To be Argued by:
LOUISE M. CHERKIS
(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 DEFENDANTS/THIRD-PARTY PLAINTIFFS/ THIRD THIRD-PARTY PLAINTIFFS-RESPONDENTS TISHMAN SPEYER PROPERTIES, L.P. & 200 PARK, LP

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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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 500.l(f) of the New York Court of Appeals Rules of Practice, Defendants/Third-Party Plaintiffs-Respondents 200 Park, L.P. and Tishman Speyer Properties, L.P. submit as follows:

200 Park, L.P.'S direct and indirect parents are:

- 200 Park GP, L.L.C.
- 200 Park Senior Mezz, L.P.
- 200 Park Senior Mezz GP, L.L.C.
- 200 Park Junior Mezz, L.P.
- 200 Park Junior Mezz GP, L.L.C.
- 200 Park JV, L.P.
- 200 Park JV GP, L.L.C.
- 200 Park Partners JV, L.P.

200 Park has no subsidiaries.

Tishman Speyer Properties, L.P. Subsidiaries are:

- Tishman Speyer Properties, L.L.C.
- Tishman Speyer Properties 200 Park GP, L.L.C.

Affiliate of Tishman Speyer Properties, L.P. is 200 Park Partners JV, L.P.

Dated: New York, New York
April 1, 2024

Louise M. Cherkis

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QUESTIONS PRESENTED

Statement of Questions Presented Pursuant to Ct. App R. 500.13(a) and (c)(3)

1. Was Plaintiffs' leave application by motion served and filed on December 23, 2022 before this Court untimely depriving this Court of jurisdiction to entertain this appeal in light of the Order with Notice of Entry of the First Department having been served and filed on November 22, 2022 [R2646-2650]?

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

2. Were deficiencies in Plaintiffs-Appellants' Briefing before this Court relating to Park and Tishman of such gravity so as to justify the Court rejecting in its discretion consideration of the appeal as to them including, but not limited to, that (1) Plaintiffs seek relief on a Labor Law 241(6) claim previously dismissed in the Supreme Court New York County 12-14-20 Order, and not appealed before the First Department as to Tishman [R15-31; 2646-2650]; (2) Park and Tishman are erroneously characterized by Plaintiffs' counsel and expert in submissions as being contracting parties in the Project with Structure Tone in the Record and Plaintiffs-Appellants' Brief [R1852-1878; 1103-1222]; and (2) Plaintiffs otherwise failed to adhere to the Court of Appeals Rules?

A. The First Department never reached this question. This Court should answer "Yes."

3. Were Labor Law 241(6) claims appealed from as predicated upon 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2) properly dismissed as to Park and Tishman by the First Department?

A. The First Department answered, "yes." This Court should answer "Yes."

4. Were the Labor Law 200 and common law negligence claims as to Park and Tishman properly dismissed by the First Department?

A. The First Department answered, "yes." This Court should answer "Yes."

PRELIMINARY STATEMENT

Defendants-Respondents 200 Park, LP (hereinafter, "Park") and Tishman Speyer Properties, L.P.(hereinafter "Tishman") (collectively, "P&T") present this Brief in opposition to the appeal before this Honorable Court by Plaintiff-Appellant Felipe Ruisech ("Plaintiff" or "Ruisech") and Martha Ruisech (collectively "Plaintiffs-Appellants" or "Plaintiffs") from the Order of the Appellate Division, First Department, dated August 16, 2022 ("8-16-22 Order"), which dismissed plaintiff's complaint in its entirety [R2636-2644]. This Court should affirm.

At the outset, Plaintiffs' leave application to this Court was untimely by one day such that jurisdiction to entertain the appeal should be declined for late filing**.** The force and effect of CPLR §5513[b]'s "Time to Move for Permission to Appeal" dictates the specific time frame of thirty days which shall be applied to compute timeliness. Plaintiffs-Appellants attempt to deny lateness must be rejected. See Point I.

Should this Honorable Court nonetheless consider the substance of the appeal, affirmance of the 8-16-22 Order remains proper. Moreover, as regards P&T, Plaintiffs' appellate presentation does not even merit consideration. See Statement of Facts and Point II.

This personal injury action relates to an alleged accident which occurred in the course of an ongoing construction project on the 19th Floor ("Project") at 200 Park Avenue, New York, N.Y. ("Building") on June 2, 2011. The Building was then owned by Defendant-Respondent Park, and its managing agent was Defendant-Respondent Tishman [R1347-1604, 2069-2080]. Defendant-Respondent CBRE Inc. ("CBRE") was Park's lessee for the entire 19th floor ("Lease") [R1347-1348; 1503-1589]. Defendant-Respondent CBRE, *not Park*, contracted with Defendant Structure Tone Global Services, Inc. ("ST" or "Structure Tone")) as general contractor for renovations within CBRE's leasehold ("CBRE/ST Agreement") [R1103-1222]. Structure Tone then hired plaintiff's employer, A-Val Architectural Metal III, LLC ("A-Val") to perform metal and glass work [R405-418]. The Plaintiffs-Appellants erroneously characterize Park as having contracted with Structure Tone ("ST") when said construction contract was between tenant CBRE ("CBRE") and ST (See misrepresentation in Plf. Br at 6) and proceed with the appeal operating under that erroneous construct.

As further discussed in the Counterstatement below, in seeking to erroneously reinstate claims against Defendants P&T, Plaintiffs misidentify contracting parties as well as earlier Court rulings. For example, Plaintiffs disregard that in the Supreme Court, New York County Order of December 14, 2020 ("12/14/20 Order") [R15-47] from which the 8-16-22 Order followed, *all*

Labor Law ("LL") §241(6) claims against Tishman including alleged violations of 12 NYCRR §23-1.7(d) ("§23-1.7(d)") and 12 NYCRR §23-1.7(e)(2) ("§23-1.7(e)(2)") *were* dismissed [R23-24]. That dismissal was not appealed. The First Department summary dismissal specifically limited its scope "to the extent appealed from as limited by the briefs" [R2636-2644].

Plaintiff Ruisech claims injury as a result of having momentarily lost his footing (though he did not fall) upon slipping in the presence of minute pebbles which were the byproduct of work that had been performed by Plaintiff Ruisech's co-workers in installing the channel (also called "track") [R501] in preparation for placement of glass dividers within it [R467-468]. Plaintiff was in the process of installing when his accident allegedly occurred [R499]. Plaintiff testified that the pebbles were made out of the cement from the concrete flooring "when the channel was chipped to make a space for the glass" [R503]. Plaintiff Ruisech testified that due to being minute, plaintiff had not noticed them earlier. The minute pebbles which plaintiff called debris were by the base of a channel created by his A-Val co-workers as part of the glass installation [R502].

The First Department correctly determined that the pebbles did not trigger a viable Labor Law §241(6) claim under Industrial Code 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2) as to P&T, CBRE and ST: all other alleged Industrial

Code violations which Plaintiff had alleged as foundation for a Labor Law §241(6) claim had been dismissed in the 12/14/20 Order.

Plaintiffs' LL §200 and common law negligence claims were also properly dismissed by the First Department. If the Honorable Court deems it appropriate to address Appellants' substantive arguments at all, the First Department's dismissal is properly affirmed.

COUNTERSTATEMENT

In their Plaintiffs-Appellants' Brief before the Court of Appeals, Plaintiffs have jumbled the roles of Tishman and Park with other defending parties such that at the outset, we are compelled to provide clarification for this Honorable Court.

At Page 2 of Plaintiffs' Brief, Plaintiffs assert that they commenced action against the "owner of the building, the managing agent and the general contractor" followed by the owner and managing agent commencing a third-party action against the "tenant on the floor where the work was being performed." (App. Br. at 2). This characterization inaccurately and immediately skewed party roles. Firstly, this characterization omitted that the building tenant, Defendant/Third-Party Defendant/CBRE, Inc. ("CBRE"), also a Defendant-Respondent before this Court, is a primary defendant upon the Second Amended Complaint [R157, 2402-2422; R1347-1348; 1503-1589].

Plaintiff, having initially incorrectly named a prior building owner in the original summons and complaint, included Park in a Supplemental Complaint [R139], as well as in the Second Amended Complaint [R157]. The Second Amended Complaint followed upon P&T's impleader of CBRE, the tenant occupying the entire 19th floor [R158-177, 213-227]. Both Structure Tone and P&T commenced third-party actions against A-Val [R158-169, 213-227].

While the 12-14-20 Order as related to cross-claims and third-party claims are not before this court [R13-47], Plaintiffs' penchant for inaccurate presentation commencing with pleadings in this matter should not be overlooked, including Plaintiffs' misstatement of what was before the First Department for review.

As addressed in the Preliminary Statement above, Labor Law §241(6) claims premised upon §23-1.7(d) and §23-1.7(e)(2) as to managing agent Tishman were dismissed in the 12-14-20 Order and were not the subject of appeal to the First Department [R15-47]. In addition as to defendants Park, CBRE, ST, the lower court's 12-14-20 Order had dismissed all other Labor Law §241(6) claims premised on other alleged administrative code violations. Those Industrial Code allegation which did *not* survive the 12-14-20 Order included among others, 2 NYCRR § 23- 1.7(e)(1) [R254].

On the date of the alleged occurrence, Defendant-Respondent CBRE was the tenant who had leased the entire 19th floor from Park, said lease of the 19th

Floor having pre-existed Park's ownership of 200 Park Avenue [R1347-1348; 1503-1589]. CBRE's tenancy, including occupation of the entire 19th Floor, commenced as of the "Seventh Modification of Lease" ("7th Mod.") dated July 20, 2004 at which time CBRE, as Tenant, entered into the lease with Metropolitan Insurance and Annuity Company c/o Metropolitan Life Insurance Company ("MetLife") [R1498-1502], as Landlord [R1498-1502]. The 7th Mod. included as part of the tenancy "the entire 18th and 19th floors of the building known as 200 Park Avenue" [R1498].

