party seeking to limit an adversary's appellate time.' Rather, 'a' party, which is unrestricted, necessarily refers to 'any' party to an action. As a result, the service of an order or judgment with written notice of entry commences the 30-day time to appeal as to not only the party performing the service, but as to all other parties as well.

W. Rogowski Farm, LLC v. County of Orange, 171 A.D.3d 79, 87-88 (2d Dep't 2019) (dismissing plaintiff's appeal as untimely as to all the defendants since plaintiff's "time to appeal the order as to all of the defendants" began to run as soon as one defendant served the order with written notice of entry) (internal citations omitted).

And the amendment to CPLR § 5513 makes perfect sense, as it would be illogical and irrational to have each party file a notice of entry from a *single* order, especially in the e-filing age where each party

receives the e-filing notifications instantaneously. It would not make much sense for each party to file the notice of entry multiple times regarding a *single* order, as multiple notices of entry would create unnecessary confusion and place further burdens on an already overtaxed Court system (which notice of entry applies, when does the time begin to run, and who does the notice of entry apply to?). There is no need to litigate this issue after the CPLR § 5513 amendment.

Here, however, plaintiff did not *serve* his motion until 31 days later, on December 23, 2023. Of course, this means that the motion was untimely, as a motion is *made* – *e.g.*, indicating whether it is timely – when it is *served*. "A motion on notice is made when a notice of the motion or an order to show cause is served." CPLR § 2211; *City Bank Farmers Tr. Co. v. Cohen*, 300 N.Y. 361, 367 (1950)("It is statutory law that [a] motion is made when a notice thereof or an order to show cause is duly served.") (Internal citations and quotation marks omitted).

Further, New York's General Construction Law § 20 ("NY GCL"), regarding the computation of time in calculating a deadline, does not "begin[] on day two", or two days after the deadline begins to run (App. Br. at 17). The statute requires the calculating or counting to begin *one* day after the deadline begins to run – *i.e.*, the date of "reckoning" – the

statute explicitly states that the computation is "exclusive of the calendar day from which the reckoning is made." NY GCL § 20.

In other words, it is only the day that the *counting* begins – the "reckoning" day; the date the deadline begins to run – that is excluded from the calculation; but the deadline day, and the day after the reckoning, is included in the calculations; the litigant is not entitled to one extra day after the deadline expires, or one extra day before the calculating begins. "The proper method when computing time periods is to exclude the day of the event and to include the last day up to midnight of that day (General Construction Law § 20)." *Bacalokonstantis v. Nichols*, 141 A.D.2d 482, 484 (2d Dep't 1988); *see Kane v. City of Brooklyn*, 114 N.Y. 586, 594 (1889)("The general rule for the computation of time in this state is to exclude the first day and to include the last"); *see also H. E. & S. Transp. Corp. v. Checker Cab Sales Corp.*, 271 N.Y. 239, 242 (1936)(same).

Accordingly, this Court should not award plaintiff any relief based on one simple yet dispositive fact: his leave application was untimely by one day, depriving this Court of the jurisdiction to entertain the appeal. There is no discretion or choice here, as the defect is jurisdictional in nature. This is dispositive.

POINT II

THE LABOR LAW § 241(6) CLAIM FAILS BECAUSE THE TINY CONCRETE PARTICLES OR DUST OR GRANULATES WERE CREATED AS A NECESSARY AND UNAVOIDABLE BYPRODUCT OF THE ONGOING WORK – THE CONCRETE PARTICLES WERE FORMED AS A RESULT OF THE CHANNEL WORK IN THE FLOOR, WHICH ALLOWED THE GLASS TO BE INSTALLED

Plaintiff's Labor Law § 241(6) claim is unsustainable because his A-Val co-workers created the incidental concrete particles or dust or granulates as a part of the ongoing glass installation work. The concrete particles were a necessary byproduct of that work as A-Val *needed* to create channels in the floor to install that glass, which created the miniscule concrete crumbs at issue.

And Labor Law § 241(6) does not apply regardless of whether this concrete dust was created by A-Val or some other contractor – and regardless of *when* those particles were created – as tiny or minute concrete particles or imperfections on an unfinished concrete floor are a standard reality for all ongoing construction projects in connection with unfinished floors. This is not a situation that can be avoided on an ongoing project.

A. Labor Law § 241(6) does not apply to incidental construction dust or particles created in connection with, in furtherance of, and that is necessary to the ongoing construction

The integral to the work defense applies to this case based on this Court's own recent holding. That doctrine:

> applies only when the [condition] is inherent to the task at hand, and not...when a defendant or third party's negligence created a [condition] that was avoidable without obstructing the work or imperiling the worker.

Bazdaric v. Almah Partners LLC, 2024 WL 674245 (2024).

In *Ghany v. BC Tile Contractors, Inc.*, 95 A.D.3d 768 (1st Dep't 2012), plaintiff "tripped over a small stone" while carrying another extremely heavy stone, and "the small stone was either created during the delivery of" other stones to the project, "or when the larger stones were sized by plaintiff and his coworkers." *Id.* at 768. The Court affirmed the Order dismissing plaintiff's Labor Law § 241(6) claim because, as here:

> the small stone on which plaintiff allegedly fell was 'an unavoidable and inherent result' of the work being performed at the site.

