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

Court of Appeals

of the

State of New York

FELIPE RUISECH and MARTHA RUISECH,

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents,

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

– and –

CBRE INC.,

Defendant-Respondent.

(For Continuation of Caption See Inside Cover)

MOTION FOR LEAVE TO APPEAL

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

Third-Party Plaintiffs-Respondents,

– against –

CBRE INC.,

Third-Party Defendant-Respondent.

STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff-Respondent,

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant-Respondent.

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

Third Third-Party Plaintiffs-Respondents,

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent.

STATE OF NEW YORK: COURT OF APPEALS

---X

FELIPE RUISECH, et al.,

Plaintiffs-Appellants,

-against-

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC., et al.,

Defendants-Respondents,

-and-

CBRE INC.,

Defendant-Respondent.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third-Party Plaintiffs-Respondents,

-against-

CBRE INC.,

Third-Party Defendant-Respondent.

---X

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff-Respondent,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant-Respondent.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third Third-Party Plaintiffs-Respondents,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent.

---X

NOTICE OF MOTION

Supreme Court, New York County Index No: 159007/13

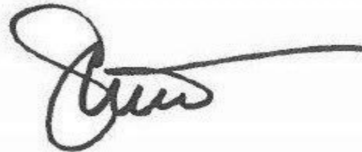
Appellate Division Case No.: 2021-00357

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Richard P. Amico and the Exhibits attached thereto, upon the record and briefs submitted on the appeal below, and upon all prior papers and proceedings, the Plaintiffs-Respondents, by their attorneys, The Barnes Firm, P.C., will move this Court on Monday, January 9, 2023, at Court of Appeals Hall, 20 Eagle Street, Albany, New York, pursuant to CPLR 5602(a)(1)(i) and Court Rule 500.22, for permission to appeal to the Court of Appeals from an Order of the Appellate Division, First Department, entered on August 16, 2022, dismissing Plaintiffs' Complaint.

DATED: Rochester, New York
December 22, 2022

Yours, etc.,

The Barnes Firm, P.C.



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STATE OF NEW YORK: COURT OF APPEALS

---X

FELIPE RUISECH, et al.,

Plaintiffs-Appellants,

-against-

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC., et al.,

Defendants-Respondents,

-and-

CBRE INC.,

Defendant-Respondent.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third-Party Plaintiffs-Respondents,

-against-

CBRE INC.,

Third-Party Defendant-Respondent.

---X

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff-Respondent,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant-Respondent.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third Third-Party Plaintiffs-Respondents,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent.

---X

ATTORNEY AFFIRMATION

Supreme Court, New York County Index No: 159007/13

Appellate Division Case No.: 2021-00357

RICHARD P. AMICO, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under the penalties of perjury:

1. I am a member of The Barnes Firm, P.C., attorneys for Plaintiffs-Respondents Felipe and Martha Ruisech and, as such, I am fully familiar with the facts and circumstances set forth herein. I submit this Affirmation in support of Plaintiffs' motion, pursuant to CPLR 5602(a)(1)(i) and Court Rule 500.22, for permission to appeal to the Court of Appeals from an Order of the Appellate Division, First Department, entered on August 16, 2022, which dismissed Plaintiffs' Complaint.

PROCEDURAL HISTORY AND TIMELINESS

2. This case involves an appeal by Defendants from an order of Supreme Court, New York County (Goetz, J.), entered December 14, 2020, which denied Defendants' motions for Summary Judgment seeking to dismiss Plaintiffs' claims under Labor Law §241(6) and Labor Law §200, and for negligence (Annexed as Exhibit A).

3. By decision and order entered on August 16, 2022, the Appellate Division, First Department, reversed the trial court and dismissed Plaintiffs' Labor Law and common-law negligence claims. A copy of the order, with notice of entry, was served on August 18, 2022 via NYSCEF (Annexed as Exhibit B).

4. On September 16, 2022, Plaintiffs filed and served via NYSCEF a motion for reargument/leave to appeal with the Appellate Division, First Department (Annexed as Exhibit C). The Appellate Division issued its order denying Plaintiffs' motion on November 22, 2022, and a copy of the order with notice of entry was filed/served the same day via NYSCEF (Annexed as Exhibit D).

5. The motion now before this Court, made within 30 days of service of the notice of entry of the Appellate Division order denying leave, is timely pursuant to CPLR 5513(b).

JURISDICTION

6. This Court has jurisdiction over the proposed appeal pursuant to CPLR 5602(a)(1)(i), which provides that, for actions originating in Supreme Court, an appeal may be taken by permission "from an order of the Appellate Division which finally determines the action and which is not appealable as of right." The First Department dismissed Plaintiffs' claims as a matter of law, which constitutes a final determination that is not appealable as of right.

THE QUESTIONS PRESENTED MERIT REVIEW

7. The Plaintiffs-Respondents seek permission to appeal to this Court with an understanding of its dual jurisprudential function to give uniformity and finality to the laws of this State and to see that justice is done in particular cases.

8. Plaintiff Felipe Ruisech worked in the construction industry, the inherent dangers of which account for extensive statutory and regulatory protections afforded workers in New York State. Plaintiff lost his career and is permanently disabled because he was deprived of those protections, and he is without a remedy at law because the Appellate Division extended a rule of this Court beyond its intended reach.

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

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

11. That holding is inconsistent with the reasoning underlying the “integral part of the construction” exception, and it extends the exception so far beyond this Court’s decision in O’Sullivan that it subsumes the regulations entirely.

12. The holding not only defeats specific industrial code regulations designed to promote the safety of construction workers, but it also usurps the fact-finding function of a jury on such matters as what constitutes “debris,” “foreign substance,” “slippery condition,” and “passageway.”

13. Plaintiffs should be granted leave to appeal to the Court of Appeals in order to settle the law in that regard. The case involves questions of law that affect innumerable workers in the construction industry and that have significant public importance. Injuries to construction workers have a negative societal impact, just as the prevention of injuries provides a benefit to society as a whole.

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

15. Though raised on appeal, the Appellate Division did not address the general contractor’s express assumption of duty for the precise condition protected against by the Industrial Code, which was the indisputable cause of Plaintiff’s injuries.

16. The failure to enforce the general contractor's express assumption of duty to the Plaintiff (evidenced by the construction contract itself) deprived Mr. Ruisech of the protections of Labor Law §200, in addition to those of Labor Law §241(6), effectively shifting all responsibility to the State and social institutions.

17. Further, the appellate court inexplicably ignored the affidavit of Plaintiffs' engineering expert – and/or determined the weight rather than legal sufficiency of the evidence – when deciding that the spoils of the concrete work did not constitute "an existing defect or dangerous condition of the property."

18. Thus, the court did not require the defendant to meet its evidentiary burden on a motion for summary judgement, since the court did not require Defendant Structure Tone to demonstrate that it did not have actual or constructive knowledge of the condition that caused Plaintiff's injuries.

THE APPEAL IS MERITORIOUS

19. The law creates a nondelegable duty on the part of property owners and contractors for what would otherwise be evaluated under ordinary principles of negligence. In that regard, Labor Law § 241(6) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * * *

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work … shall comply therewith.

20. It is settled that section 241(6) applies to violations of "specific, positive command[s]" of the Industrial Code. Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993). The case at bar involves Industrial Code Rule No. 23, relating to "Protection in Construction, Demolition and Excavation Operations." 12 NYCRR 23-1.1.

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

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

> **(e)** The <u>hazards incidental to the handling and movement of heavy materials</u>.

12 NYCRR 23-1.2 (emphasis added).

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

> 12 NYCRR 23-1.7(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.
>
> 12 NYCRR 23-1.7(e) Tripping and other hazards.
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

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

The first crew had finished, leaving the concrete spoils behind. No one had cleared the concrete spoils before Plaintiff's crew was due to make the installation. It was upon the debris left behind that Plaintiff slipped.

24. Within this context, the appellate court found that such "accumulations of dirt and debris" were "an integral part of the construction," despite that such dirt and debris are, by definition, substances that must be discarded in order to reduce the risk of harm to human beings.

25. As mentioned above, the general contractor assumed a duty in the construction contract itself to "keep the Site and surrounding areas free from accumulation of debris" occasioned by the work. At a minimum, such contractual provision created an issue of fact regarding the general contractor's liability.

26. Inexplicably, the appellate court found no duty on the part of Structure Tone, only "a general level of supervision that is not sufficient to warrant" a finding of liability.

27. The First Department's decision and order are in direct conflict with its previous decisions in: Pereira v. New Sch., 148 AD3d 410, 412 (1st Dept. 2017) (the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site); Tighe v Hennegan Constr. Co., Inc., 48 AD3d 201, 202 [1st Dept 2008] (demolition debris was not integral to electrician's work); Lester v JD Carlisle Dev. Corp., 156 AD3d

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

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

29. Based on all of the foregoing, Plaintiffs-Respondents respectfully request that the Court grant their motion for leave to appeal to the Court of Appeals.

Dated: December 22, 2022
Rochester, New York

The Barnes Firm, P.C.

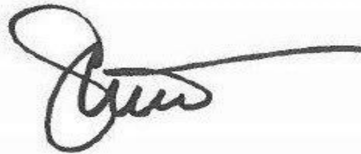

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ — *Justice*

PART IAS MOTION 47EFM

INDEX NO. 159007/2013

MOTION DATE 07/06/2020, 08/19/2020, 08/19/2020, 11/02/2020

MOTION SEQ. NO. 004 005 006 007

FELIPE RUISECH, MARTHA RUISECH,

Plaintiffs,

- v -

STRUCTURE TONE GLOBAL SERVICES, INC.,TISHMAN SPEYER PROPERTIES, L.P., METROPOLITAN LIFE INSURANCE COMPANY, 200 PARK LP, CBRE INC,

Defendants.

DECISION + ORDER ON MOTION

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

Third-Party Plaintiffs,

-against-

CBRE, INC.,

Third-Party Defendant.

Third-Party Index No. 590013/2014

STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiffs,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant.

Second Third-Party Index No. 590202/2014

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

Third-Party Plaintiffs,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Third-Party Defendant.

Third Third-Party Index No. 595439/2018

The following e-filed documents, listed by NYSCEF document number (Motion 004) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 185, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 271, 272, 273, 274, 277, 284, 285, 286, 287, 288, 289, 292, 293, 294, 295, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 186, 205, 206, 207, 208, 209, 210, 269, 270, 278, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 184, 187, 211, 212, 213, 214, 215, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 279, 296, 297, 298, 299, 300, 301

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 188, 201, 202, 203, 204, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 275, 276, 280, 281, 282, 337

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of a construction site accident that occurred on June 2, 2011 at 200 Park Avenue in Manhattan (the premises). Plaintiff Felipe Ruisech (hereinafter, plaintiff), a glazier, alleges that he slipped on construction debris while attempting to install a glass partition, injuring his back.

Defendants/third-party plaintiffs/third third-party plaintiffs 200 Park, LP (200 Park) and Tishman Speyer Properties, L.P. (Tishman Speyer) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims and Labor Law § 241 (6) claim and all cross claims asserted against them. In addition, 200 Park and Tishman Speyer move for summary judgment on their common-law indemnification claims against defendant/third-party defendant CBRE, Inc. (CBRE), defendant/second third-party defendant Structure Tone, Inc. i/s/h/a Structure Tone Global Services, Inc. (Structure Tone), and

second third-party defendant/third third-party defendant A-Val Architectural Metal III, LLC (A-Val). 200 Park and Tishman Speyer also move for: (1) contractual indemnification, including defense costs/attorneys' fees, from CBRE; (2) contractual indemnification, including defense costs/attorneys' fees, from Structure Tone; and (3) contractual indemnification, including defense costs/attorneys' fees, from A-Val (motion sequence number 004).

Second third-party defendant/third third-party defendant A-Val moves, pursuant to CPLR 3212, for summary judgment dismissing Structure Tone, 200 Park, and Tishman Speyer's failure to procure insurance, common-law negligence, and common-law indemnification claims and any cross claims and counterclaims for failure to procure insurance and common-law negligence and common-law indemnification (motion sequence number 005).

Defendant/third-party defendant CBRE moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' Labor Law §§ 241 (6) and 200 claims and all cross claims and third-party claims asserted against it. CBRE also requests summary judgment on its contractual defense and indemnification claim against A-Val (motion sequence number 006).

Defendant/second third-party plaintiff Structure Tone moves for summary judgment dismissing plaintiffs' Labor Law § 241 (6), Labor Law § 200, and common-law negligence claims. Structure Tone also moves for summary judgment on its contractual defense and indemnification and failure to procure insurance claims against A-Val (motion sequence number 007).

