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

# Court of Appeals

*of the*

# State of New York

FELIPE RUISECH and MARTHA RUISECH,

*Plaintiffs-Appellants,*

– against –

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

*Defendants-Respondents,*

Index No.
159007/13

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

*Defendant,*

– and –

CBRE INC.,

*Defendant-Respondent.*

*(For Continuation of Caption See Inside Cover)*

## OPPOSITION TO MOTION FOR LEAVE TO APPEAL

GALLO VITUCCI KLAR LLP
*Attorneys for Defendant/Third-Party*
*Defendant-Respondent CBRE, Inc.*
90 Broad Street, Suite 1202
New York, New York 10004
Tel.: (212) 683-7100
Fax: (212) 683-5555
bjohnson@gvlaw.com

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

*Third-Party Plaintiffs-Respondents,*

– against –

CBRE INC.,

*Third-Party Defendant-Respondent.*

---

STRUCTURE TONE GLOBAL SERVICES, INC.,

*Second Third-Party Plaintiff-Respondent,*

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

*Second Third-Party Defendant-Respondent.*

Second Third-Party Index No. 590202/14

---

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

*Third Third-Party Plaintiffs-Respondents,*

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

*Third Third-Party Defendant-Respondent.*

Third Third-Party Index No. 595439/18

## DISCLOSURE STATEMENT

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

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

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

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

STATE OF NEW YORK: COURT OF APPEALS

----------X

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.*

----------X

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

*Third-Party Plaintiffs-Respondents,*

*-against-*

CBRE INC.,

*Third-Party Defendant-Respondent.*

----------X

STRUCTURE TONE GLOBAL SERVICES, INC.,

*Second Third-Party Plaintiff-Respondent,*

*-against-*

A-VAL ARCHITECTURAL METAL III, LLC,

*Second Third-Party Defendant-Respondent.*

----------X

Appellate Division, First Department
Case No. 2021-00357

**AFFIRMATION IN OPPOSITION**

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

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.*

----------X

C. Briggs Johnson, an attorney admitted to practice law before the Courts of the State of New York, affirms under the penalties of perjury:

1. I am of counsel to Gallo Vitucci Klar LLP, attorneys for Defendant-Appellant-Respondent CBRE, Inc. ("CBRE"). I submit this affirmation in opposition to plaintiff's *untimely* motion seeking leave to appeal to this Court.[1]

2. In this personal injury action, plaintiff claims that he injured himself on pebbles, recently created by an ongoing construction project, on the 19th Floor of a building in Manhattan. At that time, defendant 200 Park LP owned the building, and CBRE leased the 19th floor. CBRE hired Structure Tone as the general contractor, which hired plaintiff's employer, A-Val, to perform glass work.

3. Plaintiff, a glazier, testified that when he injured himself, he was moving glass within open office space, and that the glass was to divide a hallway and an interior office after the project was completed. Plaintiff attributed his injuries to tiny or minute pebbles on the floor, which were a necessary and *unavoidable* byproduct of the glass installation work of his A-Val co-workers.

[1] Plaintiff effectively concedes that his Labor Law § 200 and common-law negligence claims are meritless by not specifically, nor even implicitly, seeking appellate review of the dismissal of those claims in his motion (*see gen.*, Amico Affirm.).

4. Procedurally, plaintiff's motion fails on multiple grounds. First, because the motion is untimely. Plaintiff was served with notice of entry of the Order denying his motion to reargue or for leave to appeal to this Court on November 22, 2022 (Amico Affirm., Exhibit D). He had *thirty days* from then *serve* a motion for leave to appeal to this Court (CPLR § 5513(b)). However, he did not *serve* his motion until *31 days later*, on December 23, 2022 (*see* plaintiff's Affidavit of Service).[2]

5. Nevertheless, plaintiff failed to meet his burden for leave to appeal on other procedural grounds. This is because the simple and straightforward issue implicated here – where plaintiff injured himself on debris that was an unavoidable byproduct of the project's work – were not novel, nor do they implicate a matter of public importance *that has not already been decided by this Court and the other Appellate Divisions*.

6. Additionally, plaintiff's leave application also fails procedurally because there is no split nor conflict between the other departments – nor with this Court – on this issue. Rather, the other Departments and this Court agree on the law, which is why the First Department dismissed the Complaint.

7. To be clear, plaintiff admitted that his co-workers from A-Val created the pebbles during their glass installation work – through A-Val's track or channel work on the concrete floor, which was where the glass was to be installed.