The "Eighth Modification of Lease" dated December 23, 2009 ("8th Mod") was between Park and CBRE [R1503-1589], therein recognizing the building owner as Park. Like the 7th Mod, it included "the entirety of the 19th Floor Premises" [R1498]. On the accident date of June 2, 2011, the Tenth Modification dated May 5, 2011 was in force which identified 200 Park LP as the Landlord, and MetLife as "predecessor in interest," [R1593-1604]. CBRE's tenancy pre-existed the CBRE/ST Agreement dated February 3, 2011 [R1103-1222, 1304].

CBRE engaged general contractor services from Structure Tone. CBRE, not Park, hired Structure Tone as the general contractor [R1103-1222]. Structure Tone hired plaintiff's employer, A-Val Architectural, to perform metal and glass work [R405-418].

Plaintiffs' reference to P&T on this appeal is limited to identifying them as Defendants-Respondents (Defendants)" (App. Br. at 2), in their "Preliminary Statement", erroneously referring to them as having hired Structure Tone, stating "The owner and manager 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…" (App. Br. at 6, second full paragraph). .

For this incorrect statement, Appellants cited "R.461-62, 1103-1222, 1276-1289)" Id.

R461-462 do not refer to P&T. The address of "200 Park" appears on R462. R1103-1222.

R1103-1222 is the "Agreement between CB Richard Ellis, Inc. Owner and Structure Tone, Inc. General Contractor" ("CBRE-ST Agreement") as it is titled on R1103, followed by its content which clearly identified that under the CBRE/ST Agreement the "Owner" is defined as CB Richard Ellis, Inc. [R1106].

R1279-1289 is part of the deposition transcript of Sheldon Franco of CBRE [R1268-1303]. On those pages, Mr. Franco makes no mention of P&T but rather is questioned as to Structure Tone's role at the jobsite and therein identifies CBRE as the owner [R1289]. Mr. Franco testified:

> Q. And is it your understanding – was CBRE the owner of the project?

> A. Well yes, It was basically the project being built out by Structure Tone for CBRE or as the contract at that time says CB Richard Ellis.

[R1289].

The CBRE/ST Agreement itself defines its contracting parties, identifying CBRE as "Owner" and Structure Tone as General Contractor" [R1103-1222]. Neither Park nor Tishman are parties therein. Id. Appellants' Brief refers to their expert Gailor reviewing "pertinent records" including the "Construction Agreement Between CB Richard Ellis, Owner, and Structure Tone, General Contractor" (Aff. Br. at 11), but the Appellants' Brief continued mischaracterizing P&T as "defendant-owner" (App. Br. at 13) as if they were participating parties to the CBRE-ST contract. Mr. Gailor also engaged in the misrepresentation in presenting his opinion before the lower court on which Plaintiffs relied [R1870-1878] (App Br. at 7).

Suffice to say, though these inaccuracies were repeatedly presented, they were deciphered correctly by the First Department in properly granting dismissal of all claims. Note that the Plaintiff Appellants' Statement of Facts (Aff. Br. at 6-15), having erroneously identified P&S as "defendant-owners" contracting with ST also ignored acknowledgment of testimony by P&T's witness, Michael Mucci, while referencing testimonies from Plaintiff, ST (Brian Orsini) and CBRE (Sheldon Franco), as well as Plaintiffs' "expert" Ernest Gailor. What we are left

with in examining Plaintiffs' Appellant Brief is an "Argument" that makes no citation or reference to any proofs or testimony as to P&T except for lumping them into incorrect references as "Defendants-owners" in the Brief.

By contrast, along with the documentary evidence of the CBRE lease verified by attestation of Mark Landstrom property manager at Tishman [R1347-1604] and the CBRE/ST Agreement establishing that Plaintiffs' characterization of P&T as contracting with Structure Tone was a false representation, Michael Mucci, Senior Director of Tishman, testified for P&T [R1234-1235] stating that Park was not involved directly with the work on this project in any capacity because the project "wasn't direct work with the owner" [R1248]. He testified that CBRE's role at the Building was as a tenant who hired Structure Tone to do general contractor work on their behalf [R1247].

Mucci was unaware of anyone from Tishman or Park having reviewed the CBRE/ST Agreement with respect to compliance with its terms and conditions [R1243], and commented that "the contract is between two parties and neither one of those parties is 200 Park. The contract would not be given to us to review" [R1249].

As Mucci testified that as the work involved in the Project was not direct work for the owner, Tishman would not get involved directly in any capacity, did not get involved with contractors or subcontractors or in determining equipment

usage [R1248-1250]. Asked about Tishman's role in the project, he explained, "Not much at all. If there is coordination needed for light safety of building shut down in terms of sprinkler systems and access to building, we would help coordinate it but it was a tenant direct job so the involvement was minimal." [R1247-1248]. This was recognized in the First Department decision [R2636-2644].

Plaintiff Ruisech acknowledged P&T did not direct or control the means, methods and manner of Ruisech's work on the 19th Floor [R463, 834-836]. He did not make a complaint to P&T [R835]. He made clear that he was aware that he was within the leased space occupied by the tenant CBRE at his second deposition [R800-801]. He was on the 19th Floor in the course of his employment with A-Val, a subcontractor of Structure Tone, and was told to work at the location of the occurrence for work by A-Val [R820—821]. He testified that he did not know who the "owner of the job" or the managing agent or if the Building had a managing agent [R463]. He never spoke to anyone who he believed could be from the owner, tenant or managing agent [R463]. He received supervision from A-Val, and ST was the general contractor [R462-463]. P&T did not provide the plaintiff with any tools, materials or equipment: he had his own glazier's kit and received equipment from A-Val [539-540].

He described the entire 19th floor as under construction and the nature of his work done on the 19th Floor as installation of huge panels of glass [R466]. He described the nature of his work done on the 19th Floor as installation of huge panels of glass, some weighing up to 500 pounds, caulking, climbing ladders and everything "in the scope of glazing was involved here." Id. The 10'x4'x1" glass panels were dividers between the internal hallway and the offices delivered to the jobsite by A-Val [R467-468].

Describing the incident, he testified that four men were in the process of installing a glass panel: he was located in the center [R491]. There was a track in place on the floor that A-Val had installed. Id. The men lifted the glass for the installation [R497]. He testified that "As we leaned the glass, the men at the ends and the men that were on the glass could not hold the glass." [Id]. He testified that what happened next was "[T]he glass was coming down on me and was going to crush me; me myself, and the men that was next to me. So I used all my strength in my body to prevent it from falling on me." [Id]. No suction cup lost contact with the glass [R498]. The team was aware of this, so they pushed the glass away from plaintiff. Id. He then testified that, "When I lifted up the glass and when I went to install the glass, you got to take a step towards --- away from you or where you are installing the glass and there is something on the ground, it must have been

pebbles, it must have been something that when I put my foot down, my foot slipped and that was when I felt something, like something happened"[R499-500].

He stated that when his right foot slipped forward, his upper body jolted backwards [R653]. When his right foot slipped forward it went against the channel on the concrete floor [R644], before which he was facing sideways. Id.

Asked what allegedly caused slipping, he initially responded that "[T]here was debris all over the floor" which he had seen before and which he never cleaned "[B]ecause that's not our job" [R500-501]. However, he proceeded to identify the specific location of the channel/track and acknowledged he neither saw nor complained of the condition before it happened [R501-501]. He testified:

> Q: What about this particular location?
>
> A: I didn't know that was there. It was minute.
>
> MR AMICO: What did you say?
>
> THE WITNESS: It was minute, It was small, little rocks. It was something small.

[R502-503].

He also testified that his co-workers had not complained of the condition [R500-503]. He explained that these "small, little rocks" were minute pebbles which he referred to as "concrete debris" resulting when co-workers at A-Val

created recessed 4 ¼ inch channels in the floor [R500-505] which would serve to anchor the glass he was installing. He did not know who at A-Val did this chipping [R503] nor the customary time frame between channel/track installation and glass placement [R504]. He never spoke to Structure Tone regarding debris or concrete chips in any recessed channel [R505]. He stated that cleaning was done by laborers for Structure Tone [R504]. The area was a concrete deck with some carpeting, but the occurrence happened on concrete [R500].

As to additional discussion of the evidentiary proofs, we refer the court to submissions presented by the contracting defendants CBRE and ST, as well as the testimony and summaries [R83-114] which appears in P&T's original motion for summary judgment in the Record. A-Val was never deposed. Additional references are in the Argument section which follows.

ARGUMENT

POINT I

THE COURT OF APPEALS SHOULD DECLINE JURISDICTION SINCE THE STATUTORY PREREQUISITE OF TIMELY FILING LEAVE TO APPEAL WAS NOT ADHERED TO BY PLAINTIFFS-APPELLANTS

The New York State legislature through the explicit language in CPLR §5513 manifested its intention to establish a distinct deadline for asserting a timely appeal to foster the administration of justice. The failure to adhere is generally a

jurisdictional bar to consideration of an appeal on its merits. Plaintiffs-Appellants' failed to adhere to CPLR §5513[b] thus providing a threshold jurisdictional bar to this appeal.

The Order with Notice of Entry denying Plaintiff leave to reargue by the First Department was filed and served November 22, 2022 [R2646-2650]. Both Defendants-Respondents Structure Tone and P&T, respectively, have specifically presented before this Court a motion and cross-motion presently submitted for decision as of April 15, 2024 to dismiss this appeal on this procedural ground as Plaintiffs' motion for leave before this Court was filed on December 23, 2022. We reiterate, adopt and incorporate our support for the Structure Tone motion upon which P&T had cross-moved and fully briefed this issue.

As this issue can also be addressed on full appellate briefing, we address the herein as well. CPLR §5513[b] "Time to Move for Permission to Appeal" states in pertinent part, "The time within which a motion for permission to appeal must be made *shall* be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry.... A motion for permission to appeal must be made within thirty days."