Id. at 769; *see Torres v. Triborough Bridge and Tunnel Auth.*, 193 A.D.3d 665 (1st Dep't 2021)(same "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").

Moye v. Alphonse Hotel Corp., 205 A.D.3d 907, 908 (2d Dep't 2022) is also persuasive. In *Moye*, plaintiff tripped "on a pile of debris" that was directly related to and caused by his ongoing demolition work at the relevant time. *Id.* at 908. The Court affirmed the dismissal of the Labor Law § 241(6) claim because "the debris upon which the plaintiff allegedly tripped was an integral part of the ongoing demolition work being performed." *Id.* at 908.

In *Harris v. Rochester Gas & Elec. Corp.*, 11 A.D.3d 1032 (4th Dep't 2004), the Court reached the same result. There, plaintiff was injured while using a jack hammer as a part of an ongoing construction project, which created the "loose debris" that contributed to his accident – like the concrete particles or dust created by the channel work here. *Id.* at 1033. The Court dismissed the Labor Law § 241(6) claim because:

> [t]he accumulation of the concrete debris in the work area 'was an unavoidable and inherent

> result of [the] work at a[n] ongoing [construction project].

Id. at 1033.

Cabrera v. Sea Cliff Water Co., 6 A.D.3d 315, 316-17 (1st Dep't 2004) is no different. Plaintiff injured himself over accumulated debris – sheet rock *dust* and *sawdust* – made by the ongoing construction project. Plaintiff and his co-workers had created the dust by cutting sheet rock and plywood in preparation for their work. *Id.* at 316. The Court dismissed the Labor Law § 241(6) claim because:

> the sheet rock dust and sawdust appear to have been an unavoidable and inherent result of the cutting of the sheet rock and plywood. 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. at 316.

In *Bond v. York Hunter Const., Inc.*, 270 A.D.2d 112 (1st Dep't 2000), *aff'd*, 95 N.Y.2d 883 (2000) – where plaintiff "landed on debris" on a construction project after slipping on grease – *this Court* affirmed that: "the accumulation of debris was an unavoidable and inherent result of work at [an] on-going [construction] project, and therefore provides no basis for imposing liability" under Labor Law § 241(6). *Id.* at 113.

All of the Departments have consistently agreed on this interpretation of the integral to the work defense – no conflict exists. *Cooper v. Sonwil Distrib. Ctr., Inc.*, 15 A.D.3d 878 (4th Dep't 2005) (same holding as *Bond* "when plaintiff tripped on debris [created by him and his coworkers] while he was performing demolition work at defendant's warehouse"); *Salinas v. Barney Skanska Const. Co.*, 2 A.D.3d 619, 622 (2d Dep't 2003) (same); *Harvey v. Morse Diesel Intern., Inc.*, 299 A.D.2d 451, 453 (2d Dep't 2002) (same regarding an electrical cable that plaintiff discarded); *Alvia v. Teman Elec. Contr., Inc.*, 287 A.D.2d 421, 423 (2d Dep't 2001) (same where plaintiff was removing and stacking the plywood on which he tripped).

Similarly, here, plaintiff testified that the "minute" concrete dust or crumbs or granulate were an incidental result of the track or channel work performed by other A-Val workers – the channel was located and formed right next to these minute particles – and that these particles were a necessary byproduct of the ongoing glass installation work as the glass needed to be installed into these tracks or channels (490-492, 500-504). *See Lopez v. Edge 11211, LLC*, 150 A.D.3d 1214, 1215 (2d Dep't 2017)(affirming the dismissal of the Labor Law § 241(6) claim

where "the protective rosin paper upon which the plaintiff slipped was an integral part of [his and his employer's] tile work").

Again, the glass installation work was *still ongoing*, as plaintiff was installing glass when he fell (485, 616). This is dispositive. *See Mateo v. Iannelli Constr. Co. Inc.*, 201 A.D.3d 411 (1st Dep't 2022) (dismissing the Labor Law § 241(6) claim where plaintiff "fell after trying to climb over an air duct that was left on the floor" as a part of the ongoing "demolition work his employer was subcontracted to perform").

Thus, this concrete dust was "'an unavoidable and inherent result' of the work being performed at the site" and thus integral to the project. *See Ghany*, 95 A.D.3d at 768-69; *Torres*, 193 A.D.3d 665. The dust or particles were necessary. A-Val *needed* to create the channels in the concrete floor that allowed the glass to be installed, and the channels created those concrete particles. The particles were therefore a necessary byproduct of that work.

Plaintiff misunderstands that the dispositive inquiry is whether the concrete crumbs were created in furtherance of the ongoing project. It does not matter that plaintiff did not personally create the dust or granulates, nor does it matter that he was not specifically

assigned to clean them up. All that matters is that his co-workers created them as a necessary byproduct of their ongoing work. As *this Court* and the First Department have uniformly explained, the integral to the 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 A.D.3d 479, 481 (1st Dep't 2020), *quoting*, *O'Sullivan v. IDI Const. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dep't 2006), *aff'd*, 7 N.Y.3d 805 (2006).

