To be Argued by:
WILLIAM D. JOYCE III
(Time Requested: 30 Minutes)

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

Court of Appeals

of the

State of New York

FELIPE RUISECH and MARTHA RUISECH,

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents,

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

– and –

CBRE INC.,

Defendant-Respondent.

(For Continuation of Caption See Inside Cover)

BRIEF FOR DEFENDANT/SECOND THIRD-PARTY PLAINTIFF-RESPONDENT STRUCTURE TONE INC.

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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.

DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), Defendant/Second Third-Party Plaintiff-Respondent Structure Tone, Inc. i/s/h/a Structure Tone Global Services, Inc. states:

Global Infrastructure Solutions, Inc. owns STO Group, Inc., which owns STO Building Group, Inc., which owns STO Holdings Inc., which owns Structure Tone Group, LLC, which owns Structure Tone, LLC, the successor entity for Structure Tone, Inc., incorrectly sued herein as Structure Tone Global Services, Inc.

Structure Tone, Inc. is not the parent of any subsidiary or affiliate.

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PRELIMINARY STATEMENT

Defendant/Second Third-Party Plaintiff-Respondent Structure Tone, Inc. ("Structure Tone") respectfully submits this brief in opposition to the appeal of Plaintiffs-Appellants[1] from the Decision and Order of the Appellate Division, First Department, dated and entered August 16, 2022,[2] which dismissed the entire Complaint, including the Labor Law §§ 241(6) and 200, and common-law negligence claims. (2636-2644). This Court should affirm.

This personal injury action arises out of an alleged accident that occurred on June 2, 2011, during the "build out" of office space on the 19th floor of the premises at 200 Park Avenue, New York, New York (the "Project").

Defendant/Third-Party Plaintiff-Respondent 200 Park, LP owns the subject premises and Defendant/Third-Party Plaintiff-Respondent Tishman Speyer Properties, L.P. ("Tishman Speyer") is the Managing Agent. Defendant/Third-Party Defendant-Respondent CBRE, Inc. ("CBRE"), a tenant, retained Structure Tone as the general contractor on the Project and, in

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[1] Plaintiff Martha Ruisech asserts a derivative claim. All future references to plaintiff Felipe Ruisech will be in the singular.

[2] Numbers in parentheses refer to pages in the Record on Appeal.

turn, Structure Tone subcontracted Second Third-Party Defendant/Third Third-Party Defendant-Respondent A-Val Architectural Metal III, LLC ("A-Val"), Plaintiff-Appellant's employer, to perform arch metal and glass work on the Project.

Plaintiff-Appellant Felipe Ruisech, a journeyman glazier, was a member of a four-person crew installing a 400-to-500 pound floor-to-ceiling glass wall panel, part of which was to be maneuvered into a recessed track in the concrete floor of an interior office, when he stepped on "minute" pieces of concrete on the floor, causing one of his feet to slide forward approximately four inches. A-Val employees had chipped out the concrete floor to install the track channel, leaving behind this concrete material.

Plaintiff-Appellant, who did not fall and never lost his grip on the glass panel, is the sole witness to the alleged accident. He did not report the alleged accident for more than six days and when he did, he failed to report that he slid on concrete material. Plaintiff-Appellant never documented the condition that he contends caused his alleged injuries.

The appeal is untimely by one day, which necessarily deprives this Court of jurisdiction over it and requires its dismissal.

Plaintiff-Appellant concedes that Structure Tone's electronic service of written Notice of Entry of the Appellate Division Order denying their motion for leave to appeal made via NYSCEF on November 22, 2022, was proper and effective to start the 30-day period for leave to appeal, under CPLR § 5513(b). Plaintiff-Appellant refers to the computation of time under New York's General Construction Law § 20 as beginning on November 23, 2022, yet fails to acknowledge that the thirtieth day falls on December 22, 2022. Indeed, it is obvious that Plaintiff-Appellant studiously avoids any reference to the December 23, 2022, service of the motion for leave to appeal, which would lay bare the untimeliness of the appeal. Accordingly, the appeal should be dismissed.

As to the merits, Plaintiff-Appellant contends that Structure Tone's liability as a general contractor on the Labor Law §§ 241(6) and 200, and common-law negligence claims is defined by a provision in its contract with CBRE in which it agreed to keep the work site free from the accumulation of construction debris "at all times." (1120, ¶ 16(a)).

Plaintiff-Appellant argues that Structure Tone is essentially subject to strict liability for a breach of purported duties to Plaintiff-Appellant that it did

not expressly assume and which far exceed the common-law duty of reasonable care.

Plaintiff-Appellant fails to provide any justifiable basis for their argument (there is none), which contravenes basic principles of contract and statutory interpretation, and this Court's well-documented analysis of the legislative history and purpose of Labor Law § 241(6), including protecting owners and general contractors subject to vicarious liability by proscribing the very same arguments advanced by Plaintiff-Appellant.