BACKGROUND

On June 2, 2011, 200 Park and Tishman Speyer were the owner and managing agent of the building, respectively. CBRE was a tenant on the 19th floor (NY St Cts Elec Filing [NYSCEF] Doc No. 162, eighth modification of lease). CBRE hired Structure Tone as a general

contractor to build-out floors in the building (NYSCEF Doc No. 128, Structure Tone's general contract). Structure Tone, in turn, retained A-Val to perform "all labor and materials to complete the arch metal and glass work" on the project (NYSCEF Doc No. 105, purchase order, at 1). Plaintiff was employed as a glazier by A-Val on the date of the accident.

Plaintiff testified that, at about 1:00 p.m. on June 2, 2011, he had an accident on the 19th floor of 200 Park Avenue (NYSCEF Doc No. 153, plaintiff tr at 38). Structure Tone was the general contractor on the job (*id.* at 41). He reported his accident directly to Bryan Orsini (Orsini), Structure Tone's general manager (*id.* at 41-42). A-Val's glass foreman gave him instructions at the job site (*id.* at 42). Plaintiff testified that A-Val's work consisted of installing huge glass panels, and that some of them weighed as much as 500 pounds (*id.* at 46). The whole floor was under construction (*id.*). The glass was going to be used as a divider between the internal hallway and the offices (*id.* at 47). The panels were about 10 feet high and four feet wide (*id.*). Structure Tone conducted safety meetings at the site (*id.* at 49). There were at least 10 foremen on the site (*id.* at 50). Plaintiff occasionally acted as the foreman, and told the workers where to install the glass (*id.* at 50-51). He did not recall who the foreman was that day (*id.* at 53).

Plaintiff further testified that his A-Val team had to lift a piece of glass that weighed about 500 pounds, and they told A-Val that they needed at least five workers to install the glass (*id.* at 59). Plaintiff and his coworkers were going to move a piece of glass that was approximately 10 feet tall and four feet wide and weighed 500 pounds about 10 feet to the hallway (*id.* at 63-66). The piece of glass was sitting on a wall in a pile (*id.* at 65). There were eight pieces of different sizes (*id.* at 66). He testified that the piece of glass was moved with suction cups; "[y]ou would have men at the ends, one man at the end, and then men in between

the other men with other the suction cups" (*id.* at 67). According to plaintiff, the workers had to pitch it up and stand it up; "[w]hen [they] stood the glass up and [they] were just about getting ready to install it, they came and took away one man" (*id.* at 70). Plaintiff stated that "they had two men at the ends and two men at the center, and [plaintiff] was one of the men in the center of the glass" (*id.* at 71). The glass had to be fit into a track in the floor (*id.*). He testified that "[a]s [they] leaned the glass, the men at the ends and the men that were on the glass could not hold the glass" (*id.* at 77). Plaintiff explained that "[t]he glass was coming down on [plaintiff] and was going to crush [plaintiff] . . . and the man that was next to [him]. So [plaintiff] used all [his] strength in [his] body to prevent it from falling on [him]" (*id.*). Plaintiff testified that he slipped on something when installing the glass: "[w]hen [he] lifted up the glass and when [he] went to install the glass . . . it must have been pebbles, it must have been something that when [he] put [his] foot down, his foot slipped and that was when [he] felt something, something happened" (*id.* at 79). The pebbles were made out of the cement from the flooring (*id.* at 82-83).

Bryan Orsini (Orsini) testified that he was Structure Tone's construction superintendent at the 200 Park Avenue project in 2011 (NYSCEF Doc No. 155, Orsini tr at 9). He worked with Patrick Higgins, the project manager, who was responsible for "mak[ing] sure that the project was going in the right direction" (*id.* at 10). Structure Tone had laborers on the project who cleaned the job site (*id.*). The project was a build-out of CBRE's four floors (*id.* at 32). Orsini testified that, among other things, he coordinated the trades (*id.* at 9). Orsini walked the job site daily and spoke to the foreman for the different trades and asked if they "[had] any concerns about missing information, just going around making sure they're coordinated" (*id.* at 12-13).

Orsini did not recall any construction debris, plaster or any type of rocks on the 19th floor around the date of the accident (*id.* at 14-15). He did not remember the name of Structure Tone's

foreman on the date of the accident (*id.* at 19). Orsini created an accident report on June 13, 2011 (*id.* at 24-25). He believed that he received the information from the foreman on the project (*id.* at 25). He did not recall speaking to plaintiff (*id.* at 27). According to Orsini, Structure Tone was required to ensure that subcontractors were working safely (*id.* at 36). Structure Tone had a safety department, but did not have a safety coordinator on site (*id.* at 47). Orsini testified that he "can't tell [a subcontractor] what equipment to use. [He is] not trained in that . . . [He] coordinate[s] the trades. [He doesn't] tell them how to do it. [He] just [gets] them in at the right time to perform their tasks" (*id.* at 49-50). If he observed a safety issue, he spoke to the foreman (*id.* at 50).

Structure Tone's injury/accident report filled out by Orsini on June 13, 2011 states that:

> "Felipe was lifting a 4' x 8' x ¾" glass with 3 other glasiers [sic] when he pulled his lower back. Felipe didn't seek immediate care, he waited until Saturday 6/4 to go to hospital. Felipe was back on the job Friday 6/3 working. He didn't come in to claim an injury until Tuesday 6/7 around 11 am"

(NYSCEF Doc No. 159, accident report, at 4).

Michael Mucci (Mucci), a senior director of Tishman Speyer, testified that CB Richard Ellis was a tenant at 200 Park (NYSCEF Doc No. 156, Mucci tr at 9, 12). After reviewing Structure Tone's contract, Mucci stated that CB Richard Ellis hired Structure Tone to perform construction work (*id.* at 12). He believed that Structure Tone was responsible for maintaining the work area (*id.* at 15). Tishman Speyer's role with respect to the project was "minimal"; "if there was coordination needed for light safety or building shut down in terms of sprinkler systems or access to the building, we would help coordinate it" (*id.* at 22-23). Tishman Speyer was not involved with how subcontractors performed their work (*id.* at 23-24).

Sheldon Franco (Franco) testified that he was the director of facilities for CBRE, formerly known as CB Richard Ellis (NYSCEF Doc No. 157, Franco tr at 9). As the director of

facilities, Franco oversaw the various offices that his company used in the tristate area (*id.* at 9-10). The project was a build-out of new office space (*id.* at 13). Franco believed that the project started in 2010 (*id.* at 11). Franco stated that Structure Tone was responsible for keeping areas on the job site free from accumulations of debris, waste materials, and other rubbish (*id.* at 15). He recalled that "a window broke and someone was hurt" (*id.* at 17). CBRE did not supervise the work (*id.* at 21). Structure Tone informed CBRE about the progress of the work (*id.* at 22).

Plaintiffs commenced this action on October 2, 2013, seeking recovery for violations of Labor Law §§ 240 (1), 241 (6), 200 and under principles of common-law negligence (NYSCEF Doc No. 135). By stipulation dated October 15, 2019, plaintiffs withdrew their Labor Law § 240 (1) claim (NYSCEF Doc No. 145).

200 Park and Tishman Speyer brought a third-party action against CBRE, seeking contractual indemnification, common-law indemnification, contribution, and damages for breach of contract for failure to procure insurance (NYSCEF Doc No. 136).

Structure Tone commenced a second third-party action against A-Val, asserting four causes of action seeking contractual indemnification, common-law negligence, attorney's fees, and damages for failure to procure insurance (NYSCEF Doc No. 140).

200 Park and Tishman Speyer also brought a third third-party action against A-Val, seeking contractual indemnification, common-law indemnification, contribution, and damages for failure to procure insurance (NYSCEF Doc No. 143).

DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060,

1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). The court's function on a motion for summary judgment is “issue-finding, rather than issue-determination” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY3d 941 [1957] [internal quotation marks and citation omitted]).

A. Labor Law § 241 (6)

Labor Law § 241 (6) provides, in pertinent part, as follows:

> “All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

Labor Law § 241(6) imposes a duty upon owners, contractors and their agents “to ‘provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). “The duty to comply with the Commissioner’s safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable” (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). In addition, “[t]he [Industrial Code] provision relied upon by [a] plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law

principles" (*id.*, citing *Ross*, 81 NY2d at 504-505). Therefore, in order to prevail on a Labor Law § 241 (6) claim, "a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct" (*see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]), and that the violation was a proximate cause of the injury (*see Egan v Monadnock Constr., Inc*., 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Whether CBRE and Tishman Speyer May Be Held Liable Under Labor Law § 241 (6)

In motion sequence #006, CBRE contends that it cannot be held liable under Labor Law § 241 (6) because it was a tenant and not an owner or general contractor.

Contrary to CBRE's contention, it may be held liable under Labor Law § 241 (6). "The term "owner" within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005], quoting *Copertino v Ward*, 100 AD2d 565, 566 [1984]). Here, as a tenant with rights to the property, CBRE fulfilled the role of an owner by retaining Structure Tone for the renovation of the demised space (NYSCEF Doc No. 128).

200 Park and Tishman Speyer also argue that Tishman Speyer cannot be held liable under the statute because it had no supervisory authority over the project in CBRE's space.

Here, 200 Park and Tishman Speyer have demonstrated that Tishman Speyer may not be held liable under section 241 (6). It is undisputed that Tishman Speyer, the managing agent, is not an owner or contractor. Thus, Tishman Speyer may only be held liable as an agent of an owner or contractor (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981] ["When the work giving rise to these duties has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory

'agent' of the owner or general contractor. Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241"]). There is no evidence that Tishman Speyer had the authority to supervise and control the work (*see Reyes v Bruckner Plaza Shopping Ctr. LLC*, 173 AD3d 570, 571 [1st Dept 2019]). Tishman Speyer's role on the project was "minimal," and did not direct subcontractors on how to perform their work (NYSCEF Doc No. 156, Mucci tr at 22-24). Plaintiffs have failed to raise a triable issue of fact. Therefore, Tishman Speyer is entitled to dismissal of plaintiffs' Labor Law § 241 (6) claim.

Whether Plaintiffs Have Alleged A Specific and Applicable Industrial Code Violation

Plaintiffs' bills of particulars allege the following Industrial Code violations: "12 NYCRR subpart 20-1, including but not limited to 12 NYCRR 23-1.5 (a); 12 NYCRR 23-1.5 (b); 12 NYCRR 23-1.5 (c); 12 NYCRR 23-1.5 (2); 12 NYCRR 23-1.7 (a) (b); 12 NYCRR 23-1.7 (d) (e) (1) (2); 12 NYCRR 23-6.1; and 12 CFR 1910.12 (a) and 12 CFR 1910.132 (a)" and "12 NYCRR 23-2.1 (a) and 12 NYCRR 23-2.1 (b)" (NYSCEF Doc No. 142).

200 Park and Tishman Speyer, Structure Tone, and CBRE move for summary judgment dismissing plaintiffs' Labor Law § 241 (6) claim. In opposition to the motions, plaintiffs only rely on sections 23-1.7 (d) and 23-1.7 (e) (1) and (2) (NYSCEF Doc No. 292 at 4-10). Therefore, plaintiffs have abandoned reliance on the remaining cited provisions (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009] ["Plaintiff abandoned any reliance on the various provisions of the Industrial Code cited in his bill of particulars by failing to address them either in the motion court or on appeal . . ."]). Therefore, the court will only consider whether plaintiffs have a valid Labor Law § 241 (6) claim as predicated on the alleged violations of sections 23-1.7 (d) and 23-1.7 (e) (1) and (2).

12 NYCRR 23-1.7 (d)

Section 23-1.7 (d) provides as follows:

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

(12 NYCRR 23-1.7 [d]).

200 Park and Tishman Speyer argue that section 23-1.7 (d) does not apply because plaintiffs do not allege any slippery condition. Structure Tone similarly contends that plaintiff's accident did not occur as a result of a slippery condition or foreign substance; rather, he testified that he was lifting a piece of glass at the time of the accident. In addition, Structure Tone maintains that plaintiff was injured on an open floor, not in a passageway. CBRE adopts Structure Tone's arguments with respect to section 23-1.7 (d).

Plaintiffs counter that the area where plaintiff was injured was located inside space under renovation. The glass panels were being erected to form passageways and walkways between cubicles and offices. Thus, the area where plaintiff was injured was a floor, passageway or walkway, rather than an open area. They further argue that plaintiff slipped on pebbles that were not integral to his work.

"12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles . . ." (*Rizzuto*, 91 NY2d at 351; *see also Carty v Port Auth. of N.Y. & N.J.,* 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]). Further an open area does not constitute a "floor, passageway, walkway, scaffold, platform or other elevated working surface" within the meaning of the provision (*see e.g. Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]). Moreover section 23-1.7 (d) does not apply where the worker's

accident does not result from a "foreign substance" which may cause slippery footing (12 NYCRR 23-1.7 [d]; *see also Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]; *Kowalik v Lipschutz*, 81 AD3d 782, 784 [2d Dept 2011]). As the Court of Appeals has held,

> "[a] violation of 12 NYCRR 23-1.7 (d), while not conclusive on the question of negligence, would thus constitute *some evidence of negligence* and thereby reserve, for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances"

(*Rizzuto*, 91 NY2d at 351 [emphasis in original]).