Plaintiff fails to distinguish the dispositive case law relied on by CBRE. Plaintiff incorrectly claims that the Court in *Ghany* found an issue of fact on the Labor Law § 241(6) claim, and that plaintiff was assigned to clean up the debris there (App. Br. at 31).

By contrast, the Court affirmed the Order that dismissed plaintiff's Labor Law § 241(6) claim in *Ghany* because – just like plaintiff's co-workers creating the concrete crumbs in this case – plaintiff "tripped over a small stone" while carrying another extremely heavy stone, and "the small stone was either created during the delivery of" other stones to the project, "or when the larger stones were sized by plaintiff and his coworkers." *Id.* at 768. Thus,

> the small stone on which plaintiff allegedly fell was 'an unavoidable and inherent result' of the work being performed at the site.

Id. at 769.

Plaintiff also never distinguished *Torres*, 193 A.D.3d 665, *supra* (App. Br. at 31). This makes sense, however, since the fact that the plaintiff in *Torres* that "had been assigned to clean up" the demolition debris that he fell over was only *incidental* to the holding in *Torres*. *Id.* 665. The dispositive fact there was that plaintiff fell over "demolition debris [that] resulted directly from the ongoing work being performed." *Id.* at 665.

Indeed, the Court in *Torres* led with the fact that the debris had been created by the ongoing work in its holding – the fact that plaintiff had been assigned to clean up the debris came after and thus was tangential to that finding – and because the Court then cited *Solis v. 32 Sixth Ave. Co. LLC*, 38 A.D.3d 389 (1st Dep't 2007) with approval.

And the reliance on *Solis* matters a great deal here. This is because there, the Court *never discussed* whether plaintiff was assigned to clean up the debris involved in his accident when affirming the dismissal of plaintiff's Labor Law § 241(6) claim. *Id.* at 390. Instead, that claim failed:

> because the debris covering the scaffold resulted directly from the masonry work plaintiff and his coworker were performing, and thus constituted an integral part of that work.

Id. at 390.

For identical reasons, plaintiff cannot distinguish: *Cabrera*, 6 A.D.3d 315; *Bond*, 270 A.D.2d 112; *Cooper*, 15 A.D.3d 878; and *Salinas*, 2 A.D.3d 619, *supra*. Indeed, *Bond* applies because there, as here, plaintiff claimed that the debris he landed on, and that contributed to his accident, constituted an Industrial Code § 23-1.7(d) violation. *Bond*, 270 A.D.2d at 112. Plaintiff was wrong as "the accumulation of debris was an unavoidable and inherent result of work at [an] on-going demolition project, and therefore provides no basis for imposing liability." *Id*. at 113. And *this Court* affirmed that holding. *Bond*, 270 A.D.2d 112, *aff'd*, 95 N.Y.2d 883.

To reiterate, it is not "relevant" whether "plaintiff created or was in the process of cleaning the debris which caused his fall." (App. Br. at 30). All that matters is whether these tiny concrete particles were an inherent byproduct of the ongoing work. They were, rendering the Labor Law § 241(6) meritless.

Zieris v. City of New York, 93 A.D.3d 479, 479 (1st Dep't 2012) proves the point. There, the Court affirmed the Order that dismissed plaintiff's Industrial Code § 23-1.7(e) claim when plaintiff injured himself "while performing rivet removal work on a bridge when he stepped on a loose rivet stem and fell." *Id.* at 479. The Court rejected plaintiff's "argument that the rivet did not originate from the work that he himself was performing [as] unavailing" since the:

> rivets left by his coworkers, who were performing the same rivet removal work, could still be deemed an integral part of the work.

Id. at 480.

Accordingly, this Court should affirm the dismissal of plaintiff's Labor Law § 241(6) claim.

B. Regardless of when the concrete dust was created, Labor Law § 241(6) should not apply to a miniscule condition created by the ongoing work as it would be impossible for the in-progress project to be free of this condition at all times

Regardless of whether the concrete dust or particles were created by A-Val or some other contractor – and regardless of *when* those

crumbs were created – tiny or minute concrete granulates or imperfections on an unfinished concrete floor are a standard reality for all ongoing construction projects in connection with unfinished floors. This is not a situation that can be avoided on an ongoing project.

In plaintiff's own words, "it was an unfinished [concrete] floor" (500), and the concrete dust was located immediately next to the track created by A-Val to install the glass (500-01). Plaintiff never complained about this insignificant condition as it was infinitesimal – "It was minute" – undetectable to the human eye (501-02). Not even a broom would catch these particles.

The Labor Law "should be construed with a commonsense approach to the realities of the workplace at issue." *Salazar v. Novalex Contr. Corp.*, 18 N.Y.3d 134, 140 (2011)(dismissing the Labor Law §§ 240(1) and 241(6) claims); *see Nicometi v. Vineyards of Fredonia, LLC*, 25 N.Y.3d 90, 101 (2015)(same regarding plaintiff's Labor Law § 240(1) claim).

Furthermore, "[t]he Industrial Code should be *sensibly* interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace." *Bazdaric*, 2024 WL 674245 (internal citation omitted) (emphasis added).