Plaintiff-Appellant's arguments with respect to Structure Tone's purported statutory and common-law duties and liabilities should be disregarded in their entirety as frivolous and contrary to well-established law.

The Appellate Division properly dismissed the Labor Law § 241(6) claim.

Industrial Code § 23-1.7(d) ("Slipping hazards") does not apply because Plaintiff-Appellant did not slip in a passageway or defined walkway at the time of the alleged accident. Moreover, since the concrete material was an inherent byproduct of the concrete flooring, it does not constitute a "foreign substance" within the meaning of the regulation and Plaintiff-Appellant failed to prove that it caused the floor to be in a "slippery condition." In their

principal brief, Plaintiff-Appellant did not prove that they raised a triable issue of fact that the concrete material was a "foreign substance" under the *prima facie* standards addressed in this Court's recent decision, Bazdaric v. Almah Partners LLC, 2024 N.Y. LEXIS 71, 2024 NY Slip Op 000847, 2024 WL 674245 (Feb. 20, 2024).

Industrial Code § 23-1.7(e)(2) ("Tripping hazards – Working Areas") does not apply because the concrete material was integral to the installation of the glass panel.

Therefore, the appeal should be dismissed and the Appellate Division Order should be affirmed in its entirety.

COUNTER-QUESTIONS PRESENTED

1. In this case subject to mandatory e-filing, did Structure Tone's electronic filing of the Notice of Entry on November 22, 2022, via NYSCEF, commence the 30-day period to seek leave to appeal, pursuant to CPLR § 5513(b)?

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

2. Was the plaintiff's motion for leave to appeal untimely, depriving this Court of the jurisdiction to entertain this appeal?

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

3. Does the plaintiff have standing to enforce the terms of the agreement between CBRE and Structure Tone which expressly excludes subcontractors as third-party beneficiaries thereof?

The First Department never reached this question. This Court should answer "no."

4. Was the Labor Law § 241(6) claim predicated upon an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(d) properly dismissed where the plaintiff failed to establish by competent evidence that a violation of the Industrial Code regulation was both applicable and a proximate cause of the alleged accident?

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

5. Was the Labor Law § 241(6) claim predicated upon an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2) properly dismissed because it was inapplicable to the circumstances of the alleged accident?

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

6. Were the Labor Law § 200 and common-law negligence claims properly dismissed where the uncontested evidence established that Structure Tone did not exercise supervisory control over the means and methods of the plaintiff's work and the plaintiff's testimony proves the lack of notice of the alleged defective condition?

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

COUNTERSTATEMENT OF THE FACTS OF THE CASE

Overview Of The Parties And The Project

200 Park, LP owns the building located at 200 Park Avenue, New York, New York and Tishman Speyer is the Managing Agent. (1078-79; 1081-82; 1232-33).

CBRE, a tenant in the subject premises, retained Structure Tone as the general contractor on a construction project to build-out office space on four floors of its leased premises, including the 19th floor (the "Project"). (1053; 1068; 1076; 1103-1222; 1347-1604; 2069-80).

Structure Tone's Construction Superintendent Bryan Orsini was responsible for overseeing the work on the Project, including coordinating the work performed by Structure Tone's subcontractors. (1044-45; 1085-86). Mr.

Orsini walked the Project site on a daily basis. (1048-49; 1088). He had the authority to stop work if he observed an unsafe condition. (1049-50; 1086).

Structure Tone furnished approximately 11 laborers who cleaned and maintained the Project site. (1046-47; 1052-54).

Structure Tone subcontracted with A-Val, Plaintiff-Appellant's employer, to perform arch metal and glass work on the Project. (400; 1345).

Plaintiff-Appellant Felipe Ruisech was employed by A-Val as a journeyman glazier on the Project. (432; 440; 458; 462; 528).

CBRE – Structure Tone Agreement

On October 1, 2010, CBRE (as "Owner") entered into an Agreement to retain Structure Tone (as "General Contractor") as the general contractor on the Project. (1103-1222).

Structure Tone agreed to "take all reasonable and necessary precautions for the safety of its employees and all other persons in or about the Site or at any locations where the Work is being performed, and shall comply with all applicable provisions of federal, state and municipal laws and rules… and shall use its best efforts to prevent accidents or injury to persons or damage to property." (1118, ¶ 9).

The Agreement contained the following provision: "[Structure Tone] shall at all times keep the Site and surrounding areas free from accumulation of debris, waste material and other rubbish caused by the performance of, or arising in connection with, the Work and the Coordination Items…" (1120, ¶ 16(a))

The Agreement contemplates that Structure Tone will retain subcontractors approved by CBRE to satisfy its contract obligations. (1108-09, ¶ 1(t); 1114, ¶ 2; 1124, ¶ 1). In turn, Structure Tone's subcontractors were obligated to be bound by the terms of the Agreement. (1124, ¶ 3).