---

[2] Of course, a motion is *made* – e.g., indicating whether it is timely – when it is *served*. "A motion on notice is made when a notice of the motion or an order to show cause is served." CPLR § 2211; *City Bank Farmers Tr. Co. v. Cohen*, 300 N.Y. 361, 367 (1950)("It is statutory law that [a] motion is made when a notice thereof or an order to show cause is duly served.")(internal citations and quotation marks omitted).

8. And this is precisely why the First Department correctly dismissed plaintiff's Labor Law § 241(6) claim against CBRE. Plaintiff injured himself on pebbles that his A-Val *co-workers created* during, and in furtherance of, the glass installation work for the project. Thus, the pebbles were inherent or integral to that work; they were a necessary and *unavoidable* byproduct of that work.

9. The dispositive inquiry is whether – as this Court and the other Appellate Departments have repeatedly held – the pebbles were created by A-Val's work or by the project generally. It is immaterial – as plaintiff argued, despite decades of precedent to the contrary – that *he* did not create the pebbles, nor does it matter that he was not assigned to clean them.

10. By contrast, all that mattered then, and all that matters now – under the clear and consistent precedents of this Court and of the Appellate Division – is that his co-workers created the pebbles, which were an *unavoidable* byproduct of their work. And this is why the Labor Law § 241(6) failed as a matter of law.

11. Finally, plaintiff incorrectly claims that the jury – or his own expert – should decide whether the particular industrial codes allegedly at issue here apply.

12. However, the Courts of this State have repeatedly stated the exact opposite for decades: that the interpretation of an Industrial Code regulation, and the determination as to whether a particular condition is within the scope of the regulation, present questions of law for the Courts to decide.

13. Minimally, plaintiff should only be granted leave to appeal regarding the dismissal of his complaint as against defendant Structure Tone – and not against

CBRE – because plaintiff implicitly concedes in his motion papers that he is not seeking to reinstate any claims against any other defendant (*see gen.*, Amico Affirm).

14. CBRE's position in opposition is that this Court should deny plaintiff's motion in its entirety and with prejudice because:

- Plaintiff is not entitled for leave to appeal to this Court as his application is untimely (*see* Point I, *infra*);

- Plaintiff is not entitled for leave to appeal to this Court as the issues herein – on this simple and straightforward personal injury action – are neither novel, nor are they issues of public importance that have not already been firmly decided for decades; and the Appellate Division, and this Court, agree on the law (*see* Point I, *infra*); and

- Plaintiff's Labor Law § 241(6) claim was properly dismissed because the pebbles plaintiff injured himself on were integral or inherent to the project, as those pebbles were a necessary and unavoidable byproduct of the project's work (*see* Point II, *infra*).

## ARGUMENT

## POINT I

## PLAINTIFF IS NOT ENTITLED TO APPEAL TO THIS COURT BECAUSE THE SIMPLE AND STRAIGHT FORWARD ISSUE PRESENTED – PLAINTIFF INJURING HIMSELF ON PEBBLES THAT WERE AN UNAVOIDABLE BYPRODUCT OF THE PROJECT'S WORK – IS NOT NOVEL NOR IS IT OF PUBLIC IMPORTANCE, AND THERE IS NO SPLIT NOR CONFLICT AMONGST THE COURTS OF THIS STATE ON THE CONTROLLING LAW

15. Plaintiff's leave application initially fails on timeliness grounds. Plaintiff was served with notice of entry of the Order denying his motion to reargue or for leave to appeal to this Court on November 22, 2022 (Amico Affirm., Exhibit D). He had *thirty days* from that date to *serve* a motion to this Court seeking leave to appeal (CPLR § 5513(b)). However, he did not *serve* his motion until *31 days later*, on December 23, 2022 (*see* plaintiff's Affidavit of Service).

16. Of course, this means that the motion is untimely, as a motion is *made* – *e.g.*, indicating whether it is timely – when it is *served.* "A motion on notice is made when a notice of the motion or an order to show cause is served." CPLR § 2211; *City Bank Farmers Tr. Co. v. Cohen*, 300 N.Y. 361, 367 (1950)("It is statutory law that [a] motion is made when a notice thereof or an order to show cause is duly served.")(internal citations and quotation marks omitted).

17. But plaintiff also failed to meet his burden for leave to appeal on this simple and straightforward personal injury action on other procedural grounds. This is because the issues presented – where plaintiff injured himself on debris created by, or an unavoidable byproduct of, the project's work – were not novel, nor do they

implicate a matter of public importance that has not already been decided by this Court and the other Appellate Divisions.