Harris, 11 A.D.3d 1032, *supra*, perfectly underscores this principle in the context of this case. The relevant fact in *Harris* was that plaintiff's jackhammer work created the "loose debris" that caused his accident. *Id.* at 1033. Thus, the Labor Law § 241(6) claim failed as, just like in this case,

> [t]he accumulation of the concrete debris in the work area 'was an unavoidable and inherent result of [the] work at a[n] ongoing [construction project]...It would have been impossible for plaintiff's worksite to be completely free of debris at all times.

Id. at 1033-1034 (internal citations omitted).

Indeed. The Court in *Harris* perfectly described the reality of all construction projects. That on a construction project, it is "impossible for plaintiff's worksite to be completely free of debris at all times." *Id.* at 1033-1044. This is especially true here, where the concrete particles were so small that a broom would not have swept them away.

These concrete dust particles, or trivial imperfections, are simply an unavoidable or inherent reality that exist on all construction projects while work on an unfinished concrete floor is still taking place. It is impossible for a worksite to be always free of such particles, especially particles so small that no human eye can detect them, and where that work is still taking place.

Plaintiff's own testimony supports this reality. Plaintiff described the condition that he purportedly slipped on as "minute", or concrete dust or particles from an unfinished floor (499, 500-04, 819-820). Specifically, plaintiff explained that "I didn't know that that was there. It was minute." (502). The concrete dust was so small that the human eye could not detect it.

Accordingly, this Court should not extend the Labor Law to apply to concrete dust or particles or granulates on an unfinished concrete floor where construction work is still ongoing. A construction site simply cannot be free of these types of particles – especially particles so small that no one can see them – where the work on the project and on the unfinished concrete floor is still taking place.

C. Plaintiff's authorities do not apply because plaintiff confuses the meaning of the words "sufficient" and "necessary"

None of the cases relied on by plaintiff apply. Plaintiff misunderstands that simply because the Courts have previously found that objects that are "purposely laid" or "permanent" to be *sufficient* to deem those objects integral to the work, it does not automatically follow that the Courts *require* an object to be purposely laid or

permanent for that defense to prevail. Plaintiff confuses the meaning of the words "sufficient" and "necessary."

On this point, plaintiff's reliance on *Johnson v. 923 Fifth Ave. Condominium*, 102 A.D.3d 592 (1st Dep't 2013) (App. Br. at 26) is misplaced. That case merely stands for the proposition that Labor Law § 241(6) will not apply if the object that plaintiff tripped over was "purposefully laid" in the area where plaintiff fell – this is sufficient for a dismissal of that claim – and thus that object will be deemed an "integral part of the work" in those situations. *Id.* at 593. In other words, in *Johnson*, it was sufficient that the object that plaintiff tripped over was purposefully laid to find that it was integral to the work, but it was not necessary for the Court's holding.

Indeed, as shown above (*see* Point II-A, *supra*), there is a wide range of other scenarios where a plaintiff has injured himself on construction debris at a construction project that was not purposefully laid, or on a non-permanent object like dust, and where that object was deemed integral to the work. The object need not be "permanent" nor "purposely laid" for plaintiff's Labor Law § 241(6) claim to fail.

For the very same reasons, *Rajkumar v. Budd Contr.* Corp., 77 A.D.3d 595 (1st Dep't 2010), *Hammer v. ACC Constr. Corp.*, 193

A.D.3d 455, 456 (1st Dep't 2021), *O'Sullivan v. IDI Const. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dep't 2006), *aff'd*, 7 N.Y.3d 805 (2006), and *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D.3d 1, 12-13 (1st Dep't 2011) (App. Br. at 25-26, 26) are inapplicable.

D. There is no internal split in the First Department

Contrary to plaintiff's contentions (App. Br. at 29), there is no internal split on this issue within the First Department. Instead, the cases relied on by plaintiff on this point are factually inapplicable, which is why the First Department never used them as guidance when dismissing the complaint.

To be clear, plaintiff frames the issue before this Court as if randomly placed debris played a role in his accident, such as discarded garbage or materials that had existed for days or weeks or months (*see gen.*, App. Br.). But this is untrue based on plaintiff's own testimony where he admits that he slipped on tiny concrete particles and not any such debris (*see* Point II-A, *supra*), but also because that so-called debris was integral to his own work.

Plaintiff testified that it was standard practice for A-Val to take "debris" or sheetrock from the project and to place it on the ground, so the glass was not directly on the floor – he called it a rug or a cushion

for the glass to protect the glass and the floor (600, 826-27). Thus, this "debris" was a part of and necessary to A-Val's work.

For example, in *Lester v. JD Carlisle Dev. Corp., MD.*, 156 A.D.3d 577 (1st Dep't 2017) (App. Br. at 30), unlike here, the "loose granules" that plaintiff fell over had nothing to do with, and were not created by, his work on the project. *Id.* at 578. Instead, those granules were a part of a "waterproof membrane" that "was slippery because it contained granules, i.e., a 'ball bearing' or sand like substance" that was unrelated to plaintiff's job of "constructing a steel frame for a move screen on top of a roof."[3]

Here, though, plaintiff said that the concrete crumbs were the incidental result of the track or channel work performed by other A-Val workers, which was necessary to install the glass; the glass was to be installed into these tracks or channels (490-492, 501-504). And, the project and glass installation work was still ongoing, as plaintiff was installing glass at the relevant time (485, 616).