The Agreement expressly states that "[n]o Subcontractor shall be, or deemed to be, a third party beneficiary of this Agreement." (1135-36, ¶ 2).

Structure Tone – A-Val Purchase Orders and Blanket Insurance/Indemnity Agreement

Structure Tone entered into Purchase Order agreements with A-Val to perform arch metal and glass work ("Work") on the Project. (400-418; 1345).

A-Val agreed to "furnish all labor, materials, supervision and items required for the proper and complete performance of the Work, and in compliance in every respect with [] all applicable local, federal and state laws, codes and ordinances." (1345, ¶ 3). A-Val also agreed to "perform the Work in a prompt and diligent manner…" (1345, ¶ 4).

A-Val agreed that it "is bound to Structure Tone for the performance of the Work in the same manner as Structure Tone is bound to Owner under Structure Tone's contract with Owner…" (1345, ¶ 2).

Structure Tone and A-Val entered into a Blanket Insurance/Indemnity Agreement which provides, in relevant part, that "[A-Val] shall comply with all laws, codes, permit requirements, rules, orders, judgements, decrees, ordinances or provisions of any federal, state or local government, agency, authority, or court pertaining to work performed by [A-Val]… (417, ¶ 7)

Deposition Testimony Of Plaintiff Felipe Ruisech[3]

Plaintiff-Appellant Felipe Ruisech joined the glaziers union and became a journeyman glazier sometime prior to 2002. (440; 2215).

Plaintiff-Appellant was employed by A-Val off-and-on since he first became a glazier. (459; 528-29). As a glazier, he experienced constant layoffs. (477). Throughout Plaintiff-Appellant's testimony he repeatedly voices his frustration that A-Val did not comply with union staffing requirements. (479-82; 583-94; 802-07).

[3] As a consequence of Plaintiff-Appellant's failure to timely report the alleged accident, which would have prompted an investigation of the accident site location and conditions, Plaintiff-Appellant's failure to photograph the post-accident site conditions and their inability to identify the general accident site location from other pre-accident photographs on their phone, Plaintiff-Appellant's is the sole percipient witness to the accident location. (756-57).

On June 2, 2011, the date of the alleged accident, Plaintiff-Appellant was employed by A-Val as a journeyman glazier on the Project. (432; 440; 458; 462; 528). He had worked on the Project off-and-on since December 2010. (459-60).

As a journeyman glazier, Plaintiff-Appellant's duties involved "[a]ll types of glass installations, caulking. Everything that has to do with glass… We did it all." (441). Plaintiff-Appellant brought his own tool kit to the Project, including a suction device, hammers and mallets. (542).

Plaintiff-Appellant's work on the Project was supervised exclusively by various A-Val glass foremen. (462-63; 469-70). There were also times when Plaintiff-Appellant acted as glass foreman and he directed the work of other A-Val employees. (470-71; 2164).

No one other than A-Val personnel directed Plaintiff-Appellant's means and methods of work on the Project. (462). Specifically, no one from Structure Tone told him how to perform his work; he denied speaking with anyone from Structure Tone prior to the alleged accident. (474; 820).

Work on the Project was performed throughout the entirety of the 19th floor. (466).

A-Val furnished A-frame dollies. (482-82; 668-69). Depending on the situation, the glass panels were either transported on dollies or carried by hand. (468).

The alleged accident occurred on Thursday, June 2, 2011, at approximately 1:00 p.m. (458; 529-30; 564-65; 738; 756). Plaintiff-Appellant's shift was from 7:00 a.m. to 2:30 p.m. (472; 538; 718).

A-Val glazier Tom Condy was the acting glazier foreman that day. (473-74; 477-79; 562-64; 568-70). At the beginning of the shift, Mr. Condy assigned the location where Plaintiff-Appellant was to install glass panels. (560-61; 569-71; 820-21). Plaintiff-Appellant agreed that he was a professional glazer and he did not require any further directions as to how he was to perform this work. (570-71).

Plaintiff-Appellant worked as part of a five-person crew of A-Val glaziers. (473-74; 478-79; 572; 574-75).

Prior to the lunch break, Plaintiff-Appellant's crew installed at least six glass panels without incident. (580-83; 595). These panels were smaller than the panel Plaintiff-Appellant was installing at the time of the alleged accident. (828).

The alleged accident occurred after the lunch break. (582-83). Plaintiff-Appellant's crew was installing an interior, floor-to-ceiling glass panel wall, which divided "an open office space" from the hallway. (615-16; 619; 748; 751; 828-29).