In this case, section 23-1.7 (d) is applicable, and there are questions of fact as to whether the provision was violated and was a proximate cause of plaintiff's accident. Plaintiff testified that he slipped on pebbles from the cement flooring (NYSCEF Doc No. 153, plaintiff tr at 79, 82-83). Although defendants argue that the accident location does not constitute a "passageway," the area of the 19th floor constitutes a floor within the meaning of section 23-1.7 (d) (*see Temes v Columbus Ctr. LLC*, 48 AD3d 281, 281 [1st Dept 2008]). Moreover, the pebbles were not integral to plaintiff's work at the job site as the track for the glass plaintiff was handling had already been completed (*see Pereira New Sch.*, 148 AD3d 410, 412 [1st Dept 2017] ["the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site"]; *Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456, 457 [1st Dept 2014] [ice was not integral to the work even though there was evidence that the work required the use of a solution of water and a chemical intended to reduce its freezing point]).

12 NYCRR 23-1.7 (e)

12 NYCRR 23-1.7 (e) governs "Tripping and other hazards." It provides that:

> "(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> "(2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed"

(12 NYCRR 23-1.7 [e]).

Sections 23-1.7 (e) (1) and (e) (2) are sufficiently specific to support a Labor Law § 241 (6) claim (*Farina v Plaza Constr. Co.*, 238 AD2d 158, 159 [1st Dept 1997]; *Colucci v Equitable Life Assur. Socy. of U.S.*, 218 AD2d 513, 515 [1st Dept 1995]). Like section 23-1.7 (d), section 23-1.7 (e) does not apply where the instrumentality that caused the accident was an integral part of the work (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Krzyzanowski v City of New York*, 179 AD3d 479, 480 [1st Dept 2020]).

200 Park and Tishman Speyer and Structure Tone argue that section 23-1.7 (e) (1) does not apply because plaintiff was not injured in a passageway. Further, Structure Tone contends that plaintiff did not trip. Finally, 200 Park and Tishman Speyer and Structure Tone maintain that section 23-1.7 (e) (2) is inapplicable because the accident did not involve materials or tools scattered on the floor, and the condition was created by plaintiff's work. CBRE adopts Structure Tone's arguments with respect to section 23-1.7 (e).

Contrary to Structure Tone's contention, the fact that plaintiff slipped, rather than tripped, is not dispositive as to the applicability of section 23-1.7 (e) (*Fitzgerald v Marriott Intl., Inc.*, 156 AD3d 458, 459 [1st Dept 2017]; *but see Purcell v Metlife Inc.*, 108 AD3d 431, 432 [1st Dept 2013]).

However, section 23-1.7 (e) (1) is inapplicable because plaintiff was not using the hallway as a passageway at the time of the accident (*see Conlon v Carnegie Hall Socy. Inc.*, 159 AD3d 655, 655-656 [1st Dept 2018]).

But, section 23-1.7 (e) (2) applies because the pebbles that plaintiff allegedly slipped on were "not an integral part of the work being performed by the plaintiff at the time of the accident" (*Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008] [demolition debris was not integral to electrician's work]). Plaintiff testified that the pebbles were made out of the cement from the flooring, another A-Val team performed that work, and that he had never done that work (NYSCEF Doc No. 153, plaintiff tr at 82-83, 84). There are questions of fact as to whether section 23-1.7 (e) (2) was violated and was a proximate cause of plaintiff's accident.

In sum, plaintiffs have a valid Labor Law § 241 (6) claim to the extent that it is predicated on 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2). Accordingly, summary judgment should be granted to dismiss plaintiffs' Labor Law § 241 (6) to the extent it is predicated on any other alleged violation of 12 NYCRR subpart 20-1.

B. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005], citing *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Claims brought under this section “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]). If the accident arises out of a dangerous premises condition, liability may be imposed if defendant created the condition or failed to remedy a condition of which it had actual or constructive notice (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). “Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury producing work” (*Cappabianca*, 99 AD3d at 144). Thus, even though a defendant may possess the authority to stop the construction work for safety reasons or exercise general supervisory control over the work site, such authority is insufficient to establish the degree of supervision and control necessary to impose liability (*see Villanueva v 114 Fifth Ave. Assoc. LLC*, 162 AD3d 404, 407 [1st Dept 2018] [finding a defendants’ stop work authority insufficient to establish that the defendant actually “exercised any control over the manner and means of plaintiff’s work”]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007] [concluding that overseeing job site activities and monitoring project milestones insufficient evidence of the requisite degree of supervision and control necessary to impose liability under common-law negligence or Labor Law § 200]).

200 Park and Tishman Speyer seek dismissal of plaintiffs’ Labor Law § 200 and common-law negligence claims, arguing that they did not direct or control plaintiff’s work, and did not have notice of any dangerous condition.

CBRE contends that it did not provide any equipment to subcontractors and did not control the means and methods of the subcontractors. Further, CBRE argues that it did not have any notice of the pebbles that plaintiff slipped on.

Structure Tone argues that it did not control the means and methods of plaintiff's work and did not create or have notice of the pebbles.

In response, plaintiffs contend that Structure Tone had a contractual duty to keep the work site free from the accumulation of construction debris "at all times." According to plaintiffs, defendants have failed to show that they lacked notice of the pebbles, as they have not submitted evidence as to their inspections of the site.

Here, the accident arose out of an alleged dangerous premises condition, not the means and methods of the work (*see DeMercurio v 605 W. 42nd Owner LLC*, 172 AD3d 467, 467 [1st Dept 2019] [green dust was a dangerous condition that existed prior to plaintiff's arrival at the job site and was not a part of the work that he was performing]; *see also Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020] [loose pipe in front of a doorway constituted a premises condition]). Plaintiff testified that he slipped on pebbles, and that the area with the pebbles was "about 10 feet" (NYSCEF Doc No. 153, plaintiff tr at 79, 82). He further testified that the pebbles were made out of the concrete flooring, that another A-Val team performed that work, that he never did that work (*id.* at 83, 84) and that Structure Tone had laborers who cleaned the job site (NYSCEF Doc No. 155, Orsini tr at 10-11).

Applying the premises condition standard, defendants have failed to show that they did not have notice of the pebbles where plaintiff fell, since they have not submitted any evidence as to when the area was last inspected (*see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 68 [1st Dept 2018]; *Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015]).

Accordingly, defendants are not entitled to dismissal of plaintiffs' Labor Law § 200 and common-law negligence claims.

C. 200 Park and Tishman Speyer's Request for Common-Law Indemnification Against CBRE, Structure Tone, and A-Val/A-Val's Request for Dismissal of Common-Law Indemnification Claims Against it

200 Park and Tishman Speyer move for common-law indemnification against CBRE, Structure Tone, and A-Val. CBRE asserts, in opposition, that there is no evidence of its negligence, nor any evidence that it exercised any supervision and control over the injury-producing work. Structure Tone argues that it did not supervise A-Val's means and methods.

"To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] ["a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part"]).

> "Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered'"
>
> Workers' Compensation Law § 11 provides that:
>
> "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury.'"
>
> The statute also defines a "grave injury" as:

> "only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability"

(*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 429-430 [2005]).

However, "an employer may not benefit from section 11's protections against third-party liability unless it first complies with section 10 and secures workers' compensation for its employees" (*Boles v Dormer Giant, Inc.*, 4 NY3d 235, 239 [2005]).

A-Val argues, in support of its own motion, that the common-law indemnification claims against it should be dismissed because plaintiff did not suffer a "grave injury." According to A-Val, plaintiff alleges that he suffered a back and shoulder injury as a result of the accident (*see* NYSCEF Doc No. 172, verified bill of particulars, ¶ 20; supplemental bills of particulars, ¶ 9).

In opposition to A-Val's motion, 200 Park and Tishman Speyer argue that A-Val has failed to demonstrate entitlement to dismissal of the common-law indemnification claims. 200 Park and Tishman Speyer maintain that A-Val did not submit any medical proof that plaintiff did not suffer a "grave injury." Additionally, 200 Park and Tishman Speyer contend that A-Val did not offer any evidence that it actually procured workers' compensation insurance.

Here, 200 Park and Tishman Speyer have failed to demonstrate prima facie entitlement to summary judgment on their common-law indemnification claims against CBRE and Structure Tone because they fail to establish that CBRE or Structure Tone were negligent or exclusively supervised the injury-producing work. Plaintiff testified that his foreman gave him instructions on the site (NYSCEF Doc No. 153, plaintiff tr at 42). Even though Structure Tone employed laborers to clean the site (NYSCEF Doc No. 155, Orsini tr at 10), it cannot be determined on this record whether Structure Tone was negligent.

In addition, 200 Park and Tishman Speyer have not shown that the Workers' Compensation § 11 bar is inapplicable as to A-Val (*see McCrea v Arnlie Realty Co. LLC*, 140 AD3d 427, 429 [1st Dept 2016]; *Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 674 [2d Dept 2014]). 200 Park and Tishman Speyer do not address in their moving papers whether A-Val procured workers' compensation insurance for plaintiff (NYSCEF Doc No. 132 at 17). Moreover A-Val has not demonstrated that it procured workers' compensation insurance. A-Val has not submitted an insurance policy, and the certificate of workers' compensation insurance is insufficient to establish that it obtained coverage (*see Matter of Chmura v T&J Painting Co., Inc.*, 83 AD3d 1193, 1195 [3d Dept 2011]).[1]

In any event, there are triable issues of fact as to Structure Tone and A-Val's responsibility for the accident and "an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties" (*Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1030 [2d Dept 2009]).

Accordingly, the branch of 200 Park and Tishman Speyer's motion seeking common-law indemnification must be denied. The branch of A-Val's motion seeking dismissal of the common-law indemnification claims against must be denied.

D. 200 Park and Tishman Speyer's Request for Contractual Indemnification Against CBRE

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70

[1] Nevertheless, A-Val correctly contends that Structure Tone's claim for attorneys' fees is duplicative of its contractual indemnification claim. Accordingly, this claim must be dismissed.

NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

"Summary relief is appropriate on a claim for contractual indemnification where, as here, the [lease] is unambiguous and clearly sets forth the parties' intention that a [tenant] indemnify the [landlord] for the injuries sustained" (*Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556, 556 [1st Dept 2007]).

200 Park and Tishman Speyer move for contractual indemnification from CBRE based upon article 34 of CBRE's lease, which provides as follows:

> "34.01 Tenant shall indemnify and save Landlord harmless from and against any (i) liability or expense arising from any breach of this Lease and (ii) damages suffered or arising from the acts or omissions of Tenant or anyone on the demised premises with Tenant's permission"

(NYSCEF Doc No. 162, lease, at 82).

In opposition, CBRE contends that this provision is vague and violates the General Obligations Law. In addition, CBRE argues that indemnification is premature because there is no evidence that it breached the lease, and there is no evidence that it was negligent.

In reply, 200 Park and Tishman Speyer notes that the eighth modification to the lease deleted article 34 and replaced it with the following provision:

> "34.01 (a) Tenant shall indemnify, defend, protect and hold harmless each of the Indemnitees (as defined in subsection (b) hereof), from and against any and all Losses (as defined in subsection (b) hereof), resulting from any claims against the Indemnitees (i) arising from any act, omission or negligence of any Tenant Parties (as defined in subsection (b) hereof, (ii) except to the extent arising from the negligence or willful misconduct of Landlord, its contractors, licensees or the Parties (as defined in Section 20.01 of this Lease), arising from any accident, injury or damage caused to any person or to the property of any person and occurring in or about the demised premises, and (iii) by a third party resulting from any breach,

> violation or nonperformance of any covenant, condition or agreement of this Lease on the part of Tenant to be fulfilled, kept or observed"
>
> ***
>
> "(b) (i) As used in this Article 34, the term 'Losses' means any and all losses, liabilities, damages, claims, judgments, fines, suits, demands, costs, interest and expenses of any kind or nature (including reasonable attorneys' fees and disbursements) incurred in connection with any claim, proceeding or judgment and the defense thereof, and including all costs of repairing any damage to the demised premises or the Building, or the appurtenances of any of the foregoing, to which a particular indemnity and hold harmless agreement applies.
>
> "(ii) As used in this Article 34, the term 'Indemnitees' means Landlord, Landlord's agents, each mortgagor and lessor, and each of their respective direct and indirect partners, officers, shareholders, managers, directors, members, trustees, beneficiaries, employees, principals, contractors, licensees, invitees, servants, agents and representatives"

(NYSCEF Doc No. 286 at 37-38).