Plaintiff fares no better with *Singh v. Young Manor, Inc.*, 23 A.D.3d 249 (1st Dep't 2005) (App. Br. at 30). *Singh* does not apply because there, plaintiff slipped on a random "nail near a pile of debris"

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[3] These facts are from the brief submitted by plaintiff-appellant in *Lester*, which can be found on WESTLAW here.

in his work area "that had been permitted to accumulate for *several days*" (*id.* at 249); but here, plaintiff tripped over concrete particles intentionally created by his co-workers, and that were an inherent part of the glass installation work (485, 490-492, 501-504, 616) (emphasis added).

Tighe v. Hennegan Const. Co., Inc., 48 A.D.3d 201 (1st Dep't 2008) (App. Br. at 29-30) is also inapplicable. There, plaintiff injured himself when he fell over "debris accumulated as a result of the demolition" by *another* contractor during plaintiff's electrical work for a *separate* contractor. *Id.* at 202. Thus, *Tighe* is inapplicable as plaintiff's work was not related to the debris he fell over, but here plaintiff slipped on concrete dust directly related to and caused by his employer's work (485, 490-492, 501-504, 616).

The same is true of *Pereira v. New School*, 148 A.D.3d 410, 411-12 (1st Dep't 2017) (App. Br. at 29). Plaintiff forgets that the dispositive inquiry there was that the "discarded concrete" that he fell on was not integral to plaintiff's work as "plaintiff did not work with concrete and concrete was not a part of his [work] responsibilities." *Id.* at 412. Here, the concrete dust plaintiff slipped on was an inherent byproduct of his co-workers' work (485, 490-492, 501, 503-504, 616).

Singh v. Manhattan Ford Lincoln, Inc., 188 A.D.3d 506, 507 (1st Dept 2020) (App. Br. at 30) is also unpersuasive because issues of fact existed in that case on whether the debris was integral to *plaintiff's own* debris removal work. "Specifically," unlike here, "issues exist as to whether plaintiff was engaged *in the same debris removal work* as the workers throwing and pouring it from the sidewalk bridge and sweeping it from the sidewalk below which caused it to accumulate by the dumpster where he slipped." *Id.* at 507. (Emphasis added).

In this case, there is no issue of fact. The evidence shows that plaintiff's own co-workers created the concrete dust as a part of their glass installation work, which was necessary to that in-progress work, rendering the dust integral to the project (485, 490-492, 501-504, 616). Accordingly, this Court should affirm the dismissal of plaintiff's Labor Law § 241(6) claim.

POINT III

NEVERTHELESS, THE INDUSTRIAL CODE SECTIONS RELIED ON ARE FACTUALLY INAPPLICABLE BECAUSE: INCIDENTAL CONSTRUCTION DUST IS NOT A SLIPPING HAZARD UNDER INDUSTRIAL CODE § 23-1.7(D); PLAINTIFF ADMITTED THAT HE ONLY SLIPPED, NECESSARILY DEFEATING THE INDUSTRIAL CODE §§ 23-1.7(E)(1) AND (2) CLAIMS; AND HIS EXPERT'S OPINION IS IRRELEVANT

Nevertheless, the First Department properly dismissed the Labor Law § 241(6) claim as the industrial code sections relied on are factually inapplicable. This is because: incidental construction dust is not a slipping hazard within the meaning of Industrial Code § 23-1.7(d); and plaintiff admitted that he only ever slipped – that he never tripped – defeating the Industrial Code §§ 23-1.7(e)(1) and (e)(2) claims. Further, the expert's opinion on the applicability of the codes is irrelevant since that is a pure question of law for this Court to decide.

The First Department correctly held that Industrial Code § 23-1.7(d) is factually inapplicable because that section only applies to certain expressly defined and similarly related conditions: "ice, snow, water, grease, and any other foreign substance which may cause slippery footing." *Id.*

Bazdaric, 2024 WL 674245, *supra*, does not change this conclusion. There, unlike here, the "plastic covering" that plaintiff

slipped on "was not a component of the escalator" where plaintiff was painting and injured himself, nor was it "necessary to the escalator's functionality." *Id.* Indeed, it was undisputed and corroborated by the parties that the plastic covering was not only the wrong type of covering for the job, but that a safer or non-slippery covering existed. *Id.*

Here, however, plaintiff injured himself on concrete particles or dust created by the construction project (490-492, 501-504), and those conditions are "not the type of [slippery hazard or] foreign substance contemplated by this provision." *Salinas*, 2 A.D.3d at 622 (holding that section 23-1.7(d) was inapplicable where plaintiff slipped on demolition debris); *see Cruz v. Metro. Tr. Auth.*, 193 A.D.3d 639 (1st Dep't 2021)(same regarding the "loose dirt and debris" upon which plaintiff slipped); *D'Acunti v. New York City School Const. Auth.*, 300 A.D.2d 107, 107 (1st Dep't 2002)(same regarding accumulated "dirt and debris" that contributed to the accident); *Rose v. A. Servidone, Inc.*, 268 A.D.2d 516, 518 (2d Dep't 2000)(same where plaintiff fell on unlevel ground "strewn with dirt, pebbles, blacktop, and concrete").