Plaintiff-Appellant did not recall where the office was located nor was he able to describe the general area, such as whether it was in a corner or the middle of a hallway. (794).

The glass panel was to be installed next to a similarly-sized glass panel, forming a total width of eight-to-ten feet. (792-94). The opposite side of the glass panel being installed was empty. (792-99).

The glass panel needed to be positioned in corresponding aluminum tracks installed in the concrete floor and in the ceiling. (491-92; 500-01; 534; 773; 785).

Unidentified A-Val employees installed the aluminum track in the concrete floor. (491-92; 500-01). The track was recessed approximately a quarter-inch deep. (503). Plaintiff-Appellant did not know when A-Val employees created the recessed track or when A-Val employees installed the aluminum track – he did not observe them performing this work. (501). He

did not know how long the track had been in place prior to the alleged accident. (501).

During installation of the glass panel, Plaintiff-Appellant's crew used pieces of sheetrock as dunnage to protect the glass from the floor. (557; 814; 827). The size of the sheetrock depended on what was available, possibly salvaged from "garbage on the site." (599-601; 827).

Before transporting the glass panel for installation, Plaintiff-Appellant's crew prepped and staged the work area by placing four pieces of sheetrock on the floor as dunnage; each piece of sheetrock was approximately ten inches by six-to-eight inches. (599-602; 827).

Plaintiff-Appellant's crew then selected a glass panel from a stack of panels, approximately 10 feet from the work area. (485-86; 550; 554; 558-59; 596; 598-99). The panel was approximately 10 feet high, four feet wide and one inch thick and it weighed approximately 400-500 pounds. (479; 484; 781-83).

Plaintiff-Appellant and his four co-workers positioned themselves along the length of the glass panel and they carried it 10 feet to the work area. (473; 487-89; 572; 574-75). They shifted the glass panel into a vertical

position and placed it on top of the sheetrock dunnage. (489-91; 496; 606; 622-23).

A-Val glazier foreman Tom Condy came to the work area and directed one member of the crew to perform other work in a different part of the Project site, leaving Plaintiff-Appellant and three co-workers to install the glass panel. (490-91; 658-61; 836-37).

The top of the glass panel needed to be tilted in order to move it into the overhead track. (492; 497; 609). The panel was to be tilted toward Plaintiff-Appellant, who was on the hallway side of the panel, standing sideways with his right foot closest to the glass, his right hand on a suction cup affixed to the glass at hip level and his left hand overhead on the glass; he was wearing rubber-soled construction boots. (491-93; 496; 530-31; 616; 619-21; 624; 635-36; 641; 818-19). One co-worker was also positioned with a suction cup affixed to the hallway side of the glass panel and the other two were positioned with suction cups affixed to the office side. (620; 623-24; 627).

As the crew began to tilt the glass panel, Plaintiff-Appellant stepped forward and his right foot slipped on "something on the ground, it must have been pebbles." (499-500; 635-36). His right foot slid forward approximately

four inches and contacted the aluminum track, as his left foot remained planted on the floor; he maintained his hold on the suction cup with his right hand throughout. (640; 642-45; 650).

When Plaintiff-Appellant's foot slipped, the crew momentarily lost control of the glass panel and it began moving toward him. (497-98; 530-31; 635; 645-46). Plaintiff-Appellant pushed against the glass panel and within seconds, the crew re-gained control of the panel and successfully installed it in the overhead track. (532:33; 644; 647; 650-52).

Despite the presence of his crew on either side of the glass panel, Plaintiff-Appellant was not aware of any witnesses to the alleged accident. (506-08; 576).

Plaintiff-Appellant variously described the condition that he slipped on as "debris," "pebbles" and "small, little rocks." (499-503). The debris covered a 10-foot area of the floor. (500; 502).

Plaintiff-Appellant contends that the pebbles were concrete debris, consisting of leftover "cement from the flooring" when unidentified A-Val workers "chipped" into the concrete floor to create the recessed track for the glass panel. (500; 503-04).

Plaintiff-Appellant did not see the A-Val workers perform this work. (503-04). He did not know how long the concrete debris had been present prior to the alleged accident. (819-20).

Plaintiff-Appellant gave conflicting testimony concerning his awareness of the concrete debris prior to his alleged accident. He initially testified that he had seen the concrete debris prior to the alleged accident. (500). However, in response to questioning about his prior complaints of a debris condition in this area, Plaintiff-Appellant testified that he had not observed the concrete debris prior to the alleged accident because the condition was so "minute.. [and] small" that he "didn't know that that was there, despite adequate lighting conditions." (501-02; 823).

Plaintiff-Appellant never complained about the "pebbles" or the condition of the concrete deck in the accident location, nor was he aware of any such complaints by his A-Val co-workers. (502:19-503; 826).