A properly served order or judgment with notice of entry establishes a time limit which neither the court, see *Reinfeld v. 325 West End Corp*., 43 A.D.2d 671

(1st Dep't 1973), nor waiver by the adversary, *Hill Dickinson LLP v. Il Sole, Ltd*., 149 A.D.3d 471 (1st Dep't 2017), nor even agreement by the parties, see *Matter of Haverstraw Park, Inc. v. Runcible Props. Corp*., 33 N.Y.2d 637 (1973), can extend. See also, *Hall v. Board of Educ. of City of New York*, 79 A.D. 102 (2d Dep't 1903), modified on other grounds by *Hall v. New York*, 176 N.Y. 293 (1903) (delay of even one day in the serving and filing of the notice of appeal is fatal).

Plaintiff's appeal to this Court by statute necessitated the filing of a motion for permission to appeal, was filed one day late, depriving this Court of jurisdiction to entertain this appeal. It is undisputed that Plaintiffs-Appellants consented to receive all filings through NYSCEF in the First Department and in Supreme Court, New York County and the evidentiary proofs establishing the untimeliness appear therein as well as in the motions to dismiss presently submitted in this Court.

Plaintiffs-Appellants failed to take the appeal from the First Department's Order served with Notice of Entry dated November 22, 2022 within the time limited by CPLR §5513(b). Counsel 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 Plaintiffs' right to appeal against all parties, and they had thirty days from that date to serve a motion to this Court seeking leave to appeal (see CPLR § 5513(b)). That ST's November 22 Order with Notice of Entry filing on NYSCEF was followed by a November 23 Order with

Notice of Entry filing by P&T did not, contrary to Plaintiff's argument (App. Br. at 17), add an extra day for counting the deadline as to P&T for when Plaintiffs needed to file a motion for leave. ST's initial filing was the trigger.

Plaintiffs' logic is seriously flawed. They appear to reason the time did not run based on P&T filing and absence of a filing by CBRE. This argument defies logic as if all parties could start their count based on when they decided to file the Order with Notice of Entry, rather than based on the first party to file, chaos would ensue in docketing of appeals as parties to a single action could have separate deadline dates leading to scattered, duplicative rulings and clogging of the courts.

Plaintiffs failed to serve the timely motion counting thirty days from the November 22, 2022 Order with Notice of Entry filing by ST. The motion was served thirty one days later, on December 23, 2022. CPLR §2211 is statutory law which provides that "A motion on notice is made when a notice of the motion or an order to show cause is served." See *City Bank Farmers Tr. Co. v. Cohen*, 300 N.Y. 361, 367 (1950). In Plaintiffs-Appellants' Brief, Plaintiffs perform a mistaken calculation (App. Br. at 17) purporting to follow New York's General Construction Law §20 ("GCL"). GCL §20 states in pertinent part:

> "A number of days specified as the period from a certain day within which of after which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning was made…"

As November 22, 2022 was a Tuesday, the next sentence in GCL §20 referring to two days from the reckoning if a weekend or public holiday is not applicable. However, Plaintiffs erroneously added two days to their calculation.

GCL §20's computation of time in this instance for calculating a deadline requires the calculating to begin one day *after* the date of reckoning. GCL §20 measures the count "exclusive of the calendar day from which the reckoning is made." GCL § 20. Therefore, the date of "reckoning" was November 22, 2022 which was when the Order with Notice of Entry was electronically filed with NYSCEF by Steven Aripotch [NYSCEF Index No. 159003-2013; Doc. No. 366] of Barry McTiernan & Moore LLC. This electronic filing also functioned as service under NYSCEF rules.

The computation thus commenced on November 23. See GCL §20; *Bacalokonstantis v. Nichols*, 141 A.D.2d 482 (2d Dep't 1988) (["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)"]); *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"). The day from which any specified period of time is reckoned shall be excluded in making reckoning. First day is excluded in computation of years as well as in computation of days, weeks or months. *Tismer v New York Edison Co*., 228 N.Y. 156, reh'g

denied, 228 N.Y. 585 (1920). See also, *H. E. & S. Transp. Corp. v. Checker Cab Sales Corp*., 271 N.Y. 239, 242 (1936).

This time honored statutory mandate was not adhered to by Plaintiffs-Appellants in seeking jurisdiction in this Court. See also, *CPLR §5513 McKinney's Commentary, "Appellate Court's Jurisdiction*" (David B. Hamm, Herzfeld & Rubin, P.C., General Editor, David L. Ferstendig, Law Offices of David L. Ferstendig, LLC). Failure to timely appeal is a jurisdictional bar to consideration of an appeal on its merits. CPLR §5513. *Commentary*, supra. Because the legislature manifested its intention through such explicit language, the courts have generally held that the failure to timely appeal is a jurisdictional bar to consideration of the appeal on its merits. Id. See also, generally *Weinstein Korn & Miller*, New York Civil Practice: CPLR ¶ 5513.02 (David L. Ferstendig, 2d Ed. 2023).

The CPLR §5513 *Commentary*, supra, further noted, "A properly served order or judgment with notice of entry establishes a time limit which neither the court., see *Reinfeld v. 325 West End Corp*., 43 A.D.2d 671 (1st Dep't 1973), nor waiver by the adversary, *Hill Dickinson LLP v. Il Sole, Ltd*., 149 A.D.3d 471 (1st Dep't 2017), nor even agreement by the parties, see *Matter of Haverstraw Park, Inc. v. Runcible Props. Corp*., 33 N.Y.2d 637 (1973), can extend."

Plaintiffs' error in calculation is not to be excused. This Court has historically honored such statutorily mandated deadlines. See i.e., *Haverstraw*

Park, Inc. v. Runcible Properties Corp., 33 N.Y.2d 637 (1973) (denied motion for leave to appeal from an appellate order "upon the ground it was not made within the time prescribed by statute [CPLR § 5513]. A stipulation of the parties cannot confer jurisdiction on the Court of Appeals to consider an untimely motion"); *Ocean Acc. & Guarantee Corp. v. Otis Elevator Co*., 291 N.Y. 254 (1943) (denied motion for reargument of motion for leave to appeal stating "[t]he Court is without power to entertain an appeal when it appears that an appellant has failed to comply with the limitations of time imposed [by statute]. This Court possesses only those powers which are conferred by the Constitution as limited by statute in accordance with the Constitution"); *W. Rogowski Farm, LLC v. County of Orange*, 171 A.D.3d 79, 88 (2d Dept. 2019) ("[t]he time period for filing a Notice of Appeal is jurisdictional in nature and nonwaivable").

As the Structure Tone Motion and P&T's Cross-Motion evince, the statutory requisites were not satisfied by Plaintiffs-Appellants. In the rare event that this Honorable Court has made exception to following the statutory mandate, this Court has identified absence of Respondents having moved for dismissal resulting in absence of pertinent documents being available for court examination unless the Court engaged in its own evidentiary search. See *Zuccarini v. Ziff-Davis Media, Inc.*, 306 A.D.2d 404 (2d Dep't 2003). Obviously the documentation is before the court in ST and P&T's motion and cross-motion to dismiss.

Accordingly, this Court should reject consideration of this appeal since Plaintiffs' leave application was untimely, thus depriving this Court of the jurisdiction to entertain the appeal.

In fact, as discussed below in Point II, the manner in which Plaintiffs-Appellants have presented this appeal demonstrates further instances of Plaintiffs claiming right to appeal by misinterpretation and disregard of rulings in the First Department's 8-16-22 Order and the Supreme Court's 12-14-20 Order preceding this appeal.

POINT II

PLAINTIFFS-APPELLANTS APPEAL AS TO 200 PARK LLC AND TISHMAN SPEYER IS FUNDAMENTALLY FLAWED SUCH THAT THIS COURT SHOULD REJECT CONSIDERATION OF THE APPEAL AS TO THEM

As the above describes, Plaintiffs-Appellants have made fundamental misrepresentations in their appeal as related to P&T. In light thereof the Court should reject consideration of the Brief as it purports to relate to P&T and dismiss the appeal as to them as procedurally improper.

a. Plaintiffs Misidentification of P&T

References in the Brief misrepresent that P&T were contracting parties in the 19th Floor renovation project. The Brief proceeds to refer collectively to "Defendants" as if content related to the performance of the CBRE – Structure

Tone contract and Structure Tone/A-Val contract relates to P&T. In other words, Plaintiffs argument is starting from a false premise that P&T was a contracting party to the 19th Floor renovation and then attributes assertion as being as to them when they are not.

Plaintiffs' Briefing before this Court as to P&T is fatally flawed such that if the Court in its discretion determines to consider the substance of the appeal, the Court still should not consider the arguments as set forth against P&T as Plaintiff has wrongly defined them. P&T had not contracted with the general contractor. It was tenant CBRE who was a contracting party with Structure Tone. Although at one point in the Brief, Appellants appeared to recognize the CBRE-ST Agreement was between those entities, they persisted in referring to P&T as contracting parties by referencing collectively to "Defendants" and "Defendant-owners."

Plaintiffs, who never responded to P&T's demand for Bill of Particulars ("BP") asserted in response to BP demands by CBRE and Structure Tone that the exact location of the accident on June 2, 2011 was a "passageway on the 19th Floor" of the Building "where a large renovation project was being conducted" [R248-286]. This renovation project ("Project") encompassed floors occupied exclusively by building tenant CBRE on June 2, 2011 [R1347-1606]. The Project was subject to CBRE and its contractor, Structure Tone having entered into a contract for Structure Tone to perform construction work [R1237]. Structure Tone

in turn entered into a subcontract with A-Val [R405-418, 1345] as the glazier on the Project."