Plaintiff erroneously relied on his expert's opinion that the pebbles were a foreign substance (*see gen.*, App. Br.) – an opinion contrary to the cases above, which excludes debris as a "foreign

substance." Of course, none of these subjective descriptions or opinions matter as the law says otherwise: that incidental construction particles are "not the type of [slippery hazard or] foreign substance contemplated by this provision." *Salinas*, 2 A.D.3d at 622.

Further, plaintiff's admission that he never tripped – that he only ever slipped – dooms his reliance on Industrial Code §§ 23-1.7(e)(1) and (e)(2) as those codes only address "tripping" hazards. As the Appellate Division has repeatedly explained:

> 12 NYCRR 23-1.7(e)(1) and (e)(2), which protect workers from tripping hazards, are inapplicable to the facts of this case, since the accident was the result of a slipping hazard, not a tripping hazard, as the plaintiff testified at his deposition that he 'slipped.'

Dyszkiewicz v. City of New York, 218 A.D.3d 546, 548 (2d Dep't 2023); *see Costa v. State*, 123 A.D.3d 648, 648 (2d Dep't 2014)(Industrial Code §§ 23-1.7(e)(1) and (2) did not apply because plaintiff "did not trip"); *Purcell v. Metlife Inc.*, 108 A.D.3d 431, 432 (1st Dep't 2013)(same regarding § 23-1.7(e)(1) because plaintiff slipped and did not trip); *Gaspar v. Pace Univ.*, 101 A.D.3d 1073, 1074 (2d Dep't 2012)(Industrial Code § 23-1.7(e)(2) did not apply because plaintiff "did not trip").

Plaintiff then misstated the law by arguing that Industrial Code § 23-1.7(e) applies simply because he referred to the particles as "debris" (*see gen.*, App. Br.). But plaintiff's *subjective beliefs* are immaterial to the inquiry regarding whether the concrete dust was inherent or integral to the work.

On this point, plaintiff mistakenly relied on *Maza v. Univ. Ave. Dev. Corp.*, 13 A.D.3d 65 (1st Dep't 2004) below. *Maza* is unavailing because the debris there had not only "been present and continued to accumulate in the courtyard area" where plaintiff fell for at least *four months* – it was thrown there by other workers – but also because that debris was completely unrelated, unconnected, and "not integral to plaintiff's work as a bricklayer." *Id.* at 65-66.

Here, however, the concrete crumbs or particles were relevant, related, connected, and indeed caused by his co-workers' glass ongoing installation work on the project (485, 490-492, 501-504, 616).

Finally, plaintiff incorrectly claims that the jury should decide whether the industrial code sections alleged apply (*see gen.*, App. Br.). He also incorrectly claims that the First Department needed to accept plaintiff's expert's opinions on the interpretation of those codes (*id.*).

Plaintiff is wrong. The Courts of this State have repeatedly stated the exact opposite. That:

> [t]he interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court.

Messina v. City of New York, 300 A.D.2d 121, 123 (1st Dep't 2002); *see Pruszko v. Pine Hollow Country Club, Inc.*, 149 A.D.3d 986, 988 (2d Dep't 2017)(same); *Kelmendi v. 157 Hudson St., LLC*, 137 A.D.3d 567, 568 (1st Dep't 2016)(same); *Penta v. Related Companies, L.P.*, 286 A.D.2d 674, 675 (2d Dep't 2001)(same).

Accordingly, this Court should affirm the dismissal of the Labor Law § 241(6) claim for another reason: because the industrial codes relied on are factually inapplicable, and plaintiff's subjective beliefs and his expert opinions are irrelevant.

POINT IV

THE LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE CLAIMS AGAINST CBRE REMAIN MERITLESS AS: PLAINTIFF'S WORK CREATED THE PARTICLES, AND CBRE NEVER DIRECTED NOR CONTROLLED THAT WORK; AND CBRE HAD NO ONE PRESENT ON THE PROJECT TO HAVE CREATED OR NOTICED THE PARTICLES

The First Department correctly dismissed the Labor Law § 200 and common-law negligence claims against CBRE as plaintiff slipped on concrete dust or particles created by his employer during its still ongoing work, and CBRE never had the authority to, nor did it ever: direct, supervise, or control any aspect of the project, nor did it provide any of the materials, tools, or equipment.

Additionally, CBRE never created nor had notice of the condition as: it is undisputed that A-Val created the dust; CBRE had no employees present on the project to have noticed it; plaintiff testified that he never complained to CBRE about the condition; and there is insufficient evidence in the record to demonstrate how long the granulates existed to allow for a finding of constructive notice.

A. CBRE is not liable for the incidental concrete particles created by plaintiff's employer for its ongoing work as CBRE never directed or controlled the project

CBRE is not liable under Labor Law § 200 or negligence principles because the concrete pebbles or dust were created by plaintiff's co-workers during their ongoing glass installation work, and as CBRE never had the authority to nor did it ever: direct or control that work, nor did it ever provide any of the tools, equipment, or materials. The relevant standard is as follows:

> Claims for personal injury under [Labor Law § 200] and the common law fall into two broad categories: 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...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...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.

Cappabianca v. Skanska USA Bldg. Inc., 99 A.D.3d 139, 143-44 (1st Dep't 2012)(internal citations omitted).