Similarly, Plaintiff-Appellant had never complained to Structure Tone about any debris or concrete chips from recessed channels in the floor. (505).

Plaintiff-Appellant did not clean the floor before installing the glass panel. (501). He testified that he never did this "[b]ecause that's not our job." (501).

Structure Tone laborers cleaned debris on the Project. (504-05). Prior to the alleged accident, Plaintiff-Appellant had requested that Structure Tone laborers clean "garbage, rocks, dirt, actual product… garbage containers" from an area where he needed to work. (505-06). He does not allege that these conditions (*i.e.*, garbage, rocks, dirt) were present at the time of the alleged accident. (505-06).

Plaintiff-Appellant did not request any medical treatment on the Project site. (518). He completed his shift on June 2, 2011, and he worked a full shift the next day without any accommodations. (509-10; 521; 677).

Plaintiff-Appellant was aware that it was customary procedure to notify a foreman if an accident occurred, but he did not notify A-Val glazier foreman Tom Condy of the alleged accident on [Thursday] June 2, 2011 or the following day when he worked his entire shift. (508-09; 678-79).

Plaintiff-Appellant did not attempt to report the alleged accident to A-Val until Monday, June 6, 2011, when he called the office; however, he failed to follow-up on A-Val's directive that he needed to report the accident in person. (510:23-511:25).

On June 8, 2011, Plaintiff-Appellant reported to Structure Tone Bryan Orsini that he had sustained injuries while lifting the glass panel; Plaintiff-

Appellant admits that he did not report that he slipped and/or that he had slipped on concrete debris, *i.e.*, the alleged mechanism of injury involved in this action. (513; 520). Plaintiff-Appellant did report that his crew was supposed to have five glaziers, as required under the union contract, but Mr. Condy told them to work as a four-person crew. (512-13).

Plaintiff-Appellant proffered numerous contradictory explanations for why he failed to immediately report the accident to Mr. Condy. (507-09; 677-79).

Plaintiff-Appellant did not photograph the alleged accident site and/or the concrete material at issue, despite taking multiple photographs of the Project site prior to the alleged accident (775-76, 785-86, 791, 795-97, 827).

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED AS UNTIMELY

Plaintiff-Appellant concedes that Structure Tone's service of Notice of Entry of the final Appellate Division Order, by electronically filing on the NYSCEF site on November 22, 2022, was effective for purposes of commencing the 30-day period to seek leave to appeal, pursuant to CPLR § 5513(b). (Pl. App. Brf. 16-17). Plaintiff-Appellant also concedes that the

deadline for the motion for leave to appeal is the 30th day from November 23, 2022, *i.e.*, December 22, 2022. (Pl. App. Brf. 17). However, Plaintiff-Appellant served their motion for leave to appeal on December 23, 2022, one day after the deadline.[4]

Therefore, this appeal is manifestly untimely and this Court lacks jurisdiction over it, requiring its dismissal. It is respectfully submitted that, as detailed below, any contrary finding would flatly contravene longstanding New York jurisprudence.

A. Plaintiff-Appellant Failed To Prove That This Court Has Jurisdiction Over This Appeal

A motion for permission for leave to appeal to the Court of Appeals from an order of the appellate division which finally determines the action "must be made within thirty days" after service of a copy of such Order and written Notice of Entry. *See* CPLR § 5513(b); *see also* CPLR §§ 5602(a)(1)(i); 5611.

The 30-day time period for filing a motion for permission to appeal is a nonwaivable jurisdictional limitation. *See* Ocean Acc. & Guarantee Corp. v.

[4] This Court may take judicial notice that the affidavit of service is annexed as Exhibit 1 to Structure Tone's opposition to the plaintiff's motion for leave to appeal. *See* RuisechvStructureTone-res-StructureTone-opp.

Otis Elevator Co., 291 N.Y. 254, 254-55 (1943) ("[t]he Court is without power to entertain an appeal when it appears that an appellant has failed to comply with the limitations of time imposed [by statute]. This Court possesses only those powers which are conferred by the Constitution as limited by statute in accordance with the Constitution"); W. Rogowski Farm, LLC v. County of Orange, 171 A.D.3d 79, 88 (2d Dept. 2019) ("[t]he time period for filing a Notice of Appeal is jurisdictional in nature and nonwaivable"); *see*, *e.g.*, Haverstraw Park, Inc. v. Runcible Properties Corp., 33 N.Y.2d 637, 637 (1973); Hall v. City of New York, 79 A.D. 102, 108 (2d Dept. 1903) (appeal dismissed as untimely even though defendant was "only one day late" in serving Notice of Appeal; "[t]he rule is well settled that the time for taking an appeal cannot be enlarged when it is statutory"), *modified on other grounds*, 176 N.Y. 293 (1903).