CBRE's contention that the indemnification provision is unenforceable is without merit. "Where, as here, a commercial lease negotiated between sophisticated business entities contains an insurance provision allocating the risk of liability to a third party, the indemnification clause is valid and enforceable and does not violate the General Obligations Law" (*Gary v Flair Beverage Corp.*, 60 AD3d 414, 414-415 [1st Dept 2009]). Moreover, the indemnification provision is clear and unambiguous. It requires CBRE to defend and indemnify 200 Park for any act, omission or negligence of CBRE and for any accident occurring within the demised space. Plaintiff's accident arose out of CBRE's acts, namely the renovation project, and occurred within CBRE's space. However, 200 Park and Tishman Speyer have failed to demonstrate that Tishman Speyer qualifies as an indemnitee because a managing agent is not included in the definition under 34.01(b)(ii) (*see Hooper*, 74 NY2d at 491). Therefore, even though plaintiffs have not yet prevailed in the main action, 200 Park is entitled to conditional contractual indemnification from CBRE (*see Hong-Bao Ren v Gioia St. Marks LLC*, 163 AD3d 494, 496-

497 [1st Dept 2018] ["conditional summary judgment is appropriate here even when judgment has yet to be rendered or paid in the main action, since it serves the interest of justice and judicial economy in affording the indemnitee the earliest possible determination as to the extent to which he (or she) may expect to be reimbursed"] [internal quotation marks and citation omitted]).

E. 200 Park and Tishman Speyer's Failure to Procure Insurance Claim Against CBRE

An agreement to procure insurance is distinct from an agreement to indemnify (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Generally, where there is a breach of an agreement to procure insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]). However, in cases where the promisee has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to the promisee's out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]).

200 Park and Tishman Speyer move for summary judgment on their breach of contract for failure to procure insurance claim against CBRE. In response to 200 Park and Tishman Speyer's motion, CBRE argues that: (1) it did not breach its insurance procurement obligations, as evidenced by certificates of insurance; and (2) 200 Park and Tishman Speyer have not sustained any damages.

In *Crespo v Triad, Inc.* (294 AD2d 145, 148 [1st Dept 2002]), the First Department held that "[t]he Owners were properly granted partial summary judgment on their cross claim against

Bozell for breach of contract for failure to procure insurance where the lease between them required each to procure insurance naming the other as an additional insured, and, in response to the motion, Bozell failed to tender an insurance policy" (*see also Gary*, 60 AD3d at 415).

Although CBRE submits certificates of insurance to prove that it obtained the required insurance coverage, it is well settled that "[t]he certificate of insurance is evidence of the insurer's intent to provide coverage, but it is not a contract to insure appellants, nor is it conclusive proof, standing alone, that such a contract exists" (*Buccini v 1568 Broadway Assoc.*, 250 AD2d 466, 469 [1st Dept 1998]; *Horn Maint. Corp. v. Aetna Cas. & Sur. Co.*, 225 A.D.2d 443, 444 [1st Dep't 1996]).

"Because insurance procurement clauses are entirely independent of indemnification provisions, the determination with respect to liability for the contract breach need not await a final determination as to the underlying liability for personal injury" (*Spencer v B.A. Painting Co., B & F Abramowitz*, 224 AD2d 307, 307 [1st Dept 1996] [citation omitted]). The measure of damages cannot be determined on this motion, because it is unclear whether 200 Park and Tishman Speyer have their own insurance policy. Accordingly, 200 Park and Tishman Speyer are entitled to summary judgment as to liability on their breach of contract claim against CBRE.

F. Cross Claims Against 200 Park and Tishman Speyer

200 Park and Tishman Speyer also move for summary judgment dismissing the cross claims for common-law indemnification, contribution, contractual indemnification, and breach of contract against them. Specifically, 200 Park and Tishman Speyer argue that these causes of action "have no merit whatsoever and must be dismissed" (NYSCEF Doc No. 132 at 22). As argued by 200 Park and Tishman Speyer, there is no merit to the cross claims for contractual indemnification and breach of contract against them (*see Alvarez*, 68 NY2d at 324). However, as

noted above, there are questions of fact as to their negligence. Accordingly, 200 Park and Tishman Speyer are only entitled to dismissal of the contractual indemnification and breach of contract claims against them.

G. 200 Park, Tishman Speyer, and CBRE's Contractual Indemnification Claims Against Structure Tone

CBRE moves for contractual indemnification based upon the indemnification provision in Structure Tone's contract, which provides as follows:

> "General Contractor shall and does hereby indemnify and hold harmless Owner, Landlord, Architect, Engineer and Project Manager . . . and agents of each of the foregoing from and against any and all liability, claims, demands, damages, penalties, fines, losses, expenses and costs of every kind and nature, including, without limitation, costs of suit and attorneys' fees and disbursements (collectively, 'Claims and Expenses'), resulting from or in any manner arising out of, in connection with or on account of (i) any act, omission, fault or neglect of General Contractor, or any Subcontractor of, or material supplier to, General Contractor, or anyone employed by any of them in connection with the Work or anyone for General Contractor, or anyone employed by any of them in connection with the Work or anyone for whose acts any of them may be liable, (ii) claims of injury to or disease, sickness or death of persons or damage to property (including, without limitation, loss of use resulting therefrom) occurring or resulting directly or indirectly from the Work or the activities of the General Contractor, or any Subcontractor of, or material supplier to, General Contractor, or anyone employed by any of them in connection with the Work, or anyone for whose acts any of them may be liable . . ."

(NYSCEF Doc No. 128, article V, § 10).

Article XXVI provides as follows:

> "If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be held to be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law"
> (*id.*, article XXVI, § 9).

CBRE argues that Structure Tone is required to defend and indemnify CBRE for Structure Tone's acts of negligence and the acts of its subcontractors. CBRE points out that

Structure Tone's contract obligated Structure Tone to "at all times keep the Site and surrounding areas free from accumulation of debris, waste materials, and other rubbish caused by the performance of, or arising in connection with, the Work and the Coordination Items" (*id.*, article V, § 16 [a]).

200 Park and Tishman Speyer also seek contractual indemnification from Structure Tone based upon this provision.

In opposing CBRE's motion, Structure Tone contends that the indemnification provision requires indemnification for "any act, omission, fault, neglect of [Structure Tone]" (*id.*, article V, § 10). In this regard, Structure Tone asserts that it played no role in plaintiff's accident: Structure Tone did not instruct him how to do his work, and plaintiff never complained about debris to Structure Tone. Furthermore, Structure Tone contends that the provision is unenforceable until a jury determines liability.

Pursuant to General Obligations Law § 5-322.1, an indemnification provision in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997], *rearg denied* 90 NY2d 1008 [1997]). However, an indemnification agreement that authorizes partial indemnification "to the fullest extent permitted by law" is enforceable (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Francis v Plaza Constr. Corp.*, 127 AD3d 427, 428 [1st Dept 2014]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 464 [1st Dept 2014]; *Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Furthermore, even if the clause does not contain this limiting language, it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Here, plaintiff's accident arose out of Structure Tone's contracted work. There is no dispute that Structure Tone hired A-Val to perform glass work on the project, and that plaintiff was injured in the course of his employment with A-Val. As noted above, there are questions of fact as to CBRE's negligence. However, Structure Tone's contract provides that if any provision is "held to be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law" (NYSCEF Doc No. 128, article XXVI, § 9). Accordingly, CBRE is entitled to contractual indemnification from Structure Tone conditioned upon a finding by the jury that CBRE was not negligent.

200 Park and Tishman Speyer are not entitled to contractual indemnification from Structure Tone. The indemnification provision is contained in a contract to which they are not parties and does not identify them as indemnitees (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004] ["If the parties intended to cover Bovis as a potential indemnitee, they had only to say so unambiguously"]; *Sicilia v City of New York*, 127 AD3d 628, 628 [1st Dept 2015] ["The contractual provisions on which they rely are found in a subcontract to which they are not signatories and that does not enumerate them as indemnitees"]). Notably, Structure Tone's contract defines the "Owner" as CBRE, and Metropolitan Life Insurance Company is defined as the "Landlord" (NYSCEF Doc No. 128 at 1). Accordingly, 200 Park and Tishman Speyer's request for contractual indemnification from Structure Tone is denied.

H. 200 Park, Tishman Speyer, CBRE, and Structure Tone's Contractual Indemnification Claims Against A-Val

200 Park and Tishman Speyer move for summary judgment on their contractual indemnification claim against A-Val, based upon the indemnification provision contained within A-Val's purchase order, which states:

> "11.2 To the fullest extent permitted by Law, Subcontractor will indemnify and hold harmless Structure Tone, Inc. ('STI') and Owner, their officers, directors, agents and employees from and against any and all claims, suits, judgments, damages, losses and expenses, including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, its officers, directors, agents, employees and subcontractors, in connection with the performance of any work by Subcontractor pursuant to this Purchase Order and/or a related Proceed Order. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against STI and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default"

(NYSCEF Doc No. 164).

The blanket insurance/indemnity agreement also contains identical indemnification language (NYSCEF Doc No. 163).

In addition, Structure Tone moves for summary judgment on its contractual indemnification claim against A-Val, arguing that the indemnification provision does not violate the General Obligations Law and that A-Val acted in a manner indicating its intent to be bound by the purchase order.

CBRE also moves for summary judgment on its contractual indemnification claim against A-Val.

200 Park, Tishman Speyer, and CBRE are not entitled to contractual indemnification from A-Val. The indemnification provision is contained in a contract to which they are not parties and does not identify them as indemnitees (*see Sicilia*, 127 AD3d at 628). Contrary to 200 Park and Tishman Speyer's contention, there is no basis for a finding that 200 Park and Tishman Speyer are intended third-party beneficiaries of A-Val's contract. The terms and

conditions annexed to A-Val's purchase order do not define the term Owner, and the contract documents do not otherwise mention 200 Park and Tishman Speyer (*see Nazario v 222 Broadway, LLC*, 135 AD3d 506, 510 [1st Dept 2016], *mod on other grounds* 28 NY3d 1054 [2016]). Accordingly, the branches of these defendants' motions seeking contractual indemnification from A-Val must be denied.

However, even though there are issues of fact as to its negligence, Structure Tone is entitled to conditional contractual indemnification from A-Val. The indemnification provision is triggered because plaintiff's accident occurred while he was working for A-Val (*see Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept 2020]). The provision does not violate the General Obligations Law. "[T]he extent of its indemnification depends on the extent to which any negligence on its part is found to have contributed to the accident" (*Cuomo*, 111 AD3d at 548). Accordingly, the branch of Structure Tone's motion seeking contractual indemnification must be granted to the extent of awarding it contractual indemnification against A-Val conditioned upon a finding by the jury that Structure Tone was not negligent.

I. Failure to Procure Insurance Claims Against A-Val

A-Val moves for summary judgment dismissing 200 Park and Tishman Speyer and Structure Tone's breach of contract for failure to procure insurance claims against it. A-Val argues that it did not breach its contract. As support, A-Val offers certificates of insurance naming 200 Park and Tishman Speyer and Structure Tone as additional insureds (NYSCEF Doc No. 181).

Structure Tone moves for summary judgment in its favor on its failure to procure insurance claim against A-Val.

The blanket indemnity/insurance agreement between Structure Tone and A-Val provides that A-Val was required to procure the following insurance:

> "3.2 Comprehensive General Liability ('CGL') with a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least $4,000,000 per occurrence and aggregate. The limit may be provided through a combination of umbrella/excess liability policies. Coverage shall include the Broad From Comprehensive General Liability Endorsement. Coverage shall provide at least the following:
>
> ***
>
> (c) Blanket Written Contractual Liability covering all Indemnity Agreements.
>
> ***
>
> (e) Endorsement naming Structure Tone Inc. as an Additional Insured and endorsement of specified owners and other Additional Insureds as may be required from time to time"

(NYSCEF Doc No. 106 at 1). Thus, A-Val was required to purchase a commercial general liability policy naming Structure Tone as an additional insured.

A-Val's submission of certificates of insurance, which state that they were "issued as a matter of information only and confers no rights upon the certificate holder" (NYSCEF Doc Nos. 181, 230), is insufficient to establish that it procured the required insurance (*Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1st Dept 1996]). In response to Structure Tone's motion, A-Val did not produce an insurance policy for Structure Tone's benefit.

Accordingly, the branch of A-Val's motion seeking dismissal of the breach of contract claims against it is denied. Structure Tone is entitled to summary judgment as to liability on its breach of contract claim against A-Val.

CONCLUSION

Accordingly, it is

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.; and it is further

ORDERED that the motion (sequence number 005) of second third-party defendant/third third-party defendant A-Val Architectural Metal III, LLC is granted to the extent of dismissing the third cause of action in the second third-party complaint, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 006) of defendant/third-party defendant CBRE, Inc. is granted to the extent of:

(1) dismissing plaintiffs' Labor Law § 241 (6) claim except as to the alleged violation of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2),

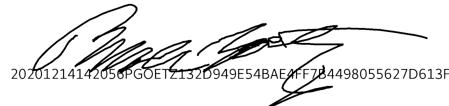
(2) granting defendant/third-party defendant CBRE, Inc. conditional contractual indemnification against defendant/second third-party plaintiff Structure Tone, Inc. i/s/h/a Structure Tone Global Services, Inc., and is otherwise denied; and it is further

ORDERED that the motion (sequence number 007) of defendant/second third-party plaintiff Structure Tone, Inc. i/s/h/a Structure Tone Global Services, Inc. is granted to the extent of:

(1) dismissing plaintiffs' Labor Law § 241 (6) claim except as to the alleged violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.7 (e) (2),

(2) granting conditional contractual indemnification against second third-party defendant A-Val Architecture Metal III, LLC, and

(3) granting partial summary judgment as to liability on its breach of contract claim against second third-party defendant A-Val Architecture Metal III, LLC.