While clearly these BPs show that Plaintiff was aware that P&T were not parties to the CBRE-ST contract, Plaintiffs-Appellants' Brief instead persists with inaccurate characterizations before New York State's highest Court. Plaintiffs also misstate the Record before this Court as to prior rulings and appealability. This folly should be recognized and warrants dismissal of claims against P&T.

b. Appellants' Failure to Adhere to Section 500.3

of the Rules of the Court of Appeals

At the outset, we direct the Court's attention to Section 500.13 of the Rules of the Court of Appeals ("Content and Form of Briefs in Normal Course Appeals") (hereinafter "§500.13") which provides in pertinent part that

> "Appellant's brief shall include a statement showing that the Court has jurisdiction to entertain the appeal and to review the questions raised, with citations to the pages of the record or appendix where such questions have been preserved for the Court's review… . Such statement shall be included before the table of contents in each party's brief."

This requirement has clearly been ignored. Technically speaking, there lacks reference to citations from the Record. As discussed below, this was not a ministerial error as examination of the prior orders reveal plaintiff seeking to appeal the unappealable.

c. Appellants' Brief and Questions Presented

misrepresent the Record before this Court as to

Prior Court Orders and Appealable Issues

The only statement that appears prior to the Table of Contents are two "Questions Presented," neither of which identifies the "citations in the record where the questions were preserved for review." Instead, Question 1 queries without citation: "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 12 NYCRR 23-1.7(e) (2) ?"

Had Plaintiff bothered to identify a citation for this query, Plaintiffs would have realized that the "Question Presented" did not accurately reflect the Record before the Court. As stated above in the Preliminary Statement, Plaintiff-Appellants' argument for reversal of the First Department's dismissal in the 8-16-22 Order omits acknowledgment that in the Supreme Court New York County Order of December 14, 2020 ("12/14/20 Order") [R15-47] the Labor Law §241(6) claims against Tishman as to the alleged violations of 12 NYCRR §23-1.7 (d) and 12 NYCRR §23-1.7(e) (2) *were* dismissed [R44].

Further, Plaintiffs did not appeal that dismissal. Therefore, the First Department did not reverse the Supreme Court's denial as there had been no denial

by the Supreme Court as to dismissal of the entirety of Labor Law 241(6) claims as to Tishman.

J.S.C. Goetz's 12-14-20 Order specifically granted relief to P&T as follows:

> ORDERED that the motion (sequence number 004) of defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP and Tishman Speyer Properties, L.P. is granted to the extent of: (1*) dismissing plaintiffs' Labor Law § 241 (6) claim as against defendant/third-party plaintiff/third third-party plaintiff Tishman Speyer Properties, L.P., (2) dismissing plaintiffs' Labor Law § 241 (6) claim as against defendant/third-party plaintiff/third third-party plaintiff 200 Park, LP except as to the alleged violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2),* (3) granting defendant/third-party plaintiff/third third-party plaintiff 200 Park, LP conditional contractual indemnification against defendant/third-party defendant CBRE, Inc., (4) granting defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP and Tishman Speyer Properties, L.P. partial summary judgment as to liability on their breach of contract claim against defendant/third-party defendant CBRE, Inc., and (5) dismissing the cross claims for contractual indemnification and breach of contract against defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP and Tishman Speyer Properties, L.P.;
>
> [R47] (emphasis added).

If that were not sufficient to illustrate the insufficiency of this appeal as directed against P&T, we direct the Court's attention to the language employed in Plaintiffs-Appellants' Brief wherein Plaintiffs assert violation by P&T of the Industrial Code (App. Br. at 13). The two Industrial Code sections addressed in

their "Questions Presented" were 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7(e) (2). If this Court in its discretion were to (1) overlook the failure of Plaintiffs to adhere to §500.13 of its own rules; (2) be inclined to scrutinize the substance of the appeal based on the "Questions Presented" as if they are an adequate response to §500.3, and (3) consider the Plaintiffs-Appellants' appeal as to P&T to be viable despite the mischaracterizations as contracting "Defendants-owners" discussed in the Counterstatement above, then the Court is left with having to consider that Plaintiffs-Appellants then erroneously attempt to reintroduce in the content of the Brief *another* Industrial Code Section - 12 NYCRR 23-1.7(e) (1) – when referring to P&T (App. Br. at 13).

Appellants state at page 13, "[T]he applicable codes that apply to the work are found in 12 NYCRR 23-1.7(d) and (e)(1)(2)." (App. Br. at 13).

The Plaintiffs' allegation as to a Labor Law §241(6) claim being premised upon 12 NYCRR 23-1.7(e) (1) was dismissed in the 12-14-20 Order [R15-47].

As with J.S.C. Goetz's dismissal of the Labor Law §241(6) claim in its entirety as to Tishman, Plaintiff did not appeal as to Park the dismissal of Labor Law §241(6) claims which encompassed 12 NYCRR §23-1.7(e) (1). While Defendants P&T appealed the denial as to 12 NYCRR §23-1.7 (d) and 12 NYCRR §23-1.7(e) (2) [R44], Plaintiff stood silent as to all other Industrial Code sections which had been dismissed, thereby accepting the ruling by JSC Goetz dismissing

the Labor Law 241(6) claim premised upon 12 NYCRR 23-1.7 (e) (1). It is procedural legal error for Plaintiffs to now inject reference to 12 NYCRR §23-1.7(e) (1) when it did not appeal the dismissal to the First Department. Notably, J.S.C. Goetz's Order also dismissed plaintiffs' Labor Law § 241 (6) claim as against Defendants-Respondents CBRE and Structure Tone "as to the alleged violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2)" [R47].

If this Honorable Court were to address any substance deemed to exist in Plaintiffs-Appellants' appeal from the 8-16-22 Order, it would be a legal nullity to advance, as Plaintiffs seek to do, and consider arguments as against Defendants-Respondents Tishman and Park for which no appeal was taken, and from which determination by the Supreme Court was not the subject of the appeals which were taken by the defending parties.

Stated otherwise, the First Department determination did not encompass a modification of dismissals which had been granted in the 12-14-20 Order. As such, if any aspect of appeal from the 8-16-22 Order is viable for appellate review, it cannot encompass the 12/14/20 Order's dismissal of (i) *all* Labor Law §241(6) claims against Tishman which includes 12 NYCRR §23-1.7 (d) and 12 NYCRR §23-1.7(e) (2), and (ii) Labor Law §241(6) claims against Park but for 12 NYCRR §23-1.7 (d) and 12 NYCRR §23-1.7(e) (2).

Thus not only do Plaintiffs-Appellants "Questions Presented" which appears to be their attempt at responding to §500.3 – supposedly their "review the questions raised" not include 12 NYCRR 23-1.7(e) (1), but the procedural history of this appeal establishes that Plaintiffs' lacks standing to bring forth an argument as to 12 NYCRR §23-1.7(e) (1) at this juncture.

Not only was that issue not preserved for review by Plaintiff before the First Department, but it is improper to attempt resurrection of it before this Court. Notably, elsewhere in Plaintiffs' Brief, Plaintiffs acknowledges that only Labor Law §241(6) claims premised on violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2) survived JSC Goetz's 12-14-20 Order (App. Br. at 3), yet they wrongfully attempt to inject an argument regarding alleged violation of 12 NYCRR 23-1.7 (e) (1) which addresses accumulations of dirt in passageways which is not properly before this Court.

Plaintiffs-Appellants' Question 2 queries "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 law negligence claims?" Here again, just as with Question 1, Plaintiff does not include a citation. So too, not only did Plaintiffs misrepresent the roles of P&T as discussed in the Counterstatement, but examination of the actual substance of the Appellants' Brief reveals that any citations therein do not cite to testimony of P&T. There is no

evidentiary proof in the Brief, let alone by citation, whatsoever to support a finding as to Park or Tishman as to these claims. Plaintiff Ruisech's own testimony and the CBRE-ST contract and other evidentiary proofs in the Record established the validity of the First Department's determination.

The absurdity of having to respond to the Appellants' Brief despite the Plaintiffs' inaccurate characterization of P&T and lack of any evidentiary proofs as to P&T is illustrated in Plaintiff's reliance on *Rizzuto v. Wenger Cont. Co.*, 91 NY2d 343 (1998). Citing *Rizzuto* (App Br. at 23), Plaintiff refers to Labor Law 241(6) as imposing "a non-delegable duty of reasonable care upon all owners and "Contractors"" (App Br. at 23). However, Plaintiffs provide no evidence targeting P&T, let alone defining them correctly. In *Rizzuto*, the Court found there were triable issues as to the general contractor's control over the methods of the subcontractors and other worksite employees and by virtue of ability to coordinate workers' activities, not issues related to the out of possession owner and managing agent. In *Rizzuto* the plaintiff, a sub-contractor's employee, brought action against the general contractor, not the owner, and the general contractor who moved for summary judgment. *Rizzuto* distinguished owner from general contractor, stating "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. at 350 (emphasis added). While P&T had presented evidentiary proofs

establishing prima facie entitlement to summary judgment under CPLR §3212 in the trial court, Plaintiffs submitted no evidentiary proofs targeting them in response, but instead wrongly and cavalierly mischaracterized them as contracting participants through to appeals.

This Court's mandate addresses issues on appeal as "limited by the briefs." *O'Sullivan v IDI Const. Co*., 7 NY3d 805 (2006). Plaintiffs-Appellants' Brief justly limited by its content does not warrant reversal of the determination of the First Department as regards dismissal of all claims in their entirety as to P&T.

POINT III

THE FIRST DEPARTMENT PROPERLY GRANTED SUMMARY DISMISSAL OF PLAINTIFFS-APPELLANTS' LABOR LAW 241(6) CAUSE OF ACTION

Along with Plaintiff having misrepresented that appealable issues survive as against Tishman under Labor Law §241(6) and as to P&T, CBRE and ST inserting argument as to 12 NYCRR 23-1.7(e) (1) despite never having appealed the dismissal of the Labor Law §241(6) claim as to that Industrial Code subsection and knowing full well that it is not among his "Questions Presented," Plaintiffs' argument as specifically directed at Labor Law §241(6) being premised upon 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7(e) (2) of Industrial Code must fail should the Court deem same to be sufficient to enable consideration of the Brief.