In response to this Court's directive for the parties to brief the timeliness of the appeal, Plaintiff-Appellant's arguments are vague and appear calculated to mislead this Court.[5]

[5] Structure Tone has a pending motion to dismiss the appeal, which seeks relief, pursuant to CPLR § 8303-a and 22 N.Y.C.R.R. § 130-1.1(a), for Structure Tone's costs and attorneys' fees incurred in opposing Plaintiff-Appellant's untimely appeal. It is respectfully submitted that Plaintiff-Appellant's arguments regarding the timeliness of the appeal are frivolous and further support Structure Tone's entitlement to relief.

For example, Plaintiff-Appellant conspicuously omitted any reference to the specific date of service of the motion for leave to appeal, even though it is determinative of the timeliness of this appeal. (App. Br. 16-17) ("A copy of the order with Notice of entry was filed [] on November 22, 2022, via NYSCEF… Plaintiff thereafter filed a motion for leave to appeal to this Court").

Plaintiff-Appellant also misstated that, by calculating the 30-day deadline for filing a motion for leave to appeal from November 23, 2022, their motion for leave to appeal was "timely filed" [on December 23, 2022]. (Pl. App. Brf. 17). However, there is no good-faith basis for this statement because a simple count reveals that December 23, 2022 is 31 days after November 23, 2022. Plaintiff-Appellant's statement, at best, reflects a failure to perform basic math and, at worst, constitutes a material misrepresentation of a critical fact proffered to deceive this Court.

To make matters worse, Plaintiff-Appellant also failed to provide a substantive response to this Court's directive for the parties to brief the timeliness of the appeal, specifically whether the electronic service via NYSCEF was effective for purposes of starting the time to seek leave to appeal to the Court of Appeals. Plaintiff-Appellant simply referred to an

unspecified "rule" governing electronic service of Notice of Entry on NYSCEF and summarily concludes that "[i]t is Plaintiff's contention that his motion for leave to appeal to this Court was timely filed under the rules as described above." (Pl. App. Brf. 17-18).

Therefore, Plaintiff-Appellant failed to make the requisite showing that this Court has jurisdiction to entertain the appeal, as required by Rule 500.13(a) of the Rules of Practice, thereby mandating dismissal of the appeal on this sole basis.

B. Electronic Service Of The Notice of Entry Via NYSCEF Was Effective For Purposes Of Starting The Time To Seek Leave To Appeal To The Court Of Appeals

Plaintiff-Appellant concedes that their 30-day deadline for filing a motion for leave to appeal commenced with Structure Tone's e-filing of the Notice of Entry on November 22, 2022. (Pl. App. Brf. 16-17).[6]

This action is subject to the mandatory e-filing program implemented by the Chief Administrative Judge. The Uniform Rules for the New York State Trial Courts (22 N.Y.C.R.R.) ("Uniform Rules") require that all documents in

[6] It is immaterial that Defendants 200 Park and Tishman Speyer subsequently served Notice of Entry on November 23, 2022, or that Defendant CBRE did not serve notice of entry. (Pl. App. Brf. 16-17). Structure Tone's service was sufficient to trigger the 30-day deadline on behalf of all parties. *See generally* W. Rogowski Farm, LLC v. County of Orange, 171 A.D.3d 79, 87-88 (2d Dept. 2019).

an action subject to the mandatory e-filing program shall be served and filed by electronic means.

The CPLR provides for service of interlocutory papers by electronic means where and in the manner authorized by the chief administrator of the courts. Uniform Rule 202.5(b)(h)(3) states that electronically filing Notice of Entry with the NYSCEF site shall constitute service thereof by the filer and NYSCEF's subsequent automatic transmission of notification to all e-mail service addresses in the action shall constitute service thereof upon the recipients.

Thus, Structure Tone's electronic service of the Notice of Entry via NYSCEF on November 22, 2022 was effective for purposes of starting the 30-day time to seek leave to appeal to this Court, pursuant to CPLR § 5513(b).

1. In Mandatory E-Filing Cases, Service Of The Notice Of Entry By Filing On NYSCEF Is Compulsory

CPLR 2103(b) governs service of interlocutory papers in a pending action. *See*, *e.g.*, Kalman v. Welsh, 303 N.Y.S.2d 702, 702-03 (2d Dept. 1969) (the plaintiff's service of notice of entry of judgment upon the defendant personally, rather than the defendant's attorneys, was ineffectual, pursuant to CPLR 2103(b)).

CPLR 2103(b)(7)[7] states that papers to be served upon a party in a pending action "shall be served… by transmitting the paper to the [party's] attorney by electronic means where and in the manner authorized by the chief administrator of the courts…" *See also* CPLR 2107(f)(2) (defining electronic means).