However, the duty a defendant owes to a plaintiff under Labor Law § 200 "does not extend to hazards that are part of, *or inherent in*, the very work the employee is to perform or defects the employee is hired to repair." *Serpas v. Port Auth. of New York and New Jersey*, 218 A.D.3d 620, 621 (2d Dep't 2023)(internal citations and quotations omitted) (emphasis added); *see Fonck v. City of New York*, 198 A.D.3d 874 (2d Dep't 2021); *Cruz*, 193 A.D.3d 639 (same regarding the "loose dirt and debris" that contributed to the accident and that were inherent in the work being performed).

Doran v. JP Walsh Realty Group, LLC, 189 A.D.3d 1363 (2d Dep't 2020) perfectly encapsulates this principle for this case. There, plaintiff was injured during his tree removal work when debris on the ground contributed to his accident, and the debris was created as a part of that ongoing work. *Id.* at 1363-64. The Court dismissed the Labor Law § 200 and negligence claims asserted against certain defendants because, as with CBRE here, none of them had the authority to supervise and control the work, and:

> the debris in the area where the accident occurred was an unavoidable and inherent result of the ongoing tree removal work.

Id. at 1364.

In *Cappabianca*, 99 A.D.3d 139, *supra*, plaintiff was performing masonry work on a pallet, which slipped on water and caused his injuries. *Id.* at 142-143. The water was created by the means and methods of the work: a chainsaw provided by plaintiff's employer that malfunctioned, causing water to spray all over the floor. *Id.* at 142-43. The Court dismissed plaintiff's Labor Law § 200 and negligence claims against the owner of the worksite and the general contractor because they never directed or controlled his work, nor did they provide him with any of the tools or equipment to perform his work, including the defective chainsaw – his employer did. *Id.* at 144; *see Mitchell v. New York Univ.*, 12 A.D.3d 200, 200-01 (1st Dep't 2004)(same result because plaintiff's accident arose out of a muddy condition caused by "water emanating from a machine used by [plaintiff's] employer," and the defendant never oversaw nor directed the project, nor did it provide any tools or equipment for the work).

Similarly, here, plaintiff unequivocally testified that the minute concrete crumbs or particles were created by his own employer, A-Val, as a part of the glass installation process – a process he was engaged in; a process that was still in motion when he fell (501-04, 616). Plaintiff testified that the concrete dust was the result of the track or

channel work – or "chip" work – which was performed by other A-Val workers in furtherance of that work (490-492, 501-504).

And, plaintiff testified that CBRE never directed the means or methods of plaintiff's work, nor did anyone from CBRE ever tell plaintiff how to do his work (801, 820). Plaintiff also never complained to anyone from CBRE regarding any aspect of the project (801).

Instead, plaintiff testified that he only received his work instructions from A-Val's "glass foreman," or himself (462-463, 469-471, 568-571, 582, 677-679). To be sure, CBRE testified that it was never involved in, *nor present for*, the supervision or overseeing of any of the work (1288). Structure Tone confirmed that CBRE never provided any of the tools or equipment for the project, nor did CBRE ever direct the manner and method of any of the work (1069, 1071).

Plaintiff mistakenly characterizes his accident as one arising out of a dangerous condition. Plaintiff is wrong as the uncontradicted evidence establishes that plaintiff's own co-workers from A-Val – through the means and methods of their glass installation work – created the insignificant and infinitesimal concrete particles.

In other words, this is not a case regarding a defective or transient condition – a crack within the floor or discarded garbage, or

a puddle of water or a sheet of ice – rather, this case involves incidental construction particles created during the ongoing project.

In this regard, *Tighe v. Hennegan Const. Co., Inc.*, 48 A.D.3d 201 (1st Dep't 2008) applies. There, plaintiff fell over "debris accumulated as a result of the demolition" work on the project, which is analogous to the concrete dust here. *Id.* at 202. Since plaintiff fell over debris that arose out of the means and methods of that work, the Court dismissed plaintiff's Labor Law § 200 and common-law negligence claims against one of the moving defendants since that defendant:

> did not exercise any control or supervision over the demolition work out of which the injury arose.

Id. at 202.

Accordingly, this Court should affirm the dismissal of the Labor Law § 200 and common-law negligence claims against CBRE.

B. CBRE never created nor had notice of the concrete particles because: A-Val created them, CBRE was never present on site, and plaintiff never complained to CBRE

Regardless of the foregoing, CBRE still cannot be held liable because CBRE never created nor had notice of the incidental concrete

particles or dust as: A-Val created them; CBRE was not present on the project; plaintiff never complained to CBRE; and there is insufficient evidence in the record to establish how long the dust existed to allow a constructive notice finding.

CBRE did not create the dust – A-Val did. Plaintiff admitted that the concrete particles were created by his A-Val co-workers, and it is undisputed that CBRE never performed any work nor provided any of the tools or equipment for the project (*see* Point IV-A, s*upra*).

Moreover, these claims also fail against CBRE because it never had notice of the concrete crumbs: CBRE had no employees present on the project, and plaintiff never complained to CBRE. This is dipositive. As the Courts have explained:

> The Labor Law § 200 claim was also properly dismissed as against [the defendant]. Regardless of the claimed dangerous condition of the worksite, which involved scattered debris…plaintiff failed to show that [defendant] had either actual or constructive notice of such conditions.