18. Additionally, plaintiff's leave application also fails procedurally because there is no split nor conflict between the other departments – nor with this Court – on this issue. Rather, the other Departments and this Court agree on the law, which is why the First Department dismissed plaintiff's claims.

19. Section 22 NYCRR 500.22[b][2][ii][4] of this Court's Rules of Practice specifies that a party who seeks permissive Court of Appeals' review should demonstrate why – in a *concise* statement[3] – the "questions presented for review … merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division …"

20. Plaintiff never met this standard because the law *is clear* in the Appellate Division and in this Court: that plaintiff's Labor Law § 241(6) claim fails against a defendant such as CBRE under the facts herein (*see* Point II, *infra*).

21. Indeed, plaintiff claims – in conclusory fashion, unsupported by any evidence – that this case: "involves questions of law that affect innumerable workers in the construction industry and that have significant public importance. Injuries to construction workers have a negative societal impact, just as the prevention of injuries provides a benefit to society as a whole" (Amico Affirm., ¶ 13).

[3] Plaintiff's motion is anything but concise. By contrast, it is disorganized, and it leaves the reader guessing what exactly are the "questions [or question] presented for review."

22. Plaintiff does not explain himself any further, further proving the point: that this case presents *no* issues of public importance that have not already been deliberated and decided by this Court and the Appellate Division.

23. To be sure, while Labor Law § 241(6) was, without question, created to protect construction workers, that statute – and the industrial codes that provide liability thereunder, for *specific* factual scenarios – does not provide for absolute liability, especially not under the facts of this case.

24. Indeed, plaintiff simply injured himself on debris that was created in furtherance of a construction project. This is one of the many situations where a plaintiff is not permitted to recover under Labor Law § 241(6).

25. That is, this Court and the Appellate Division have specifically carved out a liability exception for facts such as these: a plaintiff cannot recover when the debris or detritus that he injured himself on was: created by, in furtherance of, or a necessary byproduct of – *e.g.*, *integral* to – the project's work.

26. And to be clear, this issue *has already been decided* – many times – by *this* Court *and* the Appellate Divisions, and they are all in agreement: that plaintiff's Labor Law § 241(6) claim fails when the debris that he injures himself on was created by, and a necessary byproduct of, the project's work (*see* Point II, *infra*).

## POINT II

## PLAINTIFF'S LABOR LAW § 241(6) CLAIM WAS PROPERLY DISMISSED AS THE PEBBLES WERE CREATED BY, AND AN UNAVOIDABLE RESULT OF, THE PROJECT'S WORK

27. Plaintiff misunderstands that the First Department properly dismissed his Labor Law § 241(6) claim because he fell over pebbles that his A-Val co-workers created during, and in furtherance of, their glass installation work for the project.

28. Thus, the pebbles were an *unavoidable and inherent* result of the project; they were not "simply waste products" (Amico Affirm., ¶ 28). And this decision was in accord with case law from the entire Appellate Division, as well as precedent from this very Court.

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

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

*Id*. at 769; *see Torres v. Triborough Bridge and Tunnel Auth.*, 193 A.D.3d 665 (1st Dep't 2021)(same "since the demolition debris resulted directly from the ongoing work being performed and thus" that debris "constituted an integral part of that work").

30. In *Harris v. Rochester Gas & Elec. Corp.*, 11 A.D.3d 1032 (4th Dep't 2004), the *Fourth Department* affirmed the Order dismissing plaintiff's Labor Law §

241 claim under similar facts. There, plaintiff used a jack hammer during an ongoing construction project, which created the "loose debris" that contributed to his accident. *Id*. at 1033. The Court dismissed the Labor Law § 241 claim because, like here:

> [t]he accumulation of the concrete debris in the work area 'was an unavoidable and inherent result of [the] work at a[n] ongoing [construction project].'

*Id*. at 1033.

31. Another analogous case was decided in *Cabrera v. Sea Cliff Water Co.*, 6 A.D.3d 315 (1st Dep't 2004). There, similar to this case, plaintiff tripped over accumulated debris – sheet rock dust and sawdust – created during the ongoing construction project. Plaintiff and his co-workers had created the debris by cutting sheet rock and plywood in preparation for their building work. *Id*. at 316. The Court dismissed the Labor Law § 241 claim because:

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

*Id*. at 316.