In 1999, the New York Legislature authorized an e-filing pilot program known as "Filing by Electronic Means" (FBEM).[8] In 2009, FBEM – renamed the New York State Courts Electronic Filing System (NYSCEF) – became a permanent fixture and the Legislature authorized e-filing on a mandatory basis on a limited basis.[9] In September 2011, the Legislature expanded mandatory e-filing to include tort cases in all Supreme Court in New York City, effective September 23, 2011.[10] By Administrative Order, Chief Administrative Judge

[7] Added by L. 1999, ch. 367.
[8] L. 1999 ch. 367.
[9] L. 2009 ch. 416.
[10] L. 2011, ch. 543 (Eff. Sept. 23, 2011), § 1 ("The legislature finds and declares that use of electronic means to commence judicial proceedings and to file and serve papers in pending proceedings ('e-filing') can be highly beneficial to the state, local governments and the public. Accordingly, it is the purpose of this measure to enable a further controlled expansion of e-filing in the civil courts of the state…"); §§ 2, 4 (permitting mandatory e-filing in "[t]ort cases in supreme court in counties within the city of New York").

of the Courts directed mandatory e-filing of all tort cases in Supreme Court, New York County, effective January 17, 2012.[11]

Plaintiff-Appellant commenced this action by electronically filing the Summons and Verified Complaint with the Clerk of New York County on October 2, 2013. (120-138).[12] Thus, this action is subject to the mandatory e-filing program mandated by the chief administrator of the courts. *See* CPLR 2103(b)(7); 22 N.Y.C.R.R. §§ 202.5-bb(a), (c)(1). Counsel for Plaintiff-Appellant did not "opt-out" of the mandatory e-filing program.[13]

Article 22 of the New York Codes, Rules and Regulations contains the Uniform Rules for e-filing. E-filing in the Supreme Court under the mandatory program is governed by Uniform Rules 202.5-b and 202.5-bb. *See* 22 N.Y.C.R.R. § 202-5.bb(a)(1) ("[e]xcept to the extent that this section shall otherwise require, the provisions of section 202.5-b of these rules shall govern electronic filing under this section").

Uniform Rules 202-5.bb(a)(1) and 202-5.bb(c)(1) provide that, with respect to actions subject to the mandatory e-filing program, "all documents"

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[11] Chief Administrative Judge of the Courts, Administrative Order (1/12/12), AO/245/12, Appendix B.

[12] The Court may take judicial notice of the document list and confirmation of electronic filing for the Supreme Court, New York County Index No. 159007/2013 (NYSCEF Doc. No. 1).

[13] *See* 22 N.Y.C.R.R. §§ 202.5-bb(e).

filed and served in Supreme Court "shall be" "filed and served" "by electronic means."[14] *See* 22 N.Y.C.R.R. §§ 202-5.bb(a)(1) ("[e]xcept where otherwise required by statute, all documents filed and served in Supreme Court shall be filed and served by electronic means… to the extent and in the manner prescribed in this section"); 202-5.bb(c)(1) ("All documents to be filed and served electronically. Except as otherwise provided in this section, filing and service of all documents in an action that has been commenced electronically in accordance with this section shall be by electronic means"). *See also* 22 N.Y.C.R.R. § 202.5(d)(1)(v)(A) (forbids County Clerks from accepting papers filed in an "action subject to electronic filing pursuant to Rules of the Chief Administrator").

Uniform Rule 202.5(b)(h)(3)[15] provides that "[a] party shall serve Notice of Entry of an Order or judgment on another party by serving a copy

[14] Uniform Rule 202.5-b(a)(2)(iii) defines "e-filing," "electronic filing" and "electronically filing" as "filing and service of documents in a civil action by electronic means through the NYSCEF site." Uniform Rule 202.5-b(a)(2)(ii) defines "NYSCEF" as the New York State Electronic Filing System and the "NYSCEF site" as "the New York State Courts Electronic Filing System website located at www.nycourts.gov/efile."

[15] 22 N.Y.C.R.R. § 202.5(b)(h)(3) states, in relevant part, as follows:

> A party shall serve Notice of Entry of an Order or judgment on another party by serving a copy of the written notification received from the NYSCEF site, a copy of the Order or judgment and written notice of its entry. A party may serve such documents electronically by filing them with the NYSCEF site and thus causing transmission by the site of notification of receipt of the documents, which shall constitute service thereof by the filer.

of the written notification received from the NYSCEF site, a copy of the Order or judgment and written notice of its entry." This is consistent with CPLR § 5513(b), which provides that a motion for permission to appeal must be made within 30 days from the date of service of a copy of the order to be appealed from and "written notice of its entry."