12/14/2020		PAUL A. GOETZ, J.S.C.
DATE		

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION			
	☐ GRANTED	☐ DENIED	☐ GRANTED IN PART		☒ OTHER	
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	

EXHIBIT B

cases:\arh58898\entry-appellate order 8-16-22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
FELIPE A. RUISECH and MARTHA B. RUISECH, Individually and as husband and wife,

NOTICE OF ENTRY

Plaintiffs,

-against-

Index No.: 159007/2013

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

Defendants.
--X
TISHMAN SPEYER PROPERTIES, L.P. and 200 PARK, LP,

Third-Party Plaintiffs,

Index No.: 590013/14

-against-

CBRE, INC.,

Third-Party Defendant.
--X
STRUCTURE TONE, INC. i/s/h/a STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant.
--X

---X
TISHMAN SPEYER PROPERTIES, L.P. and
200 PARK, L.P.,

Third Third-Party Plaintiffs,

-against-

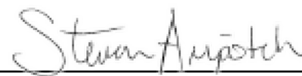
A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant.
---X

C O U N S E L O R S:

PLEASE TAKE NOTICE, that the within is a true copy of the Decision/Order of the Appellate Division, First Department dated and entered in the office of the clerk of the within named Court on August 16, 2022.

Dated: New York, New York
August 17, 2022



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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Gische, Kern, Friedman, Shulman, JJ.

15983 FELIPE A. RUISECH, et al.,
Plaintiffs-Respondents,

-against-

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC., et al.,
Defendants-Respondents-Appellants,

CBRE, INC.,
Defendant-Appellant-Respondent.

Index Nos. 159007/13
590013/14
590202/14
595439/18
Case No. 2021-00357

TISHMAN SPEYER PROPERTIES, L.P., et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

CBRE, INC.,
Third-Party Defendant-Appellant-Respondent.

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC.,
Second Third-Party Plaintiff-Respondent-Appellant,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,
Second Third-Party Defendant-Respondent-Appellant.

TISHMAN SPEYER PROPERTIES, L.P., et al.,
Third Third-Party Plaintiffs-Appellants-Respondents,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,
Third Third-Party Defendant-Respondent-Appellant.

Gallo Vitucci Klar LLP, New York (C. Briggs Johnson of counsel), for CBRE, Inc., appellant-respondent.

Barry McTiernan & Moore LLC, New York (Steven Aripotch of counsel), for Structure Tone Global Services, Inc., respondent-appellant/appellant-respondent.

Smith Mazure PC, New York (Louise Cherkis of counsel), for Tishman Speyer Properties, L.P., and 200 Park, LP, respondents-appellants/appellants-respondents.

Pisciotti Lallis Erdreich, White Plains (Charu Mehta of counsel), for A-Val Architectural Metal III, LLC, respondent-appellant.

The Barnes Firm, P.C., Rochester (Richard Amico of counsel), for respondents.

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered December 14, 2020, which, to the extent appealed from as limited by the briefs, denied the motions of defendants 200 Park, L.P. (Park) and Tishman Speyer Properties, L.P. (together, P&T), CBRE, Inc., and Structure Tone Inc., i/s/h/a Structure Tone Global Services, Inc. (ST) for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim, predicated on Industrial Code (12 NYCRR) § 23-1.7(d) and (e)(2) as against Park, CBRE, and ST and the Labor Law § 200 and common-law negligence claims as against them, denied P&T's motion for summary judgment on Tishman's contractual indemnification claim against CBRE, their contractual indemnification claims against ST and third-party

defendant A-Val Architectural Metal III, LLC, and their common-law indemnification claims against CBRE, ST, and A-Val, granted CBRE's motion for summary judgment on its contractual indemnification claim against ST conditionally and denied its motion for summary judgment on its contractual indemnification claim against A-Val and its common-law indemnification claim against ST and dismissing all common-law indemnification and contribution claims as against it, granted ST's motion for summary judgment on its contractual indemnification claim against A-Val conditionally and on the issue of liability on its breach of contract claim against A-Val for failure to procure insurance, and denied A-Val's motion for summary judgment dismissing all claims for common-law indemnification and failure to procure insurance as against it, unanimously modified, on the law, to grant Park, CBRE, and ST summary judgment dismissing the Labor Law § 241(6) claim as against them, to grant P&T, CBRE and ST summary judgment dismissing the Labor Law § 200 claim and common-law negligence claims against them, to grant Tishman's contractual indemnification claim against CBRE, grant CBRE summary judgment on its contractual indemnification claim against ST, to grant ST summary judgment on its contractual indemnification claim against A-Val and as to liability on its breach of contract claim against A-Val for failure to procure insurance, and to grant A-Val summary judgment dismissing the common-law negligence claims as against it, and otherwise affirmed, without costs.

This personal injury action stems from a construction site accident at the building owned by Park and managed by Tishman. CBRE leases several floors in the building and it entered into a contract with ST to serve as the general contractor for renovation work to be performed in its leased space on the 19th floor. ST, in turn, subcontracted with A-Val, plaintiff's employer, to perform arch metal and glass work.

Plaintiff's accident occurred as he and three other A-Val workers were attempting to lift and install a heavy interior glass wall divider into an aluminum track that had been cut into the concrete floor by other A-Val workers. When plaintiff stepped forward to place the glass into the track, he stepped onto "minute" pebbles near the track. His right foot slipped forward a few inches, but he did not fall. Plaintiff claims that he sustained injuries, not only because of pebbles he slipped on, but also because of A-Val's decision to remove one worker from his team when he undertook to move the glass.

Supreme Court dismissed the Labor Law §241(6) claim, only as against Tishman on the basis that it was not Park's statutory agent, for purposes of the Labor Law. The Labor Law § 241(6) claim should be dismissed as against Park, CBRE, and ST as well. Neither of the Industrial Code regulations that plaintiff relies on apply to the accident. The floor was not in "a slippery condition" nor were the pebbles a "foreign substance which may cause slippery footing" within the meaning of Industrial Code § 23-1.7(d) (*see Cruz v Metropolitan Tr. Auth.*, 193 AD3d 639, 640 [1st Dept 2021]). Section 23-1.7 (e)(2) of the Industrial Code also does not apply as this was not a passageway, within the meaning of the regulation. In any event, the pebbles were debris that were an integral part of the construction work. The integral to the work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident (*see Krzyzanowski v City of New York*, 179 AD3d 479, 480-481 [1st Dept 2020]).

Plaintiff's Labor Law § 200 and common-law negligence claims should also be dismissed as against P&T, CBRE and ST as well. "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" (*see id.)*. CBRE and ST provide uncontroverted evidence that they did not create the condition at issue, nor did they have notice of the condition. CBRE and ST also established that they had no control over the means and methods plaintiff used in performing the work. Park established that it 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 plaintiff's 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]). As for the Labor Law § 241 (6) claim, Tishman established that it was not Park's statutory agent, for purposes of the Labor Law (*see e.g. Venter v Cherkasky*, 200 AD3d 932, 932-933 [2d Dept 2021]). Although Orsini, ST's general manager, did regular walk throughs of the work site, regular inspection of the site or the authority to stop any unsafe work is a general level of supervision that is not sufficient to warrant holding ST liable under Labor Law § 200 (*Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st Dept 2015]). The concrete pebbles were not an existing defect or dangerous condition of the property, but rather were created by plaintiff's employer's work and the manner in which it was performed (*see also Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

At one point Metropolitan Life Insurance Corp. (MLIC) owned the building and the original, 1986 lease for the 19th floor identifies MLIC as the "landlord." The building was later sold to Park and starting with the eighth modification of the lease, Park is

listed as the "landlord." The eighth lease modification provides that CBRE shall indemnify the "Indemnities," who are defined as including "Landlord [and] Landlord's agent," against claims: "(i) arising from any act, omission or negligence of any Tenant Parties," but limited to breaches, violations or nonperformances under the lease. The term "Landlord's agents" is also undefined in the lease.

CBRE does not address, let alone oppose, P&T's argument that the term "Landlord's agents" as used in the indemnification provision of its lease, although not defined, is broad enough to encompass Tishman (the landlord's managing agent). However, as argued by CBRE, this provision has a negligence trigger. Indemnity is triggered only where the claims "arise from" CBRE's "act, omission or negligence" and in limited circumstances (*see Arias v Sanitation Salvage Corp.*, 199 AD3d 554, 557 [1st Dept 2021]). In light of our holding that CBRE is free from negligence, the indemnification provision of the lease was not triggered. Therefore, neither Tishman nor Park have shown that they are entitled to contractual indemnification by CBRE under the terms of the lease.

Although that 2009 eighth lease modification predates the 2010 contract between CBRE and ST, the CBRE/ST contract references only the original 1986 lease that does not define "landlord" as Park, but rather as MLIC. The CBRE/ST contract provides, in relevant part, that ST must indemnify CBRE, the "Landlord" and their "agents" against claims "arising out of, in connection with or on account of (i) any act, omission, fault or neglect of [ST], or any Subcontractor . . . ." As concerns CBRE's argument that it is entitled to indemnification by ST, we have found that ST is free from negligence. However, plaintiff's claims against CBRE "aris[e] out of" negligent acts by its subcontractor, A-Val, triggering the indemnification provision. Consequently, ST is

vicariously liable for the acts of A-Val and, therefore, must indemnify CBRE, as the CBRE/ST contract provides.

P&T were properly denied summary judgment on their contractual indemnification claims against ST under the CBRE/ST contract and its contract with A-Val. The indemnification clause in CBRE/ST's contract provides that ST must indemnify CBRE, the "Landlord," and their "agents" against claims:

> "resulting from or in any manner arising out of, in connection with or on account of (i) any act, omission, fault or neglect of [ST], or any Subcontractor of, . . . [ST], or anyone employed by any of them in connection with the Work or anyone for whose acts any of them may be liable"

ST's contract with A-Val consists of a series of purchase orders and a Blanket Insurance/Indemnity Agreement (insurance agreement). The reverse side of the purchase orders contains an indemnification clause requiring A-Val to indemnify ST against claims "arising in whole or in part and in any manner from the acts, omissions, breach or default of [A-Val] . . . in connection with the performance of any work by [A-Val] pursuant to this Purchase Order." The insurance agreement contains substantially similar language.

As we have seen, the CBRE/ST contract does not identify Park as the landlord and it only refers to the landlord's "agents," without any further description of who that means, but who the landlord and agents are can be inferred from the lease. Here, however, the purchase orders and the insurance agreement simply use the term "Owner," without identifying who that is. To the extent that P&T argues that we should infer that "Owner" has the same meaning as in the CBRE/ST contract, that contract defines "Owner" not as Park or Tishman, but rather as CBRE, the tenant. In any event the CBRE/ST contract is not incorporated by reference nor is it an exhibit to any of

these documents. Since the language of the parties is not clear enough on this record to enforce an obligation against ST or A-Val to indemnify P&T, and "we are unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out," P&T's motion for summary judgment on its contractual indemnification claim against ST and A-Val was properly denied (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

CBRE has also failed to show that it is entitled to contractual indemnification from A-Val, for the same reason that we find that P&T is not entitled to contractual indemnification from A-Val, namely the ambiguity of the undefined term "Owner" in the purchase orders and insurance agreement (*see Tonking,* 3 NY3d at 490).

Finally, P&T did not establish their prima facie entitlement to common-law indemnification against A-Val, plaintiff's employer. P&T solely relies on plaintiffs' bills of particulars. Since they do not allege any injuries that qualify as grave under Workers' Compensation Law § 11, P&T failed to eliminate all issues of fact as to whether plaintiff's injuries breach Workers' Compensation Law § 11's "grave injury" threshold. (*see Granite State Ins. Co. v Moklam Enters., Inc.*, 193 AD3d 616 [1st Dept 2021]).

ST is entitled to an order of unconditional, full indemnification by A-Val because there is no evidence that Structure Tone was negligent in any degree (*Sanchez v 404 Park Partners, LP,* 168 AD3d 491, 493 [1st Dept 2019]). As concerns the failure-to-procure-insurance claims, the only evidence concerning what insurance A-Val procured is certificates of insurance. A certificate of insurance may be sufficient to raise an issue of fact, but standing alone, it does not prove coverage as a matter of law (*see Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017]). Thus, the court correctly denied A-Val summary dismissal of all claims for failure to procure insurance as against

it, but should have denied so much of ST's motion for summary judgment on the issue of liability on its breach of contract claim against A-Val for failure to procure insurance. Finally, given the documentary and testimonial evidence that plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11, but also that he received workers' compensation benefits from A-Val, A-Val should have been granted summary judgment dismissing the common-law indemnification claims as against it (*see e.g. Clarke v Empire Gen. Contr. & Painting Corp.*, 189 AD3d 611, 612-613 [1st Dept 2020]).