32. To be sure, *this Court* affirmed the dismissal of plaintiff's Labor Law § 241(6) claim in *Bond v. York Hunter Const., Inc.*, 270 A.D.2d 112 (1st Dep't 2000), *aff'd*, 95 N.Y.2d 883 (2000), where, as in *this* case: "the accumulation of debris [involved in the accident] was an unavoidable and inherent result of work at [an] on-going [construction] project, and therefore provides no basis for imposing liability" under Labor Law § 241(6). *Bond*, 270 A.D.2d at 113.

33. And the Fourth and Second Departments have consistently agreed on this interpretation of the integral to the work liability exception for Labor Law §

241(6). *Cooper v. Sonwil Distrib. Ctr., Inc.*, 15 A.D.3d 878 (4th Dep't 2005)(same holding as *Bond* under similar facts); *Salinas v. Barney Skanska Const. Co.*, 2 A.D.3d 619, 622 (2d Dep't 2003)(same); *Harvey v. Morse Diesel Intern., Inc.*, 299 A.D.2d 451, 453 (2d Dep't 2002)(same); *Alvia v. Teman Elec. Contr., Inc.*, 287 A.D.2d 421, 423 (2d Dep't 2001)(same).

34. Similarly, in this case, plaintiff testified that the pebbles that he injured himself on were the result of the track or channel work performed by other co-workers, which was *necessary* to install the glass; the glass was to be installed into these tracks or channels (490-492, 501, 503-504).[4] Additionally, the project and the glass installation work was still ongoing, as plaintiff was installing glass at the relevant time (485, 616).

35. Thus, the pebbles were an "'an unavoidable and inherent result' of the work being performed at the site" and thus integral to the project. *See Ghany*, 95 A.D.3d at 768-69; *Torres*, 193 A.D.3d 665.

36. Further, plaintiff's arguments to the contrary remain unpersuasive as they are contrary to decades of unimpeachable authority from the Appellate Division, as well as the authority of this very Court.

37. Plaintiff misunderstands that the dispositive inquiry is whether the pebbles were created by the project's work. It is immaterial that plaintiff did not create the pebbles, nor does it matter that he was not specifically assigned to clean

[4] Numbers within parentheses refer to the page numbers of the Record on Appeal (which is available on NYSCEF, under the First Department case number: 2021-00357), unless otherwise indicated herein.

such debris. All that matters is that the construction work created the pebbles; that the pebbles were a necessary byproduct of the glass installation work. As the Appellate Division *and this Court* has uniformly explained, the integral to the work:

> defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may be performing at the time of the accident.

*Krzyzanowski v. City of New York*, 179 A.D.3d 479, 481 (1st Dep't 2020) *quoting*, *O'Sullivan v. IDI Const. Co., Inc.*, 28 A.D.3d 225, 226 (1st Dep't 2006), *aff'd*, 7 N.Y.3d 805 (2006).

38. Further, plaintiff's interpretation of this Court's decision in *O'Sullivan* is incorrect (Amico Affirm., ¶¶ 9-12). The Appellate Division has – for decades – accurately interpreted this Court's decision in *O'Sullivan* by applying that holding to render a Labor Law § 241(6) claim meritless under similar facts to those at bar.

39. Specifically, plaintiff forgets that simply because this Court and the Appellate Division have previously found that objects that are "purposely laid" or "permanent" to be *sufficient* to deem those objects integral to the work – as with the electrical pipe or conduit in *O'Sullivan* – it does not automatically follow that an object *must be* purposely laid or permanent for that defense to prevail.

40. On this point, plaintiff incorrectly relied on *Johnson v. 923 Fifth Ave. Condominium*, 102 A.D.3d 592 (1st Dep't 2013) (Plaintiff's Resp. Br. at 16, 18). That case merely stands for the proposition that Labor Law § 241 will not apply if the object that plaintiff tripped over was "purposefully laid" in the area where plaintiff

fell – this is *sufficient* for a dismissal of that claim – and thus that object will be deemed an "integral part of the work" in those situations. *Id*. at 593.

41. In other words, in *Johnson*, it was *sufficient* that the object that plaintiff tripped over was purposefully laid to find that it was integral to the work, but it was *not necessary* for the Court's holding.

42. Indeed, as seen above, there is a *wide range of other scenarios* where a plaintiff injures himself on an object at a construction project that is not purposefully laid, or on an object is not permanent, and where that object has also been deemed to be inherent or integral to the work by the Courts of this State. The object need not be "permanent" nor "purposely laid" for a Labor Law § 241(6) claim to fail.