Under the facts of this case, the First Department properly dismissed these remaining Labor Law §241(6) claims premised upon 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7(e) (2) of the Industrial Code. The object on which plaintiff alleged to have slipped or tripped -- the small little pebbles created by Plaintiff Ruisech's fellow A-Val workers in producing the channel for installation of the glass -- were an integral part of the work Felipe was performing, the installation process as to the glass dividers.

200 Park had no nexus to this activity capable of supporting a triable issue as to the alleged remaining violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7(e) (2) of Industrial Code. Each of these Industrial Code subsections exist within the umbrella of § 23-1.7 which is entitled "Protection from General Hazards." 12 NYCRR 23-1.7 (d) is entitled "Slipping hazards." and 12 NYCRR 23-1.7 (e) is entitled "Tripping and other hazards." The subdivision of 12 NYCRR 23-1.7 (e) which is identified in Plaintiffs' "Questions Presented" is 12 NYCRR 23-1.7 (e) (2).

None of the evidentiary proofs presented by Plaintiffs in opposition to Park and Tishman's motion for summary judgment identified any negligence by either entity. However, in mischaracterizing them as contracting parties at various points in Appellants' Brief, they ducked the facts. A look at Plaintiffs' "bullets" in his opposition papers to P&T's motion in Supreme Court [Paragraphs 7 and 8 of

Plaintiff's Opposition] which are the evidentiary proofs on which they rely fail to relate to Park and Tishman [R 1852-1868, 1855-1858].

Contrary to Plaintiffs' mischaracterizations, there is no dispute in this action that 200 Park LLC is the owner of 200 Park Avenue and Tishman is the managing agent for 200 Park LLC; 200 Park LLC entered into a Lease with CBRE whereby CBRE leased the 19th Floor of 2 Park Avenue; the lease was in full force and effect on July 5, 2012; Tenant CBRE entered into a contract with STI for STI to act as general contractor for renovations including the 19th Floor where the Plaintiff's alleged accident occurred on July 5, 2012; Plaintiff's injuries were sustained at a time when plaintiff was acting within the course of his employment with A-Val in working as a glazier on the 19th Floor of 200 Park Avenue pursuant to contract entered between ST and A-Val.

Assuming, *arguendo* for the purpose of this appeal that Plaintiffs' alleged injuries were not the product of his own mal-adjustment in maneuvering, it remains that to establish a prima facie cause of action under Labor Law § 241(6), a worker must show that defendants, as non-supervising owners or contractors, violated a specific rule or regulation of the Commissioner of Labor mandating compliance with concrete specifications. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). The facts do not establish this.

Ruisech describes the alleged condition as resulting from the cutout track created by A-Val co-workers for the installation of the glass he was assisting in placement. The chipping involved in creation of the cutout for the channel created the minute pebbles. Assuming for the purpose of this appeal that Ruisech's assertion that he must have stepped on, slipped or tripped on little the minute pebbles was not speculative, they were the product of A-Val co-workers in the course of their employ in creating the channel as part of the very glass installation he was in the process of performing. Ruisech thereby credits the creation of the condition causing his imbalance to A-Val employees who performed a task integral to enabling his installation of the glass, the very task in which he was participating when the incident occurred.

"The Code regulation must constitute a specific, positive command, not one that merely reiterates the common law standard of negligence. *Buckley v. Columbia Grammar and Preparatory,* 44 A.D.3d 263 (1st Dept. 2007). Here, the "minute" pebbles in and about the channel created by his coworkers as part of the preparation for the glass installation he was undertaking at the time of the occurrence were not a "slipping" hazard within 12 NYCRR 23-1.7 (d). Further, regarding 12 NYCRR 23-1.7 (e) (2), even on viewing the evidence in the light most favorable to Plaintiff as is required on a motion for summary judgment so as to deem the "minute" pebbles - which were the natural byproduct of Ruisech's co-

workers creating the channel for which Plaintiff was tasked with inserting the glass panels - as concrete debris, they were a necessary and unavoidable byproduct of the work being performed by A-Val in the installation process, which process included Plaintiff traversing the channel to perform the glass installation. Labor Law §241(6) has no application there because the object that allegedly caused the plaintiff's injury was an integral part of the installation work being performed. *Castillo v Starrett City*, 4 AD3d 320 (2d Dept 2004); *Harvey v. Morse Diesel Int'l*, 299 A.D.2d 451 (2d Dept. 2002).

Under Plaintiffs-Appellants' argument on this appeal, either the minute pebbles are a "slippery condition" as said term is applied in 12 NYCRR 23-1.7 (d) or the minute pebbles are "debris" as that word is applied in 12 NYCRR 23-1.7 (e) (2). However, Plaintiff appears to rely upon the errant representations of Plaintiffs' expert Gailor who also referred to 12 NYCRR 23-1.7 (e) (1) in his conclusory, speculative affidavit. As discussed above, 12 NYCRR 23-1.7 (e) (1) was dismissed by J.S.C. Goetz in New York Supreme Court and that dismissal was never appealed by Plaintiff. Therefore, it appears through Plaintiffs' jumbled argument that they attempt to assert that either the "minute" pebbles were a "slippery condition" in the context of 12 NYCRR 23-1.7 (d) and the location of the occurrence was a "passageway", not the "working area", or the "minute" pebbles constituted "debris" as a tripping hazard in a "working area" in context of 12

NYCRR 23-1.7 (e) (2). However, 12 NYCRR 23-1.7 (d) is inapplicable as the "minute" pebbles were not a "slippery condition" as contemplated by §23-1.7 (d), and was not "debris" as a tripping hazard in a "working area" as it was integral to the work being performed. Reference by Plaintiff counsel and expert as to 12 NYCRR 23-1.7 (e) (1) was a "red herring," a code section that is not an appealable issue before this court.

a. Industrial Code §23-1.7(d) Is Inapplicable.

Plaintiffs' Argument, which commences with citing the summary judgment standard followed by listing general subject areas of hazards under Industrial Code Rule 23 (App. Br. at 18-20), then launches into a discussion of various cases in an attempt to define what is *not* a passageway. The word "passageway" appears in 12 NYCRR 23-1.7 (d) and *not* in 12 NYCRR 23-1.7 (e) (2), the only two provisions brought before this court in Plaintiffs' "Questions Presented."

Those cases presented by Plaintiff do not support finding a viable claim under 12 NYCRR 23-1.7 (d) which code provision states:

> (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.

The essence of a 12 NYCRR 23-1.7 (d) violation is that of the alleged condition being within the ambit of a class of "slipping hazard" illustrated within the provision. The hazards to which it is intended to apply are illustrated therein, the provision specifically referring to "[I]ce, snow, water, grease and any other foreign substance which may cause a slippery footing shall be removed, sanded or covered to provide a safe footing." That the minute pebbles are not of the class of "foreign substance" contemplated by this provision is clearly shown by examination of legal precedent.

That said, Plaintiffs instead point to cases focused upon the surface upon which the foreign substances existed, and not the foreign substance itself, arguing apparently that while in those cases, the location was not being considered a "passageway" contemplated by the provision, Plaintiffs would apparently argue that the channel/track was within such a location. However, Plaintiffs' reasoning, if that be their intent, is seriously flawed and must be rejected by this Court.

Firstly, none of these cases cited by Plaintiff apply to the minute pebbles which plaintiff describes as "construction debris" and which Defendants submit were necessary byproduct of A-Val's creation of the channel/track existing at the very location where Plaintiff was performing his work. Each of these cases cited by Plaintiffs show that the substance involved was of the class of foreign substance covered by the provision, but the location was not. See *Morra v. White*, 276 AD2d

536 (2d Dept. 2000) (slip on snow and ice); *Constantino v. Kreisler Borg Florman General Const. Inc*., 272 AD2d 361 (2d Dept. 2000) (same); *Temes v. Columbus Centre LLC*, 48 AD2d 188 (1st Dept. 2010) (ice patch); *Whalen v. City of New York*, 270 A.D.2d 340 (2d Dept. 2000) (icy staircase); *Sergio v. Benjolo*, 168 AD2d 235, 236 (1st Dept. 1990) (fall involved stacked cartons); *Zito v. Occidental Chemical Corp*., 259 AD2d 1015 (4th Dept. 1999) (slip on a spot of grease); *Conklin v. Triborough Bridge & Tunnel Authority*, 49 AD3d 320 (1st Dept. 2008) (mud covering the cross-pieces of a ramp). Examination of these citations also reveal how Plaintiffs have erroneously relied on the Gailor Affidavit.

Appellants' reliance on *Morra* is misplaced, as are reliance on the string cites which followed. In *Morra*, the plaintiff slipped and fell on snow and ice at a construction site which would satisfy the requirement under 23-1.7 (d) as to a slippery condition. However, the Second Department's ruling focused on the other aspect of the provision, that being location, and thereby held that the Industrial Code regulations relied upon by the plaintiff, "specifically, 12 NYCRR 23-1.33 (d) (1); 23-1.7 (d) and (e), are inapplicable to this case where the plaintiff slipped in an open area of the construction site, and not within a defined walkway or passageway." Id at 537. Similarly, in *Constantino*, §23-1.7 (d) did not apply where plaintiff who slipped and fell on snow and ice at a construction site was walking in the open area rather than a "floor, passageway, walkway, scaffold,

platform or other elevated working surface" contemplated by the subsection. *Constantino,* supra at 487-488.