We have considered the defendants' remaining arguments and we find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: August 16, 2022

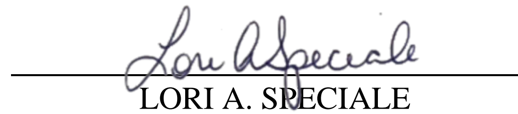
Susanna Molina Rojas
Clerk of the Court

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

AFFIDAVIT OF SERVICE BY ELECTRONIC FILING

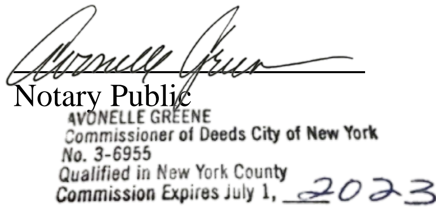
LORI A. SPECIALE, being duly sworn, deposes and says; that deponent is not a party to this action, that she is of 18 years and upwards; and that she is employed by Barry McTiernan & Moore LLC, attorneys for defendant/second third-party plaintiff-appellant, STRUCTURE TONE, INC., in the entitled action; that the office address of said attorneys is 101 Greenwich Street, 14th Floor, New York, New York 10006; that on the 17th day of August, 2022, I served the within ORDER WITH NOTICE OF ENTRY upon:

ALL PARTIES AS APPEARING ON THE SUPREME COURT, STATE OF NEW YORK ELECTRONIC FILING WEBSITE AT THE E-MAIL ADDRESSES DESIGNATED BY SAID PARTIES.



LORI A. SPECIALE

Sworn to before me this
17th day of August, 2022



Notary Public
AVONELLE GREENE
Commissioner of Deeds City of New York
No. 3-6955
Qualified in New York County
Commission Expires July 1, 2023

FELIPE A. RUISECH, ET AL v. STRUCTURE TONE, INC., ET AL.
Index No.: 159007/2013

EXHIBIT C

FILED: APPELLATE DIVISION - 1ST DEPT 09/16/2022 03:02 PM 2021-00357
NYSCEF DOC. NO. 41 RECEIVED NYSCEF: 09/16/2022

New York Supreme Court

Appellate Division—First Department

FELIPE RUISECH and MARTHA RUISECH,

Plaintiffs-Respondents,

– against –

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

Defendants-Respondents-Appellants,

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

– and –

CBRE INC.,

Defendant-Appellant-Respondent.

Appellate Case No.: 2021-00357

Index No. 159007/13

(For Continuation of Caption See Inside Cover)

MOTION TO REARGUE OR IN THE ALTERNATIVE FOR LEAVE TO APPEAL TO THE NEW YORK STATE OF APPEALS

THE BARNES FIRM, P.C.
Attorneys for Plaintiffs-Respondents Felipe Ruisech and Martha Ruisech
600 Old Country Road, Suite 425
Garden City, New York 11530
(347) 697-4758
richard.amico@thebarnesfirm.com

New York County Clerk's Index Nos. 159007/13, 590013/14, 590202/14 and 595439/18

TISHMAN SPEYER PROPERTIES, L.P. and 200 PARK LP, *Third-Party Plaintiffs-Respondents-Appellants,* – against – CBRE INC., *Third-Party Defendant-Appellant-Respondent.*	Third-Party Index No. 590013/14
STRUCTURE TONE GLOBAL SERVICES, INC., *Second Third-Party Plaintiff-Appellant-Respondent,* – against – A-VAL ARCHITECTURAL METAL III, LLC, *Second Third-Party Defendant-Respondent-Appellant.*	Second Third-Party Index No. 590202/14
TISHMAN SPEYER PROPERTIES, L.P. and 200 PARK LP, *Third Third-Party Plaintiffs-Appellants-Respondents,* – against – A-VAL ARCHITECTURAL METAL III, LLC, *Third Third-Party Defendant-Respondent-Appellant.*	Third Third-Party Index No. 595439/18

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

---X

FELIPE RUISECH, et al.,

Plaintiffs-Respondents,

-against-

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC., et al.,

Defendants-Respondents-Appellants,

-and-

CBRE INC.,

Defendant-Appellant-Respondent.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third-Party Plaintiffs-Respondents-Appellants,

-against-

CBRE INC.,

Third-Party Defendant-Appellant-Respondent.

---X

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff-Respondent Appellant,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant-Respondent-Appellant.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third Third-Party Plaintiffs-Appellants-Respondents,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent-Appellant.

---X

NOTICE OF MOTION

Supreme Court, New York County Index Nos.:
159007/13
590202/14
595439/18

Case No.: 2021-00357

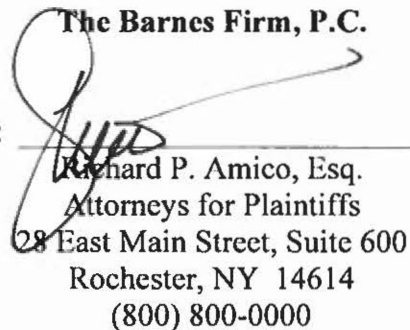
PLEASE TAKE NOTICE, that the Plaintiffs-Respondents, by their attorneys, The Barnes Firm, P.C., will move this Court at 10:00 a.m. on Monday, October 3, 2022, at the Appellate Division, First Department, located at 27 Madison Avenue, New York, NY 10010, for an order granting reargument of the appeal, pursuant to 22 NYCRR §1250.16(d)(2) or, in the alternative, for leave to appeal to the Court of Appeals pursuant to 22 NYCRR §1250.16(d)(3), upon the Affirmation of Richard P. Amico, Esq., and upon all of the pleadings and proceedings heretofore had herein.

Demand is hereby made, pursuant to CPLR 2214, that answering affidavits, if any, be served upon the Plaintiffs' attorney at least seven (7) days before the return date of this motion.

DATED: Rochester, New York
September 16, 2022

Yours, etc.,

The Barnes Firm, P.C.



By: ____________________
Richard P. Amico, Esq.
Attorneys for Plaintiffs
28 East Main Street, Suite 600
Rochester, NY 14614
(800) 800-0000

TO: ALL PARTIES VIA NYSCEF

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

---X

FELIPE RUISECH, et al.,

Plaintiffs-Respondents,

-against-

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC., et al.,

Defendants-Respondents-Appellants,

-and-

CBRE INC.,

Defendant-Appellant-Respondent.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third-Party Plaintiffs-Respondents-Appellants,

-against-CBRE INC.,

Third-Party Defendant-Appellant-Respondent.

---X

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff-Respondent Appellant,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant-Respondent-Appellant.

---X

TISHMAN SPEYER PROPERTIES, L.P., et al.,

Third Third-Party Plaintiffs-Appellants-Respondents,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent-Appellant.

---X

AFFIRMATION

Supreme Court, New York
County Index Nos.:
159007/13
590202/14
595439/18

Case No.: 2021-00357

AFFIRMATION

RICHARD P. AMICO, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under the penalties of perjury:

I am a member of The Barnes Firm, P.C., attorneys for Plaintiffs-Respondents Felipe and Martha Ruisech and, as such, I am fully familiar with the facts and circumstances set forth herein. I submit this Affirmation in support of Plaintiffs' motion, pursuant to 22 NYCRR §1250.16(d)(2) and §1250.16(d)(3), for an order granting leave to reargue the appeal in this matter or, in the alternative, for leave to appeal to the Court of Appeals.

This case involves an appeal by all Defendants from an order of Supreme Court, New York County (Goetz, J.), entered December 14, 2020, which denied Defendants' motions for Summary Judgment dismissing Plaintiffs' claims under Labor Law §241(6) and Labor Law §200, as well as their common-law negligence claims. By decision and order entered on August 16, 2022 (a copy of which is attached), this Court reversed and dismissed Plaintiffs' Labor Law and common-law negligence claims.

In doing so, the Court made determinations as a matter of law regarding the applicability of specific industrial code regulations designed to promote the safety of construction workers, usurping the fact-finding function of a jury on such matters as what constitutes "debris," "foreign substance," "slippery condition," and "passageway." Parts of such determinations are inconsistent with existing precedent from this Court, suggesting that those precedents were overlooked.

The Court determined as a matter of law that the material on which the injured worker fell ("debris," a waste product) was "an integral part of the construction work," a holding that directly conflicts with prior decisions, creates an inconsistency among the Appellate Divisions,

and expands the exception beyond the Court of Appeals' decision in O'Sullivan v. IDI Const. Co. (7 N.Y.3d 805), threatening to subsume the regulations entirely. For that reason, if the decision is permitted to stand, Plaintiffs should be granted leave to appeal to the Court of Appeals.

In another instance, the Court overlooked that Plaintiffs asserted violations of three specific Industrial Code regulations, not two, and predicated part of its decision on an obvious misapprehension of Industrial Code section 23-1.7(e)(2), which does not apply to "passageways," but rather explicitly applies to "working areas."

As relates to Plaintiffs' Labor Law §200 claim, the Court overlooked the scope of the legal duty owed by the general contractor (Structure Tone Inc.) to the Plaintiff, which was established by undisputed evidence – the construction contract itself. These facts go unmentioned in the Court's decision.

The Court also overlooked the complete absence of proof that Defendant Structure Tone fulfilled its legal duty to remove debris from the Plaintiff's work area, and that the breach of this duty directly caused Plaintiff's accident and injuries. Indeed, the Court appears to have overlooked the affidavit of Plaintiff's engineering expert and/or made its own determinations of the weight, rather than legal sufficiency, of the evidence when deciding that the spoils of the concrete work did not constitute "an existing defect or dangerous condition of the property."

The Court thereby misapprehended the nature of the defendant's evidentiary burden on a motion for summary judgement when it did not require Defendant Structure Tone to demonstrate that it did not have actual or constructive knowledge of the condition which led to Plaintiff's accident.

In order to place the Court's decision into the proper context, it is helpful to understand why the law creates a nondelegable duty on the part of property owners and contractors for what would otherwise be ordinary negligence. In that regard, Labor Law § 241(6) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * * *
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. <u>The commissioner may make rules to carry into effect the provisions of this subdivision</u>, and the owners and contractors and their agents for such work ... shall comply therewith. (Emphasis added.)

It is understood that section 241(6) imposes a non-delegable duty on contractors and owners and applies to violations of "specific, positive command[s]" of the Industrial Code. <u>Ross v. Curtis-Palmer Hydro-Elec. Co.</u>, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993). The case at bar involves "Industrial Code Rule No. 23," relating to "Protection in Construction, Demolition and Excavation Operations." 12 NYCRR 23-1.1.

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

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

(e) The <u>hazards incidental to the handling and movement of heavy materials</u>.

12 NYCRR 23-1.2 (emphasis added).

The regulations identify the hazards that endanger "the lives, health and safety" of those so employed, and the specific regulations direct the conduct designed to avoid those hazards, plain and simple. Slipping, tripping, and other hazards are explicitly designated by Rule 23 as risks that materialize from, among other things, "accumulations of dirt and debris:"[1]

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

12 NYCRR 23-1.7(e) "Tripping and other hazards.

> **(1)** Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> **(2)** Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

In this context, it is inconceivable that the specific hazards arising from "accumulations of dirt and debris," the very existence of which implies it must be discarded in order to reduce the risk of harm to human beings, would be utterly negated by a court of law by designating such dirt and debris as "an integral part of the construction." Yet, that is the holding of this Court in this case, absent any analysis of whether that hazard was an "accumulation" as opposed to something generated contemporaneously with the work.

---

[1] The plain and ordinary meaning of "debris" is "the remains of something broken down or destroyed," "something discarded: RUBBISH" (https://www.merriam-webster.com/dictionary/debris).

Here, it was no coincidence that the construction contract itself states:

> General Contractor shall at all times keep the Site and surrounding areas free from **accumulation of debris, waste materials** and other rubbish caused by the performance of, or arising in connection with, the Work and Coordination Items. (R. 1869.)(Emphasis added.)
> It's understood that Structure Tone is obligated to keep the floor free from accumulation of debris. (R. 1053, 1058.)

The Court makes no reference to this provision, by which Defendant Structure Tone contractually assumed the duty imposed by Industrial Code Rule 23. Indeed, Structure Tone presented no evidence whatsoever of actions taken to execute upon the duty it assumed, a duty to avoid the precise risk that materialized and caused the Plaintiff's accident and injuries.