43. For the very same reasons, the First Department rightly rejected plaintiff's reliance on *Rajkumar v. Budd Contr.* Corp., 77 A.D.3d 595 (1st Dep't 2010), *Hammer v. ACC Constr. Corp.*, 193 A.D.3d 455, 456 (1st Dep't 2021), *O'Sullivan*, 28 A.D.3d at 226, *aff'd*, 7 N.Y.3d 805 (2006), and *Mendoza v. Highpoint Assoc.*, *IX, LLC*, 83 A.D.3d 1, 12-13 (1st Dep't 2011).

44. Moreover, contrary to plaintiff's contentions (Amico Affirm., ¶ 27), there is no internal split on this issue within the First Department. To the contrary, the cases relied upon by plaintiff on this point are factually inapplicable, which is why the First Department never used them as guidance when dismissing the Complaint.

45. For example, *Lester v. JD Carlisle Dev. Corp., MD.*, 156 A.D.3d 577 (1st Dep't 2017) is unpersuasive (Amico Affirm., ¶ 27). In *Lester*, unlike here, the "loose granules" that plaintiff fell over had nothing to do with, and were not created by, the

project's work. *Id*. at 578. Instead, those granules were a part of a "waterproof membrane" that "was slippery because it contained granules, i.e., a 'ball bearing' or sand like substance" that was completely *unrelated* to the work of "constructing a steel frame for a movie screen on top of a roof."[5]

46. Here, however, plaintiff testified that the pebbles were the result of the track or channel work performed by other A-Val co-workers, which was necessary to install the glass; the glass was to be installed into these tracks or channels (490-492, 501, 503-504). In fact, the project and the glass installation work was still ongoing, as plaintiff was installing glass when he fell (485, 616).

47. Plaintiff fares no better with his reliance on *Singh v. Young Manor, Inc.*, 23 A.D.3d 249 (1st Dep't 2005) (Amico Affirm., ¶ 27). *Singh* does not apply because there, plaintiff slipped on a *random* "nail near a pile of debris" in his work area "that had been permitted to accumulate for several days" (*id*. at 249), but here plaintiff tripped over pebbles *intentionally and recently* created by his co-workers, and that were an unavoidable part of that work (485, 490-492, 501, 503-504, 616).

48. *Tighe v. Hennegan Const. Co., Inc.*, 48 A.D.3d 201 (1st Dep't 2008) (Amico Affirm., ¶ 27) is also inapplicable. There, plaintiff injured himself when he fell over "debris accumulated as a result of the demolition" performed by a contractor during plaintiff's electrical work for a *separate* contractor. *Id*. at 202. Thus, *Tighe* is unpersuasive because plaintiff's work there was not related to the debris he fell over,

[5] These facts were found within the brief submitted by plaintiff-appellant in *Lester*, which can be found on WESTLAW here.

but here plaintiff fell over pebbles directly related to and caused by his employer's work on the project (485, 490-492, 501, 503-504, 616).

49. The same is true of plaintiff's reliance on *Pereira v. New School*, 148 A.D.3d 410, 411-12 (1st Dep't 2017) (Amico Affirm., ¶ 27). Plaintiff forgets that the dispositive inquiry there was that the "discarded concrete" that plaintiff fell on was not integral to the work because "plaintiff did not work with concrete and concrete was not a part of his [work] responsibilities." *Id.* at 412. In this case, though, the pebbles plaintiff fell over were an unavoidable and necessary part of his co-workers' from A-Val work on the project (485, 490-492, 501, 503-504, 616).

50. Finally, the First Department also correctly held that Industrial Code § 23-1.7(d) is *factually* inapplicable because that section only applies to transient conditions: "ice, snow, water, grease, and any other foreign substance which may cause slippery footing." *Id.*

51. Here, however, plaintiff injured himself on pebbles or debris (490-492, 501, 503-504), and those conditions are "not the type of [slippery hazard or] foreign substance contemplated by this provision." *Salinas*, 2 A.D.3d at 622 (holding that section 23-1.7(d) was inapplicable where plaintiff slipped on demolition debris); *see Cruz v. Metro. Tr. Auth.*, 193 A.D.3d 639 (1st Dep't 2021)(same regarding the "loose dirt and debris" upon which plaintiff slipped); *D'Acunti v. New York City School Const. Auth.*, 300 A.D.2d 107, 107 (1st Dep't 2002)(same regarding accumulated "dirt and debris" that contributed to plaintiff's accident); *Rose v. A. Servidone, Inc.*, 268

A.D.2d 516, 518 (2d Dep't 2000)(same where plaintiff fell on unlevel ground "strewn with dirt, pebbles, blacktop, and concrete").