Temes involved a slipping condition contemplated by the §23-1.7(d), a patch of ice, which was covered by construction dirt. In that case, the plaintiff testified that at the time of the accident, he was "returning to his work area from the men's room located on another level", and was walking across a "big, open area" of a basement. In reinstating the §23-1.7(d) claim, the First Department considered the "big open area" to be a "floor" with the contemplation of the subsection. Id at 281. In *Whalen,* involving an icy staircase used as a passageway at a worksite. The First Department considered Labor Law §241(6) to extend to the entire worksite, not only where work was being conducted, noting that for liability under the statute, the plaintiff must establish that the defendant violated a regulation that sets forth a specific standard of conduct. *Whalen,* supra at 342; citing *Ross,* supra.

Clearly, the regulation is not applicable herein to the condition alleged since the slippery element contemplated by 23.1-7(d) is lacking. Further, *Teme*s and *Whalen* illustrate that all the words in the subsection have relevance in determining its breadth. In those cases, the Court assessed "passageway" and "floor" as distinguished from where work was being conducted. The word "passageway" also appears in §23-1.7(e)(1), but does not appear in §23-1.7(e)(2), the latter of which is the only other code subsection presented on this appeal.

This is notable because §23-1.7(e)(1) which refers to debris in passageways was dismissed by the 12-14-20 Order of J.S.C. Goetz, and was *not* appealed by Plaintiffs. As indicated earlier in this Brief, Plaintiffs and their expert Gailor attempted to blur lines in the briefing not only by misidentifying P&T, but in that Appellants' Brief injects §23-1.7(e)(1) into its argument. Indeed, Appellants' cite to *Sergio* demonstrates this point. *Sergio* did not involve §23-1.7(d). Rather, the First Department therein referred to "§23-1.7(e)", sans reference to any subsection. *Sergio,* supra at 477. As can be gleaned from *Sergio,* the action involved a plaintiff whose work was performed at elevators, but whose fall involved stacked cartons which fell beneath the wheels of plaintiff's tool box in a passageway. Id at 235-236. The fact pattern would therefore relate to §23-1.7(e)(1) entitled "Passageways" which is not the subject of the appeal. Nor are falling stacked cartons comparable to the minute pebbles.

While *Sergio* held under the facts of that case that neither being an out of possession building owner who lacks control over the work nor over the premises vitiates a statutory responsibility under Labor Law 241(6) over the "entire site," well-settled precedent establishes that Park is not a proper party to a Labor Law §241(6) claim herein under the Ruisech facts.

Sergio was distinguished in *Quinones v. 27 Third City King Restaurant,* 198 AD2d 23 (1st Dept. 1993). In *Quinones*, the First Department, citing *Manning v*

New York Tel. Co., 157 AD2d 264 (1st Dept. 1990) which cited *Guzman v Haven Plaza Hous. Dev. Fund C*o., 69 NY2d 559 (1987), the First Department explained that while the reservation of a right to reenter, inspect and make repairs, even without a duty to do so, may subject a landlord to liability in commercial premises covered by the Administrative Code of the City of New York, "However, we have held that only a significant structural or design defect in violation of a specific statutory safety provision will furnish a basis for such liability." *Quinones*, supra at 23. In *Quinones*, the conditions at issue were "ruts, pitting and holes in the plastic covering of an interior step installed by the tenant", which do not constitute a significant structural defect. Id. Herein, Park is the out of possession landlord and the alleged conditions resulted from an ongoing installation contracted for by the tenant which would not constitute a "significant structural defect." Id.

As discussed heretofore, Plaintiffs-Appellants have improperly defined P&T as contracting parties in the project, disregarded the dismissal of all 241(6) claims in the lower court as to Tishman which was not appealed and failed to evince that the claim involves a significant structural or design defect. Plaintiffs can not establish a claim under §23-1.7(d) by referring to a "slip" in the absence of a slippery substance contemplated by §23-1.7(d), which code subsection identified as examples "ice, snow, water, grease and any other foreign substance which may

cause slippery footing." In fact, legal precedent demonstrates lack of applicability of §23-1.7(d) to the facts of this case.

In *Cruz v. Metro. Tr. Auth.*, 193 AD3d 639 (1st Dept. 2021), the First Department unanimously affirmed the grant of summary judgment dismissing plaintiff's common law negligence and Labor Law 200 and 241(6) claims which included the Labor Law 241(6) claim premised on 23-1.7(d) specifically holding that the subsection was not applicable to "loose dirt and debris" citing *Fitzgerald v Marriott Intl., Inc*., 156 AD3d 458 (1st Dept 2017); *Salinas v Barney Skanska Constr. Co*., 2 AD3d 619 (2d Dept 2003); *D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107 (1st Dept 2002). Id. at 640.

In *Miranda,* supra, the Second Department held that a natural sand surface of an excavation trench on sandy ground did not constitute a "slippery condition" as contemplated by 23-1.7(d). Id at 404.

In *Fitzgerald,* supra, in which §23-1.7(d) was also found inapplicable, the alleged "slippery condition" or "foreign substance" was "a piece of mud-covered insulation while walking down a wooden ramp." Id at 458.

So too, §23-1.7(d) was found inapplicable in *Salinas*, supra, wherein the plaintiff alleged slipping on "demolition debris" when attempting to get out of the way of a falling duct, and the Second Department found that the demolition debris

on which plaintiff slipped was not the type of foreign substance contemplated by this provision. Id at 620.

In *D'Acunti, supra,* the First Department found "no evidence that the accumulations of dirt and debris constituted a "slippery condition" within the meaning of the cited Industrial Code section." See also, *Aguilera v Pistilli Constr. & Dev. Corp*., 63 AD3d 763 (2d Dept 2009) (debris not slippery condition under 23-1.7(d)); *Rose v. A. Servidone, Inc*., 268 AD2d 516 (2d. Dept 2000) (dirt and pebbles strewn on blacktop was not a slippery condition under 23-1.7(d)); *Cevallos v. Site 1 DSA Owner LLC*, 2020 NY Misc 2905 (Queens County, May 2020) (testimony asserting slipping hazards were "small pieces of sheetrock, small screws and leftovers of cement from the walls …such accumulated debris … is not the type of slippery condition or foreign substance contemplated by section 23-1.7(d)").

In the instant case, the location of the alleged incident was the very work site location where Ruisech was performing the installation, not a "passageway." Ironically, Plaintiffs argue that defendants have referred to the location as a passageway when "passageway" was alleged by Plaintiffs. The First Department's dismissal of all remaining claims revealed carefully scrutiny of the evidentiary proofs rather than any misrepresentations presented by Plaintiffs and their "expert."

In *Bazdaric v. Almah Partners, LLC,* 2024 NY LEXIS 71, 2024 NY Slip Op 00847 (February 20, 2024) the recent Court of Appeals decision cited by Plaintiffs, the plaintiffs moved for partial summary relief on Industrial Code §23-1.7 (d), (e) (1) and (2). In footnote 2 of said decision, this Court noted that Plaintiff did not appeal the Court's rejection of their claim under §23-1.7 (e) (2), and in footnote 3, noted the Appellate Division had rejected plaintiff's claim under §23-1.7 (e) (1).

In *Bazdaric,* the Court of Appeals determined that plaintiffs were entitled to summary judgment for a slip on an escalator floor under §23-1.7 (d) as a "plastic covering" placed on the escalator floor was a foreign substance because it was not a component part of the escalator where plaintiff was painting, was not necessary to its functionality, and the parties agreed that it was the wrong type of covering for the job. Here, by contrast, plaintiff targeted minute concrete pebbles created by Project co-workers [R490-492, 501, 503-504] which were "not the type of [slippery hazard or] foreign substances contemplated by this provision." *Salinas,* supra at 622; *Cruz,* supra at 639; *D'Acunti,* supra at 107; *Rose*, supra at 518.

b. *Industrial Code §23-1.7(e)(2) Is Inapplicable*.

[i] Plaintiff Only Testified to Slipping

Plaintiff Ruisech did not testify to having tripped [R421-1036]. Although he included Industrial Code 12 NYCRR 27-1.7(e) which refers to tripping hazards in his Supplemental BP [R266-271], his testimony is limited to slipping. Absent that,

Plaintiffs pleadings or bills of particulars do not refer to tripping on a tripping hazard [R248; 262; 272], and even had they done so, Ruisech's testimony established absence of factual support for claiming tripping. Thus, the Court can dispense with probing as to Industrial Code 12 NYCRR §23-1.7(e)(2) as regardless of pleadings, Plaintiff testified only to slipping [R499].

Since Plaintiff only testified that he "slipped" [R421-1036], Rule 23-1.7 (e), which relates to "tripping hazards," is inapplicable here. See *Dyszkiewicz v. City of New York*, 218 AD3d 546 (2d Dept 2023) (plaintiff's testimony that he slipped rendered Rule 1.7 (e) inapplicable to his Labor Law §241 (6) claim).

To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that the injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case." *Zaino v Rogers*, 153 AD3d 763 (2d Dept. 2017). Here, the defendants established, prima facie, that 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 testified to as resulting from a slipping incident, not a tripping hazard, as the plaintiff testified at his deposition that he "slipped" [R499-500] (see *Keener v Cinalta Constr. Corp*., 146 AD3d 867 (2d Dept. 2017); *Velasquez v. 795 Columbus LLC*, 103 AD3d 541 (1st Dept. 2013).

Appellants' relies on their expert, who along with misrepresenting P&T like counsel does, identified pebbles to be a "foreign substance" that would cause a "slippery footing" (App. Br. at 29). The regulation's language on its face amounts to a conclusory assertion unsupported by industry standards or a reasonable degree of engineering. *Solis v. 32 Sixth Avenue Co. LLC*, 38 AD3d 389 (1st Dept. 2007).

[ii] The Minute Pebbles were Integral to the Glass Installation Process

If the Court still determines to proceed in examining Industrial Code 12 NYCRR §23-1.7(e)(2), it is noted that 12 NYCRR §23-1.7(e)(1) was dismissed in the 12-14-20 Order, and was not the subject of appeal. However, Plaintiffs-Appellants' Brief proceeds to address §23-1.7(e)(1) along with 23-1.7(e) (2) (App Br. at 24).