Marcano v. Hailey Dev. Group, LLC, 117 A.D.3d 518, 518-19 (1st Dep't 2014); *see Padron v. Granite Broadway Dev. LLC*, 209 A.D.3d 536, 537 (1st Dep't 2022)("[Defendant] established prima facie that it did not create or have actual or constructive notice of the watery condition

by showing that it had no workers onsite and that visits by its owners were unrelated to site safety"); *Prevost v. One City Block LLC*, 155 A.D.3d 531, 534 (1st Dep't 2017)(defendant "established *prima facie* that it did not create the condition and that it had no employees who could have had notice of the loose piece of sprinkler pipe" upon which plaintiff slipped). *DeMaria v. RBNB 20 Owner, LLC*, 129 A.D.3d 623, 626 (1st Dep't 2015)("nothing in the record shows that the owner defendants created or had notice of the dangerous conditions [that] allegedly caused plaintiff's accident").

Here, CBRE never noticed the concrete particles as none of its employees were present on the project (801, 1288), and plaintiff never spoke to anyone from CBRE on the relevant date (474-475). This makes sense because plaintiff testified that CBRE never directed the means or methods of his work, nor did anyone from CBRE ever tell plaintiff how to work (801, 820).

Plaintiff also never complained to anyone from CBRE regarding any aspect of the project (801). Indeed, CBRE testified it was never present to inspect the project because that was Structure Tone's responsibility as the general contractor (1284-1285, 1288).

Further, "[t]he notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken." *Mitchell*, 12 A.D.3d at 201 (holding that the defendant did not have notice of the dangerous condition because a "general awareness…of the debris generated by the excavation work" was insufficient to find that the defendant had notice of the specific condition complained of).

In *Rodriguez v. Dormitory Auth. of State*, 104 A.D.3d 529 (1st Dep't 2013), the Court dismissed plaintiff's Labor Law § 200 and negligence claims because there, as here,

> [p]laintiff's testimony failed to raise an issue of fact, since he merely testified that he had seen similar hazards on the floor on the day of the accident and the day before; there was no testimony indicating how long the specific clamp that caused his fall had been in the location of his accident.

Id. at 530; *see Canning v. Barney's New York*, 289 A.D.2d 32, 33 (1st Dep't 2001)("Plaintiff was only able to demonstrate that complaints were made about the debris, in general, at the construction site. No evidence was submitted to raise a question of fact as to whether this defendant had notice of the [specific] condition").

The Second Department reached a similar result in *Dasilva v. Nussdorf*, 146 A.D.3d 859, 861 (2d Dep't 2017). In *Dasilva*, plaintiff fell from a ladder partly caused by the ladder's placement on ground that was "filled with debris." *Id.* at 859. Nonetheless, the Court dismissed the Labor Law § 200 and common-law negligence claims because, as with CBRE here,

> defendants demonstrated that they did not create the condition and, although they may have had general awareness that the ground was uneven and soft [and filled with debris], such awareness was insufficient to impute notice of an unsafe condition.

Id. at 861; *Zieris*, 93 A.D.3d at 479 (holding that the defendant could not be charged with constructive notice of the rivets that plaintiff fell on as: "it was not possible to catch all of the rivet pieces upon [their] removal and a general awareness of a hazardous condition is insufficient to impute constructive notice").

Similarly, here, CBRE had no notice of the concrete granules plaintiff slipped on because, although plaintiff had generally seen these "small, little rocks" before the accident (500, 502, 556-557), he never complained about them (826), nor did he have any idea how long the condition was present (370-371). And a general awareness that an

unfinished concrete floor on an ongoing construction project might generally have such particles present is insufficient to impute notice.

In other words, since plaintiff has no idea when the concrete dust was created (500-04), there is insufficient evidence to allow a constructive notice finding. *See Amaya v. Purves Holdings LLC*, 194 A.D.3d 536, 536 (1st Dep't 2021) (dismissing the Labor Law § 200 and negligence claims because "the electrical cord or wire on which plaintiff tripped was not attached or plugged into the wall 'for a sufficient length of time prior to the happening of [the] accident to permit the defendant to discover and remedy it'") (internal citations omitted).

Indeed, plaintiff's concession – regarding the extremely small size of the concrete particles (500-04) – militates against a finding that CBRE had constructive notice of them as they were not "visible and apparent" by plaintiff's own admission. *Gordon v. Am. Museum of Nat. History*, 67 N.Y.2d 836, 837 (1986).

Accordingly, the First Department correctly dismissed the Labor Law § 200 and common-law negligence claims against CBRE. That order should therefore be affirmed.

CONCLUSION

Based on the foregoing, this Court should affirm the Appellate Division, First Department's Order because: plaintiff's leave application was untimely; CBRE had no duty to clear the concrete particles or dust created as a necessary byproduct of an ongoing construction project; and this Court should award such other relief that it deems appropriate.

Respectfully Submitted,

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NEW YORK STATE COURT OF APPEALS
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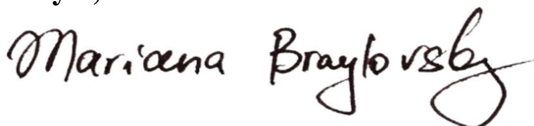

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