52. Plaintiff erroneously claims that this section applies because he "slid forward" – plaintiff, in fact, testified that he *slipped* (499, 635-637), not slid forward – and he wrongly relied on his expert's conclusory opinion that the pebbles were a "foreign substance" (Plaintiff's Resp. Br. at 23) – an opinion contrary to this Court's own law cited right above, which excludes debris as a "foreign substance."

53. Of course, none of these conclusory or subjective descriptions or opinions matter since pebbles or debris are "not the type of [slippery hazard or] foreign substance contemplated by this provision." *Salinas*, 2 A.D.3d at 622.

54. Plaintiff then misstated the law by arguing that Industrial Code § 23-1.7(e) applies simply because he referred to the pebbles as "debris" (Plaintiff's Resp. Br. at 19). But plaintiff's *subjective beliefs* are immaterial to the inquiry regarding whether the pebbles were inherent or integral to the work.

55. On this point, plaintiff mistakenly relied on *Maza v. Univ. Ave. Dev. Corp.*, 13 A.D.3d 65 (1st Dept 2004) (Plaintiff's Resp. Br. at 19). *Maza* is unavailing because the debris that plaintiff tripped over there had not only "been present and continued to accumulate in the courtyard area" where plaintiff fell for at least *four months* – it was thrown there by other workers – but also because that debris was completely unrelated, unconnected, and "not integral to plaintiff's work as a bricklayer." *Id.* at 65-66.

56. Here, though, the pebbles upon which plaintiff fell were relevant, related, connected, and indeed caused by his co-workers' glass installation work on the project (485, 490-492, 501, 503-504, 616).

57. Finally, plaintiff incorrectly claims that the jury should decide whether the particular industrial codes allegedly at issue here apply (Amico Affirm., ¶ 12). He also incorrectly claims that the First Department needed to accept plaintiff's expert's opinions regarding the interpretation of those codes (Amico Affirm., ¶ 17).

58. But plaintiff is wrong again. The Courts of this State have repeatedly stated the exact opposite; that:

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

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

59. Accordingly, this Court should deny plaintiff's motion in its entirety. The Labor Law § 241(6) claim was properly dismissed as the pebbles that plaintiff injured himself on were an unavoidable byproduct of the project.

## CONCLUSION

60. Based on the foregoing, this Court should deny plaintiff's motion in its entirety and with prejudice.

Dated: New York, New York
January 4, 2023

Respectfully submitted,

C. Briggs Johnson
GALLO VITUCCI KLAR LLP
*Attorneys for Defendant-Appellant-Respondent*
CBRE Inc.
90 Broad Street, Suite 1202
New York, New York 10004
(212) 683-7100
File No.: GB-2014-26
bjohnson@gvlaw.com

To: All parties (see attached service rider)

| | | |
|---|---|---|
| STATE OF NEW YORK ) | | **AFFIDAVIT OF SERVICE** |
| ) | ss.: | **BY OVERNIGHT FEDERAL** |
| COUNTY OF NEW YORK ) | | **EXPRESS NEXT DAY AIR** |

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

**On January 13, 2023**

deponent served the within: **Affirmation in Opposition to Motion For Leave To Appeal**

**upon:**

SMITH MAZURE, P.C.
Attorneys for Defendants/Third-Party Plaintiffs
TISHMAN SPEYER PROPERTIES, L.P.
and 200 PARK, L.P. s/h/a 200 PARK, LP
111 John Street
New York, New York 10038
(212) 964-7400

BARRY MCTIERNAN & MOORE LLC
*Attorneys for Defendant/Second Third-Party Plaintiff Structure Tone Inc. i/s/h/a Structure Tone Global Services, Inc.*
101 Greenwich Street, 14th Floor
New York, New York 10006
(212) 313-3600

PISCIOTTI LALLIS ERDREICH
Attorneys for Second Third-Party Defendant
A-VAL ARCHITECTURAL METAL III, LLC
445 Hamilton Avenue – Suite 1102
White Plains, New York 10601
(914) 287-7711

The Barnes Firm, P.C.
Attorneys for Plaintiffs
28 East Main Street, Suite 600
Rochester, NY 14614
(800) 800-0000

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on January 13, 2023**

Mariana Braylovskiy

**MARIANA BRAYLOVSKIY**
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

**Job# 318073**