Inexplicably, the Court found no duty on the part of Structure Tone, only "a general level of supervision that is not sufficient to warrant" a finding of liability. It also appears that the Court overlooked the affidavit of Plaintiff's engineering expert, which provided opinion evidence on the dangerous condition as well as the violations of the Industrial Code.

The Court should have followed its decision in Pereira v New Sch., 148 AD3d 410, 412-413 [1st Dept 2017], which is consistent with the nature of the general contractor's duty:

> As to the Labor Law § 200 and common-law negligence claims, defendants failed to establish that they lacked constructive notice of the dangerous condition that caused plaintiff's injury, since they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident (*see Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 10 NYS3d 28 [1st Dept 2015]).

The burden of proof in that regard clearly lies with the defendants. While the motion court in this case did not make a finding on the sufficiency of any such evidence, it did find that there was a material issue of fact, and that finding should be affirmed.

Further, the motion court correctly held that:

> In this case, section 23-1.7 (d) ["Slipping hazards"] is applicable, and there are questions of fact as to whether the provision was violated and was a proximate cause of plaintiff's accident. Plaintiff testified that he slipped on pebbles from the cement flooring (NYSCEF Doc No. 153, plaintiff tr at 79, 82-83). ... [T]he pebbles were not integral to plaintiff's work at the job site as the track for the glass plaintiff was handling had already been completed (see *Pereira* [sic] *New Sch.*, 148 AD3d 410, 412 [1st Dept 2017] ["the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site"]... (R. 26.)
>
> Like section 23-1.7 (d), section 23-1.7 (e) does not apply where the instrumentality that caused the accident was an integral part of the work (see *O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Krzyzanowski v City of New York*, 179 AD3d 479, 480 [1st Dept 2020]).
>
> [S]ection 23-1.7 (e) (2) applies because the pebbles that plaintiff allegedly slipped on were "not an integral part of the work being performed by the plaintiff at the time of the accident" (*Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008] [demolition debris was not integral to electrician's work]). Plaintiff testified that the pebbles were made out of the cement from the flooring, another A-Val team performed that work, and that he had never done that work (NYSCEF Doc No. 153, plaintiff tr at 82-83, 84). There are questions of fact as to whether section 23-1.7 (e) (2) was violated and was a proximate cause of plaintiff's accident. (R. 27-28.)

This Court's decision states:

> The Labor Law § 241(6) claim should be dismissed as against Park, CBRE, and ST as well. Neither of the Industrial Code regulations that plaintiff relies on apply to the accident. The floor was not in "a slippery condition" nor were the pebbles a "foreign substance which may cause slippery footing" within the meaning of Industrial Code § 23-1.7(d) (*see Cruz v Metropolitan Tr. Auth.*, 193 AD3d 639, 640 [1st Dept 2021]). Section 23-1.7 (e)(2) of the Industrial Code also does not apply as this was not a passageway, within the meaning of the regulation. In any event, the pebbles were debris that were an integral part of the construction work. The integral to the work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident (*see Krzyzanowski v City of New York*, 179 AD3d 479, 480-481 [1st Dept 2020]).

The motion court correctly relied on Pereira v. New Sch., 148 AD3d 410, 412 [1st Dept 2017], which is directly on point here:

> We find that the motion court improperly granted defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim predicated on Industrial Code (12 NYCRR) § 23-1.7 (d) (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351, 693 NE2d 1068, 670 NYS2d 816 [1998]). Plaintiffs established that the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site (*see Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456, 457, 998 NYS2d 340 [1st Dept 2014]; *Velasquez v 795 Columbus LLC*, 103 AD3d 541, 542, 959 NYS2d 491 [1st Dept 2013]). Plaintiff did not work with concrete and concrete was not a part of his responsibilities in constructing the tables and forms used to hold the rebar and other ironwork in place.

Likewise, this Court's decision in Lester v JD Carlisle Dev. Corp., 156 AD3d 577, 578 [1st Dept 2017], is directly on point and should be followed on the facts of the instant case. If it were, the Court could not have reached the conclusion it did.

> Industrial Code ... § 23-1.7 (e) (2) applies to "areas where persons work or pass." The record demonstrates that the loose granules on the roof surface that caused plaintiff to slip were not integral to the structure or the work (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226, 813 NYS2d 373 [1st Dept 2006], *affd* 7 NY3d 805, 855 NE2d 1159, 822 NYS2d 745 [2006]), but were an accumulation of debris from which § 23-1.7 (e) (2) requires work areas to be kept free (*Serrano v Con Ed* 146 AD3d 405, 44 NYS3d 392 (1st Dept 2017)]. Thus, plaintiff is entitled to summary judgment as to liability on the Labor Law § 241 (6) cause of action insofar as it is predicated upon § 23-1.7 (e) (2).

Similarly, in Singh v. Young Manor, Inc., 23 A.D.3d 249, 249 (1st Dep't 2005), where plaintiff stepped on a nail near a pile of accumulated waste, this Court considered it "debris," not an integral part of plaintiff's work removing wood paneling. Likewise, Tighe v. Hennegan Const.

Co., 48 A.D.3d 201, 202 (1st Dep't 2008), held that, where "debris accumulated as a result of the demolition," it was not "integral" to the construction work.

This Court has cited and followed O'Sullivan v IDI Constr. Co., Inc., the only Court of Appeals decision of which we are aware that has applied the "integral" exception. The Court of Appeals affirmed a decision by this Court holding that "a permanently placed electrical pipe" was "an integral part of what is being constructed." O'Sullivan v IDI Constr. Co., Inc., 28 AD3d 225, 226 [1st Dept 2006]. "The courts below properly concluded that plaintiff's Labor Law § 241(6) cause of action, based on 12 NYCRR 23-1.7 (e) (1) and (2), failed because the electrical pipe or conduit that plaintiff tripped over was an integral part of the construction." O'Sullivan v IDI Constr. Co., Inc., 7 NY3d 805, 806 [2006]. This Court has since decided other similar cases, the distinguishing feature of which is that the object or material involved was quite literally an "integral" part of the construction.

"Integral" is defined as "essential to completeness: CONSTITUENT," "formed as a unit with another part." (https://www.merriam-webster.com/dictionary/integral.) In an ordinary sense, something integral is part of a whole, something that will be incorporated into a whole. Thus, it corresponds with the definition of "integrate:" "to form, coordinate, or blend into a functioning or unified whole: UNITE," "to incorporate into a larger unit." (https://www.merriam-webster.com/dictionary/integrate.)

However, this exception has been expanded by courts to include things that are part of work being performed, things that are not constituents, that will not be incorporated into a whole, but rather are being used to facilitate the accomplishment of some task.[2] Even under that use of

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[2] "The motion court correctly dismissed the Labor Law § 241 (6) claim premised on a violation of Industrial Code (12 NYCRR) § 23-1.7 (e) (2), because the plates were not scattered materials or debris, but an integral part of the

the exception, "accumulations of dirt and debris," while perhaps a byproduct of work performed, such as the spoils of concrete upon which Mr. Ruisech was forced to tread, are "integral" to nothing, have no use, and are simply waste products. The presence of debris anywhere will only be eliminated and discarded. See, for example, McGovern v CBRE, Inc., 2022 NY Slip Op 30910[U], *9-10 [Sup Ct, NY County 2022], where the court held:

> Although the exact origin of the pin is unknown, it is undisputed that such pins would be removed when found at the jobsite. Thus, the pin, as placed, cannot have constituted an "integral part of the work performed." (*Cf. Conlon v Carnegie Hall Socy., Inc.*, 159 A.D.3d 655, 70 N.Y.S.3d 833 [1st Dept 2018] [extension cord on which plaintiff tripped necessary to perform work at jobsite; dismissal of Labor Law claim based on Industrial Code § 23-1.7(e)(1) warranted]).

This case calls for a direct and plain application of 12 NYCRR 23-1.7 (e)(2). The Plaintiff's testimony describing how the accident happened is uncontroverted. There is no dispute regarding the origin or nature of the material that caused him to lose his footing. That material cannot fairly be characterized as anything other than "debris." As such, this Court's finding not only expands the exception beyond reason, but it negates the entire purpose of the applicable Industrial Code regulation.

If that decision stands, it contradicts jurisprudence in the First Department and creates conflict with other Appellate Divisions. It also pushes the Court of Appeals decision in O'Sullivan to the point at which the question should be put before that court. Thus, should this

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construction (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 855 NE2d 1159, 822 NYS2d 745 [2006]." (Savlas v City of NY, 167 AD3d 546, 547 [1st Dept 2018])

Court deny Plaintiff's motion for leave to reargue the appeal, we respectfully request leave to appeal to the Court of Appeals.

Based upon all of the foregoing, Plaintiffs-Respondents respectfully requests that the Court grant reargument and, upon reargument, modify its Order to affirm those parts of the order of Supreme Court which denied Defendants' motions for summary judgment as to Plaintiff's Labor Law 241(6) claims (specifically as to violations 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2)) and Labor Law § 200).

Dated: September 16, 2022
Rochester, New York

THE BARNES FIRM, P.C.

Richard P. Amico, Esq.
Attorneys for Plaintiffs
28 E. Main Street, Suite 600
Rochester, NY 14614

To: ALL PARTIES VIA NYSCEF

EXHIBIT A

cases:\arh58898\entry-appellate order 8-16-22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

--X

FELIPE A. RUISECH and MARTHA B. RUISECH, Individually and as husband and wife,

Plaintiffs,

-against-

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

Defendants.

--X

NOTICE OF ENTRY

Index No.: 159007/2013

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

Third-Party Plaintiffs,

-against-

CBRE, INC.,

Third-Party Defendant.

--X

Index No.: 590013/14

STRUCTURE TONE, INC. i/s/h/a STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant.

--X

--X
TISHMAN SPEYER PROPERTIES, L.P. and
200 PARK, L.P.,

Third Third-Party Plaintiffs,

-against-

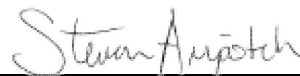
A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant.
--X

C O U N S E L O R S:

PLEASE TAKE NOTICE, that the within is a true copy of the Decision/Order of the Appellate Division, First Department dated and entered in the office of the clerk of the within named Court on August 16, 2022.

Dated: New York, New York
August 17, 2022



STEVEN ARIPOTCH, ESQ.
BARRY McTIERNAN & MOORE LLC
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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Gische, Kern, Friedman, Shulman, JJ.

15983

FELIPE A. RUISECH, et al.,
Plaintiffs-Respondents,

-against-

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC., et al.,
Defendants-Respondents-Appellants,

CBRE, INC.,
Defendant-Appellant-Respondent.

Index Nos. 159007/13
590013/14
590202/14
595439/18
Case No. 2021-00357

TISHMAN SPEYER PROPERTIES, L.P., et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

CBRE, INC.,
Third-Party Defendant-Appellant-Respondent.

STRUCTURE TONE INC., initially sued herein as STRUCTURE TONE GLOBAL SERVICES, INC.,
Second Third-Party Plaintiff-Respondent-Appellant,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,
Second Third-Party Defendant-Respondent-Appellant.

TISHMAN SPEYER PROPERTIES, L.P., et al.,
Third Third-Party Plaintiffs-Appellants-Respondents,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,
Third Third-Party Defendant-Respondent-Appellant.

Gallo Vitucci Klar LLP, New York (C. Briggs Johnson of counsel), for CBRE, Inc., appellant-respondent.

Barry McTiernan & Moore LLC, New York (Steven Aripotch of counsel), for Structure Tone Global Services, Inc., respondent-appellant/appellant-respondent.

Smith Mazure PC, New York (Louise Cherkis of counsel), for Tishman Speyer Properties, L.P., and 200 Park, LP, respondents-appellants/appellants-respondents.

Pisciotti Lallis Erdreich, White Plains (Charu Mehta of counsel), for A-Val Architectural Metal III, LLC, respondent-appellant.

The Barnes Firm, P.C., Rochester (Richard Amico of counsel), for respondents.

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered December 14, 2020, which, to the extent appealed from as limited by the briefs, denied the motions of defendants 200 Park, L.P. (Park) and Tishman Speyer Properties, L.P. (together, P&T), CBRE, Inc., and Structure Tone Inc., i/s/h/a Structure Tone Global Services, Inc. (ST) for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim, predicated on Industrial Code (12 NYCRR) § 23-1.7(d) and (e)(2) as against Park, CBRE, and ST and the Labor Law § 200 and common-law negligence claims as against them, denied P&T's motion for summary judgment on Tishman's contractual indemnification claim against CBRE, their contractual indemnification claims against ST and third-party

defendant A-Val Architectural Metal III, LLC, and their common-law indemnification claims against CBRE, ST, and A-Val, granted CBRE's motion for summary judgment on its contractual indemnification claim against ST conditionally and denied its motion for summary judgment on its contractual indemnification claim against A-Val and its common-law indemnification claim against ST and dismissing all common-law indemnification and contribution claims as against it, granted ST's motion for summary judgment on its contractual indemnification claim against A-Val conditionally and on the issue of liability on its breach of contract claim against A-Val for failure to procure insurance, and denied A-Val's motion for summary judgment dismissing all claims for common-law indemnification and failure to procure insurance as against it, unanimously modified, on the law, to grant Park, CBRE, and ST summary judgment dismissing the Labor Law § 241(6) claim as against them, to grant P&T, CBRE and ST summary judgment dismissing the Labor Law § 200 claim and common-law negligence claims against them, to grant Tishman's contractual indemnification claim against CBRE, grant CBRE summary judgment on its contractual indemnification claim against ST, to grant ST summary judgment on its contractual indemnification claim against A-Val and as to liability on its breach of contract claim against A-Val for failure to procure insurance, and to grant A-Val summary judgment dismissing the common-law negligence claims as against it, and otherwise affirmed, without costs.