Defendants established inapplicability of 23-1.7(e)(2) as "the object on which plaintiff tripped …was an integral part of the work he was performing." Id. at 820-821. *Lech v. Castle Vil. Owners Corp*., 79 AD3d 819 (2d Dept. 2020). The minute pebbles were integral to the work being performed. Plaintiffs to the contrary claim the First Department "improvidently applied discretion" when it determined that the concrete debris was an integral part of the construction (App Br. at 24). In *O'Sullivan,* the Court of Appeals affirmed dismissal of Labor Law 241(6) claims based on 12 NYCRR §23-1.7 (e) (1) and (2) since the pipe that had been *tripped* on was an integral part of the work.

Ruisech's attempt to have the minute pebbles treated as if not integral lacks merit. Notably, Ruisech uses the term "debris" liberally. He testified to utilizing materials which he himself defined as "debris" in preparing the glass for installation. That is, sheetrock debris and rugs located within the work area were repurposed during the installation process [R600, 826-827]. He and his co-workers laid the sheetrock "debris" on the ground at the point in the process at which they were repositioning the glass to a vertical position for installation. Id.

Rather than acknowledge the pebbles as integral, Appellants' instead would analogize the pebbles to "loose granules on the roof surface" in *Lester v. J.D. Carlisle Dev. Corp., MD.*, 156 AD3d 577 (1st Dept. 2017). This misses the point that the minute pebbles were part of the installation process having been actually created by Plaintiffs' co-workers at A-Val as part of that process. By contrast, in *Lester*, while the plaintiff was installing panels on a video screen, the loose granules were part of a temporary roof surface which was unrelated to the video installation process in which he was involved. There is no indication in the *Lester* decision that the "loose granules" had been purposely created and used in the installation of video panels in which process plaintiff was involved. The *Lester* granules were described as "not integral to the structure of the work" but merely an "accumulation of debris". Id.

By contrast, the minute pebbles were the direct result of the track or channel work performed by other A-Val workers necessary for the glass installation he was performing. Ruisech's deposition ultimately confirmed that the minute pebbles were directly at the point of contact with the channel upon which he was performing the installation rather than being an "accumulation" of debris.

In fact, reason demands that Ruisech's own testimony of the minuteness of the pebbles, and his testimony that he had not seen it before because it was so small is antithetical to applying the word "accumulation" to its presence.

These facts contrast *Singh v. Young Manor, Inc*., 23 AD3d 249 (1st Dept. 2005) relied on by Plaintiff. *Singh* was cited by Ruisech to argue that the pebbles were "debris" under §23-1.7(e)(2) by attempting to analogize pebbles to a nail near a pile of debris in the work area that had been permitted to accumulate for several days. In *Singh,* triable issues existed as to "whether plaintiff was engaged in the same debris removal work as the workers throwing and pouring it." By contrast, the source of the pebbles was confirmed by Ruisech as part of the same install process that plaintiff was performing making their presence an inherently linked as a byproduct of A-Val's ongoing installation process.

Tighe v. Hennegan Const. Co., 48 AD2d 201 (1st Dept. 2008) cited by Appellants is unpersuasive as well. In *Tighe*, the issue of "accumulation" was acknowledged by the Court based on it being "readily observable." Id. at 419. By

contrast, Plaintiff Ruisech himself acknowledged the minute pebbles condition had not been readily observable.

Other cases relied upon by Plaintiffs as to §23-1.7(e)(2) do not apply. In *Rajkumar v. Budd Contracting Co.*, 77 AD3d 595 (1st Dept. 2010), the court addressed Labor Law 241(6) in context of §23-1.7(e)(2) concluding that trip on brown construction paper purposely laid was distinguishable from dirt, debris and scattered tools. Again, tripping was not testified to by Ruisech. Further the minute pebbles were byproduct of the channel or track laying, a purposeful task which did not result in "loose or scattered debris" as plaintiff's own testimony noted the pebbles at the very spot of the channel which was created by removal of the concrete pebbles. To describe them as "loose or scattered debris" is to contradict Plaintiffs' own testimony as to their location and de minimus, minute size which was separate and distinct from his description of a larger area.

In *Hammer v. ACC Constr. Corp.*, 193 AD3d 455 (1st Dept. 2021), cited by Appellants in an attempt to distinguish when §27-1.7(e)(2) did not apply, a loop of electrical wire was considered "integral and permanent." By this argument, Appellants erroneously inject permanency as a requisite when it is not. In *Hammer*, the First Department cited *O'Sullivan* which defines "integral part of what is being constructed" not a permanent part of it. *O'Sullivan*, supra. And, in Hammer we again address a tripping condition which was not testified to herein.

Referencing *Johnson v. 923 Fifth Ave. Condo*, 102 AD3d 592 (1st Dept. 2013), Appellants-- again addressing tripping -- attempt to distinguish our facts from where a plaintiff tripped on a piece of plywood purposely laid over the sidewalk so people would not trip in which case §23-1.7(e)(2) was found not applicable. That comparison did not mean the pebbles were not an integral part of the process. The pebbles existed precisely because they were formed out of the process, which could not be said of the plywood, a makeshift platform used during construction..

Plaintiffs' argument that the First Department decision herein goes "far beyond" *O'Sullivan* is spurious. Rather Plaintiffs' argument expands the scope of 241(6) by disregarding its dual aims to protect construction workers but also reflect the common law sense realities of construction work. By contrast, taken to its logical conclusion, Plaintiffs are in effect advocating for owners and contractors to stand vigil during the construction process and be ready with a broom at a moments' notice, standing underfoot to remove minute byproducts of work performed, and in so doing obviously disregarding contractual division of duties..

"Industrial Code §23-1.7(e) (2) which applies to "Tripping and other hazards," provides:

> (2) Working Areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections

> insofar as may be inconsistent with the work being performed.

A working place is an area where people are working. See *Canning v. Barney's New York*, 289 A.D.2d 32, 34 (1st Dept 2001). Provided that the description of the place of injury is consistent and sufficient, the court may determine whether it was a passageway or working area on a motion for summary judgment (see *Appelbaum v. 100 Church LLC,* 6 AD3d 310, 310 (1st Dept 2004). Here, the evidence showed that plaintiff was in the very area where he was performing a task that he was hired to perform, directly at the channel at which he was placing the glass as was his job [R644]. Thus, as a matter of law, Ruisech's accident did not occur in a passageway, but in a working area.

12 NYCRR 23-1.7(e) (2) is inapplicable as Plaintiff's accident was not caused by accumulations of dirt and debris, tools or projections scattered on the floor. *Marrero v. 2075 Holding Co., LLC*, 106 A.D.3d 408 (1st Dept. 2013), citing *Burkowski v. Structure Tone, Inc.,* 40 AD3d 378 (1st Dept. 2007). The specified condition testified to by Plaintiff was created by the installation process in which he was a participant. [R664-665]. Such is comparable to the pipe in *O'Sullivan*, in which there is no detail as to the pipe's function at the time of the occurrence. Plaintiffs' attempts to distinguish the minute pebbles from other materials integral to the work must fail as a matter of reason.

12 NYCRR 23-1.7(e) (2) is specifically written so as to exempt that which encompasses material used in "work being performed" in the "working area." The regulation does not apply where the object on which plaintiff claims to have tripped was an integral part of work being performed. *Alvia v. Teman Elec. Cntr. Co*., 287 AD2d 421 (2d Dept. 2001); *Sharrow v. Dick Corp*., 233 AD2d 858 (4th Dept. 1996), citing Adams, supra at 973. The floor cutout area including the pebbles was the location on which plaintiff was working at the time of the occurrence completing the installation and the specified condition were the minute pebbles resulting from the track channel created by A-Val co-workers which enabled plaintiff's work of fitting the glass into the track. *Marrero v. 2075 Holding Co., LLC*, 106 A.D.3d 408 (1st Dept. 2013), citing *Burkowski v. Structure Tone, Inc.*, 40 AD3d 378 (1st Dept. 2007) [R491, 504]. The minute little pebbles identified by him were "consistent with" the work being performed, rather than "scattered" within the meaning of 23-1.7(e) (2) [R503-505]. *Burkowski*, supra, citing *Kinirons v. Teachers Ins. & Annuity Assoc. of Am*., 34 AD3d 237 (1st Dept. 2006).

[iii] The 8-17-22 Order is not in Conflict with other First Department Decisions

Contrary to Plaintiffs' contentions (App. Br. at 29), the First Department's dismissal was not in conflict with other First Department decisions. Rather,

Appellants misconstrue facts and case law to so assert. Plaintiffs erroneously argue that the decision is in conflict with *Lester*, supra; *Tighe*, supra; *Singh*, supra; *Johnson*, supra; *Rajkumar*, supra; and *O'Sullivan*, each of which is discussed above.

Plaintiff similarly misapplies *Pereira v New School*, 148 AD3d 410 (1st Dept. 2017), disregarding the parameters of §23-1.7(d) as to slippery conditions resulting from foreign substances and the regulations contemplated breadth. Unlike in *Pereira* in which the plaintiff offered evidence that he did not work with wet concrete, Ruisech's testimony confirmed the pebbles were the inherent byproduct of A-Val co-workers preparing the channel for his role in the installation.

Plaintiff's own testimony established that this channel and minute pebbles created by it were integral to his work at the time of the incident. By his movements and the actions of his co-workers in preparing the opening for installation of the glass, the condition was an "inherent result" of the work being performed at the site by them. Plaintiff misrepresents *Cabrera v. Sea Cliff Water Co.*, 6 AD3d 315 (1st Dept. 2004). Therein, the First Department determined that the "location where plaintiff fell was more a work area then a passageway, and *appearance of sheetrock dust and sawdust appear to have been unavoidable and*

inherent result of cutting of sheetrock and plywood by co-workers did not constitute hazard under 12 NYCRR 23–1.7(e)(2)" (emphasis added) Id.

Plaintiff misconstrues other cases as well. In *Torres v. Triborough Bridge and Tunnel Authority*, 193 AD3d 665 (1st Dept. 2021), alleged debris resulted directly from the ongoing work being performed so as to constitute an integral part of the work. That clean up of the debris was tasked to him does not preclude application of the integral part of work exclusion when conditions created by co-workers are involved. See, i.e., *Cooper v. Sonwil Distrib. Ctr., Inc.* 15 AD3d 878 (4th Dept. 2005) (debris created by co-workers); *Salinas*, supra (same). It is also significant that the glass installation work by Ruisech and his co-workers was ongoing. See *Mateo v. Iannelli Constr. Co., Inc*., 201 AD3d 411 (1st Dept. 2022) (dismissing LL 241(6) claim where plaintiff fell climbing over an air duct left on floor *by co-worker* as part of ongoing demolition work his employer was subcontracted to do).

"Inherent result" realistically identifies the collective co-worker process. See i.e., *Ghany v. BC Tile Contractors, Inc*., 95 AD3d 768 (1st Dept. 2012) (small stone was unavoidable as inherent result of work being performed at the site); *Stafford v. Viacom*, 32 AD3d 388 (2d Dept. 2006) (glue was an integral part of work activity). In *Bond v. York Hunter Constr., Inc.*, 270 A.D.2d 112 (1st Dept. 2000), aff'd, 95 NY2d 883 (2000), this Court recognized circumstances where

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.

POINT IV

THE FIRST DEPARTMENT PROPERLY GRANTED SUMMARY DISMISSAL TO DEFENDANTS UNDER LABOR LAW 200 AND COMMON LAW NEGLIGENCE.

Plaintiffs-Appellants argue that the Supreme Court had been correct in maintaining Labor Law §200 and common law negligence claims against P&T, and the First Department was in error in reversing its ruling. Plaintiffs have not supported this argument on appeal. As discussed above, Appellants erroneously characterized Tishman collectively with Park in the Appellants' Brief as if they were both contracting parties in the CBRE/ST Agreement which they were not. Plaintiffs' appellate presentation as to P&T springs from those wrongful assertions and provides nothing more. It should not be Respondents' obligation to lay the facts before the court when Appellant has not. Notwithstanding same, the entirety of the Record supports the propriety of the First Department's dismissal in the 8-16-22 Order of remaining claims which were properly appealed from the 12-14-20 Order..

As described by the lower court, Park and Tishman's summary judgment motion sought dismissal of the LL200 and common law negligence claims arguing they did not direct or control Ruisech's work and did not have notice of any

dangerous condition [R29]. While the only reference to P&T in the Appellants' Brief is to conglomerate them as parties to the CBRE/ST Agreement which they were not, Appellants realistically speaking did not present a cognizable argument as to P&T.

In dismissing Plaintiffs' Labor Law § 200 and common-law negligence claims against P&T [R2638], the First Department identified that claims for personal injury under the statute 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" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 (1st Dept 2012]). Where the injury arises from the manner in which the work was performed, the owner or general contractor is not liable, unless "it actually exercised supervisory control over the injury-producing work" Id. [2639-2640]. The Court recognized that the Record established that Park was an out -of-possession landlord and although it had a right of re-entry to maintain and repair, it was not involved in the Project and there are no allegations that the conditions alleged to have caused plaintiffs accident constituted a significant structural or design defect that violated a specific safety statute. See *Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538, 539([1st Dept 2018) [R2640].

The First Department also recognized Tishman had established that it was not Park's statutory agent [R2640]. So too, contrary to Plaintiffs' erroneous representations as to "Defendants-owner Tishman" in the Plaintiffs-Appellants' Brief, when the lower court made a finding of fact that "[I]t is undisputed that Tishman Speyer, the managing agent, is not an owner of contractor" [23], Plaintiff did not appeal the ruling.

Under these circumstances, Plaintiffs'-Appellants have satisfied their burden as appellants before this Court in even crafting an argument as to P&T. Given Plaintiffs' misrepresentation of P&T's roles identified above, there hardly seems need to further explain why Plaintiffs' appeal has no merit as to P&T.

The First Department cited *Venter v. Cherkassy*, 200 A.D.3d 932 (2d Dept. 2021) for the proposition that where plaintiff alleges that an accident involves both a dangerous condition on the premises and the means and methods of the work, "the property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards," citing *Muscat v Consolidated Edison Co. of N.Y., Inc*., 168 AD3d 717 (2d Dept. 2019). The moving defendants prevail only when the evidence exonerates them as a matter of law "'for all potential concurrent causes of the plaintiff's accident and injury, and . . . no triable issue of fact is raised in opposition as to either relevant liability standard." *Cherkasky*, supra at 1092,

citing *Rodriguez v Metropolitan Transp. Auth.*, 191 AD3d 1026 (2d Dept. 2021), quoting *Reyes v Arco Wentworth Mgt. Corp*., 83 AD3d 47 (2d Dept. 2011).

Labor Law §200 is a codification of common law and adheres to that general rule. *Russin v. Louis Picciano & Sons*, 54 N.Y.2d 311 (1981). The Courts in New York have spoken that where an owner and managing agent exercise no supervisory control over the operation, no liability attaches under Labor Law §200. *Lombardi v. Stout*, 80 NY2d 290 (1992); *Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876, (1993). Where the alleged defect or dangerous condition arise from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law §200. See also, *Sheridan v. Beaver Tower, Inc.*, 229 A.D.2d 302 (1st Dept. 1996). As the evidentiary proofs establish, including that of Ruisech and Mucci identified herein, P&T never had authority to direct, supervise, or control any aspect of the project or direct or control the Plaintiff's work, nor did it provide any of the materials, tools, or equipment. Additionally, P&T never created nor had notice of the pebbles of which it is undisputed that A-Val created the pebbles.

There are simply no triable issues of facts capable of targeting P&T under common law or Labor Law §200, the out of possession landlord property owner and managing agent neither of which have supervisory authority on the Project. See *Putnam v Karaco Indus. Corp.*, 253 A.D.2d 457 (2d Dept 1998) (even if an

owner or managing agent may periodically visit a construction site does not support finding that they either directed or controlled work, and thus there was no basis to hold them liable under LL §200). See also, *Pilato v. 866 U.N. Plaza Associates,* 77 A.D. 3d 644 (2d Dept 2010) ("although property owners have a general authority to oversee the progress of the work, a mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law Section 200." (See *Pilato*, supra). In the instant case, as this was even a Park Project: Tishman and Park did not have even a general supervisory authority.

Plaintiff mistakenly characterizes his accident as one arising out of a dangerous condition. 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 pebbles. Stated otherwise, this is not a case regarding a defective or transient related condition – as in a crack within the floor or discarded garbage, or a puddle of water or a sheet of ice – rather, this case involves minute pebbles created by Plaintiffs' co-workers during the very same ongoing installation. See discussion in Point III above.

By the facts of this case, there is no triable issue as to P&T having had actual or constructive knowledge of the concrete chips existing in the course of A-Val's installation work performed for CBRE in the course of the Project on the

19th Floor. Defendants P&T were properly granted summary dismissal of all party claims against them as regards LL §200 and common law negligence by the First Department.

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 (2d Dep't 2023); *Fonck v. City of New York*, 198 A.D.3d 874 (2d Dep't 2021); *Cruz*, supra; *Doran v. JP Walsh Realty Group, LLC*, 189 A.D.3d 1363 (2d Dep't 2020) (debris created as a part of that ongoing work tree removal work "unavoidable and inherent result"). Herein, Plaintiff unequivocally testified that the debris or pebbles 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 [R616]. Plaintiff testified that the pebbles were the result of the track or channel work – or "chip" work – which was performed by other A-Val workers in furtherance of that work [R490-492, 501, 503-504].

In *Cappabianca, 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 also, 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 machine used by plaintiff's employer, and defendant never oversaw nor directed the project, nor did it provide tools or equipment for the work).

Further, the actual facts herein reveal P&T were not contracting parties involved in the Project which was completely within the CBRE tenant's space, and, as recognized by the First Department, Park was an out of possession owner, and there was no significant structural or design defect at issue See *Dirschneider*, supra at 539. *See also, 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").

Further, "notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken." *Mitchell*, supra 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). See also, *Rodriguez v. Dormitory Auth. of State*, 104 A.D.3d 529 (1st Dep't 2013) (no triable LL §200 or common law claim where plaintiff testified that he had seen similar hazards on the floor on the day of the accident and the day before, but there was no testimony indicating how long the specific hazard, a clamp, had been in the location of his accident); *Canning v. Barney's New York*, 289 A.D.2d 32, 33 (1st Dep't 2001) (no evidence defendant had notice of specific condition); *Dasilva v. Nussdorf*, 146 A.D.3d 859 (2d Dep't 2017) (general awareness of ground uneven and soft and filled with debris was insufficient to impute notice of an unsafe condition).

So too, Plaintiff's own admission of the extremely small size of the pebbles such that he did not see them prior to the occurrence is antithetical to finding a triable issue as to constructive notice by any defendants. See *Gordon v. Am. Museum of Nat. History*, 67 N.Y.2d 836 (1986).

Accordingly, the First Department correctly dismissed the Labor Law § 200 and common-law negligence claims against P&T.

CONCLUSION

Based on the foregoing, this Court should affirm the First Department's Order and award such other relief as it deems appropriate.

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to 22 NYCRR § 500.13(c)(1), I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief, excluding the material omitted under Rule 500.13(c)(3), is 13,959 words.

This brief was prepared on a computer using Times New Roman, a proportionally spaced typeface, in point size 14.

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