This personal injury action stems from a construction site accident at the building owned by Park and managed by Tishman. CBRE leases several floors in the building and it entered into a contract with ST to serve as the general contractor for renovation work to be performed in its leased space on the 19th floor. ST, in turn, subcontracted with A-Val, plaintiff's employer, to perform arch metal and glass work.

Plaintiff's accident occurred as he and three other A-Val workers were attempting to lift and install a heavy interior glass wall divider into an aluminum track that had been cut into the concrete floor by other A-Val workers. When plaintiff stepped forward to place the glass into the track, he stepped onto "minute" pebbles near the track. His right foot slipped forward a few inches, but he did not fall. Plaintiff claims that he sustained injuries, not only because of pebbles he slipped on, but also because of A-Val's decision to remove one worker from his team when he undertook to move the glass.

Supreme Court dismissed the Labor Law §241(6) claim, only as against Tishman on the basis that it was not Park's statutory agent, for purposes of the Labor Law. The Labor Law § 241(6) claim should be dismissed as against Park, CBRE, and ST as well. Neither of the Industrial Code regulations that plaintiff relies on apply to the accident. The floor was not in "a slippery condition" nor were the pebbles a "foreign substance which may cause slippery footing" within the meaning of Industrial Code § 23-1.7(d) (*see Cruz v Metropolitan Tr. Auth.*, 193 AD3d 639, 640 [1st Dept 2021]). Section 23-1.7 (e)(2) of the Industrial Code also does not apply as this was not a passageway, within the meaning of the regulation. In any event, the pebbles were debris that were an integral part of the construction work. The integral to the work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident (*see Krzyzanowski v City of New York*, 179 AD3d 479, 480-481 [1st Dept 2020]).

Plaintiff's Labor Law § 200 and common-law negligence claims should also be dismissed as against P&T, CBRE and ST as well. "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" (*see id.)*. CBRE and ST provide uncontroverted evidence that they did not create the condition at issue, nor did they have notice of the condition. CBRE and ST also established that they had no control over the means and methods plaintiff used in performing the work. Park established that it 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 plaintiff's 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]). As for the Labor Law § 241 (6) claim, Tishman established that it was not Park's statutory agent, for purposes of the Labor Law (*see e.g. Venter v Cherkasky*, 200 AD3d 932, 932-933 [2d Dept 2021]). Although Orsini, ST's general manager, did regular walk throughs of the work site, regular inspection of the site or the authority to stop any unsafe work is a general level of supervision that is not sufficient to warrant holding ST liable under Labor Law § 200 (*Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st Dept 2015]). The concrete pebbles were not an existing defect or dangerous condition of the property, but rather were created by plaintiff's employer's work and the manner in which it was performed (*see also Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

At one point Metropolitan Life Insurance Corp. (MLIC) owned the building and the original, 1986 lease for the 19th floor identifies MLIC as the "landlord." The building was later sold to Park and starting with the eighth modification of the lease, Park is

listed as the "landlord." The eighth lease modification provides that CBRE shall indemnify the "Indemnities," who are defined as including "Landlord [and] Landlord's agent," against claims: "(i) arising from any act, omission or negligence of any Tenant Parties," but limited to breaches, violations or nonperformances under the lease. The term "Landlord's agents" is also undefined in the lease.

CBRE does not address, let alone oppose, P&T's argument that the term "Landlord's agents" as used in the indemnification provision of its lease, although not defined, is broad enough to encompass Tishman (the landlord's managing agent). However, as argued by CBRE, this provision has a negligence trigger. Indemnity is triggered only where the claims "arise from" CBRE's "act, omission or negligence" and in limited circumstances (*see Arias v Sanitation Salvage Corp.*, 199 AD3d 554, 557 [1st Dept 2021]). In light of our holding that CBRE is free from negligence, the indemnification provision of the lease was not triggered. Therefore, neither Tishman nor Park have shown that they are entitled to contractual indemnification by CBRE under the terms of the lease.

Although that 2009 eighth lease modification predates the 2010 contract between CBRE and ST, the CBRE/ST contract references only the original 1986 lease that does not define "landlord" as Park, but rather as MLIC. The CBRE/ST contract provides, in relevant part, that ST must indemnify CBRE, the "Landlord" and their "agents" against claims "arising out of, in connection with or on account of (i) any act, omission, fault or neglect of [ST], or any Subcontractor . . . ." As concerns CBRE's argument that it is entitled to indemnification by ST, we have found that ST is free from negligence. However, plaintiff's claims against CBRE "aris[e] out of" negligent acts by its subcontractor, A-Val, triggering the indemnification provision. Consequently, ST is

vicariously liable for the acts of A-Val and, therefore, must indemnify CBRE, as the CBRE/ST contract provides.

P&T were properly denied summary judgment on their contractual indemnification claims against ST under the CBRE/ST contract and its contract with A-Val. The indemnification clause in CBRE/ST's contract provides that ST must indemnify CBRE, the "Landlord," and their "agents" against claims:

> "resulting from or in any manner arising out of, in connection with or on account of (i) any act, omission, fault or neglect of [ST], or any Subcontractor of, . . . [ST], or anyone employed by any of them in connection with the Work or anyone for whose acts any of them may be liable"

ST's contract with A-Val consists of a series of purchase orders and a Blanket Insurance/Indemnity Agreement (insurance agreement). The reverse side of the purchase orders contains an indemnification clause requiring A-Val to indemnify ST against claims "arising in whole or in part and in any manner from the acts, omissions, breach or default of [A-Val] . . . in connection with the performance of any work by [A-Val] pursuant to this Purchase Order." The insurance agreement contains substantially similar language.

As we have seen, the CBRE/ST contract does not identify Park as the landlord and it only refers to the landlord's "agents," without any further description of who that means, but who the landlord and agents are can be inferred from the lease. Here, however, the purchase orders and the insurance agreement simply use the term "Owner," without identifying who that is. To the extent that P&T argues that we should infer that "Owner" has the same meaning as in the CBRE/ST contract, that contract defines "Owner" not as Park or Tishman, but rather as CBRE, the tenant. In any event the CBRE/ST contract is not incorporated by reference nor is it an exhibit to any of

these documents. Since the language of the parties is not clear enough on this record to enforce an obligation against ST or A-Val to indemnify P&T, and "we are unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out," P&T's motion for summary judgment on its contractual indemnification claim against ST and A-Val was properly denied (*Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

CBRE has also failed to show that it is entitled to contractual indemnification from A-Val, for the same reason that we find that P&T is not entitled to contractual indemnification from A-Val, namely the ambiguity of the undefined term "Owner" in the purchase orders and insurance agreement (*see Tonking,* 3 NY3d at 490).

Finally, P&T did not establish their prima facie entitlement to common-law indemnification against A-Val, plaintiff's employer. P&T solely relies on plaintiffs' bills of particulars. Since they do not allege any injuries that qualify as grave under Workers' Compensation Law § 11, P&T failed to eliminate all issues of fact as to whether plaintiff's injuries breach Workers' Compensation Law § 11's "grave injury" threshold. (*see Granite State Ins. Co. v Moklam Enters., Inc.*, 193 AD3d 616 [1st Dept 2021]).

ST is entitled to an order of unconditional, full indemnification by A-Val because there is no evidence that Structure Tone was negligent in any degree (*Sanchez v 404 Park Partners, LP,* 168 AD3d 491, 493 [1st Dept 2019]). As concerns the failure-to-procure-insurance claims, the only evidence concerning what insurance A-Val procured is certificates of insurance. A certificate of insurance may be sufficient to raise an issue of fact, but standing alone, it does not prove coverage as a matter of law (*see Prevost v One City Block LLC*, 155 AD3d 531, 536 [1st Dept 2017]). Thus, the court correctly denied A-Val summary dismissal of all claims for failure to procure insurance as against

it, but should have denied so much of ST's motion for summary judgment on the issue of liability on its breach of contract claim against A-Val for failure to procure insurance. Finally, given the documentary and testimonial evidence that plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11, but also that he received workers' compensation benefits from A-Val, A-Val should have been granted summary judgment dismissing the common-law indemnification claims as against it (*see e.g. Clarke v Empire Gen. Contr. & Painting Corp.*, 189 AD3d 611, 612-613 [1st Dept 2020]).

We have considered the defendants' remaining arguments and we find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: August 16, 2022

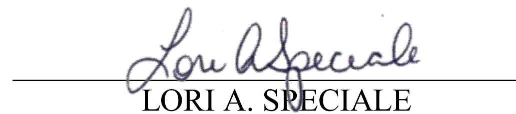
Susanna Molina Rojas
Clerk of the Court

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

AFFIDAVIT OF SERVICE BY ELECTRONIC FILING

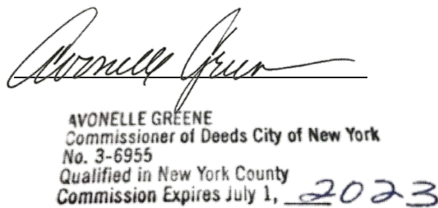
LORI A. SPECIALE, being duly sworn, deposes and says; that deponent is not a party to this action, that she is of 18 years and upwards; and that she is employed by Barry McTiernan & Moore LLC, attorneys for defendant/second third-party plaintiff-appellant, STRUCTURE TONE, INC., in the entitled action; that the office address of said attorneys is 101 Greenwich Street, 14th Floor, New York, New York 10006; that on the 17th day of August, 2022, I served the within ORDER WITH NOTICE OF ENTRY upon:

ALL PARTIES AS APPEARING ON THE SUPREME COURT, STATE OF NEW YORK ELECTRONIC FILING WEBSITE AT THE E-MAIL ADDRESSES DESIGNATED BY SAID PARTIES.



LORI A. SPECIALE

Sworn to before me this
17th day of August, 2022



FELIPE A. RUISECH, ET AL v. STRUCTURE TONE, INC., ET AL.
Index No.: 159007/2013

EXHIBIT D

cases:\arh58898\entry-appellate order 11-22-22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

--X

FELIPE A. RUISECH and MARTHA B. RUISECH, Individually and as husband and wife,

Plaintiffs,

-against-

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

Defendants.

--X

NOTICE OF ENTRY

Index No.: 159007/2013

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

Third-Party Plaintiffs,

-against-

CBRE, INC.,

Third-Party Defendant.

--X

Index No.: 590013/14

STRUCTURE TONE, INC. i/s/h/a STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant.

--X

---X
TISHMAN SPEYER PROPERTIES, L.P. and
200 PARK, L.P.,

Third Third-Party Plaintiffs,

-against-

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant.
---X

C O U N S E L O R S:

PLEASE TAKE NOTICE, that the within is a true copy of the Decision/Order of the Appellate Division, First Department dated and entered in the office of the clerk of the within named Court on November 22, 2022.

Dated: New York, New York
November 22, 2022

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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Present – Hon. Sallie Manzanet-Daniels, Justice Presiding,
Judith J. Gische
Cynthia S. Kern
David Friedman
Martin Shulman, Justices.

Felipe A. Ruisech, et al., Plaintiffs-Respondents,	Motion No.	2022-03639
	Index Nos.	159007/13 590013/14 590202/14 595439/18
-against-		
Structure Tone Inc., initially sued herein as Structure Tone Global Services, Inc., et al., Defendants-Respondents-Appellants,	Case No.	2021-00357

CBRE, Inc.,
Defendant-Appellant-Respondent.

Tishman Speyer Properties, L.P., et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

CBRE, Inc.,
Third-Party Defendant-Appellant-Respondent.

Structure Tone Inc., initially sued herein as Structure Tone Global Services, Inc.,
Second Third-Party Plaintiff-Respondent-Appellant,

-against-

A-Val Architectural Metal III, LLC,
Second Third-Party Defendant-Respondent-Appellant.

Tishman Speyer Properties, L.P., et al.,
Third Third-Party Plaintiffs-
Appellants-Respondents,

-against-

A-Val Architectural Metal III, LLC,
Third Third-Party Defendant-
Respondent-Appellant.

Plaintiffs-respondents having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on August 16, 2022 (Appeal No. 15983),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED: November 22, 2022

Susanna Molina Rojas
Clerk of the Court