There is no dispute that Structure Tone's Notice of Entry (2646-50) was in sufficient form. *Cf.*, Fazio v. Costco Wholesale Corp., 85 A.D.3d 443, 443 (1st Dept. 2011).

Uniform Rule 202.5(b)(h)(3) further states that "[a] party may serve [Notice of Entry of an Order] electronically by filing [] with the NYSCEF site and thus causing transmission by the site of notification of receipt of the documents, *which shall constitute service thereof by the filer*." 22 N.Y.C.R.R. § 202.5(b)(h)(3) (emphasis added).

Structure Tone's electronic filing of the Notice of Entry of the Appellate Division Order on November 22, 2022, complied with Uniform Rule 202.5(b)(h)(3) and constituted valid service under CPLR § 5513(b), triggering

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Uniform Rule 202.5(b)(h)(3) is applicable to actions subject to the mandatory e-filing program, pursuant to Uniform Rule 202-5.bb(a)(1).

the 30-day period for Plaintiff-Appellant to move for permission to appeal, *i.e.*, December 22, 2022.

The matter of Avgush v. Jerry Fontan, Inc., 167 A.D.3d 484 (1st Dept. 2018) is directly on point. In Avgush, an action subject to the mandatory e-filing program, defendants "properly electronically served the Order on appeal with Notice of Entry… via the New York State Courts Electronic Filing (NYSCEF) system" and plaintiff served their Notice of Appeal 31 days later. *Id.*, 167 A.D.3d at 484. The Appellate Division dismissed the plaintiff's appeal as untimely, pursuant to CPLR § 5513(a). The Court held that, "[a]s the time period for filing a Notice of Appeal is nonwaivable and jurisdictional, it does not matter that plaintiff served and filed his Notice of Appeal just one day late." *Id.* (internal citation and quotation marks omitted).

2. Structure Tone's Electronic Filing Of Its Notice Of Entry On NYSCEF Constituted Valid Service Under CPLR § 5513(b)

Plaintiff-Appellant's argument that a "quirk" in NYSCEF results in disparate procedures among the Appellate Divisions for docketing Notice of Entry of an Appellate Division Order, that may not be the "best" means of providing notice to the parties (Pl. App. Brf. 16-17), is unavailing.

It is well-settled that this Court's role is not to determine the optimal method of service of interlocutory papers by electronic means. *See* Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 300-01 (1978) (courts construe statutes "in a judicial role and do not function as legislators"); DaimlerChrysler v. Spitzer, 7 N.Y.3d 653, 660 (2006) ("[w]hen presented with a question of statutory interpretation, our primary consideration is to ascertain and give effect to the intention of the Legislature") (citations and internal quotation marks omitted); *see generally* Joblon v. Solow, 91 N.Y.2d 457, 465 fn.2 (1998) ("[d]efendants' complaint… is better addressed to the Legislature. The Legislature can, of course, revise the statute to limit its reach if it so intends").

Service of notice of entry of an order by e-filing on a specific docket on the NYSCEF site is clearly immaterial for jurisdictional purposes under CPLR § 5513 because the Legislature does not impose any such filing requirements. *Cf.* CPLR § 5515(1) (requires that an appeal be taken "[b]y serving on the adverse party a notice of appeal and *filing it in the office where the judgment or order of the court of original instance is entered*") (emphasis added); CPLR § 5515(2) (whenever an appeal is taken to the court of appeals, the clerk of

the office "*where the notice of appeal is required to be filed*" must forward a copy of the notice to the clerk of the court of appeals) (emphasis added).

CPLR 2103(b)(7) requires papers to be served "by electronic means *where* and in the manner authorized by the chief administrator of the courts…" *Id.* (emphasis added). The Uniform Rules provides that documents are electronically filed "through the NYSCEF site." *See* 22 N.Y.C.R.R. §§ 202.5-b(a)(2)(iii) (defines "e-filing," "electronic filing" and "electronically filing" as "filing and service of documents in a civil action by electronic means through the NYSCEF site"); 202.5-b(a)(2)(ii) (defines "NYSCEF" as the New York State Electronic Filing System and the "NYSCEF site" as "the New York State Courts Electronic Filing System website located at www.nycourts.gov/efile").

The Uniform Rules do not specify where Notice of Entry of an Order must be filed within the NYSCEF site – that is, the Uniform Rules do not address whether notice of entry must be e-filed on the docket of the issuing court (including the Appellate Division) or the court of original instance.

Indeed, Plaintiff-Appellant's assertion that some difference exists between filing the notice of entry on the appellate versus supreme court docket of the same matter between the same parties is not only unfounded but entirely

disingenuous given that Plaintiff-Appellant was represented by the same counsel under both dockets, Richard P. Amico, Esq. of The Barnes Firm, P.C. and, consequently, the filing of the notice of entry via NYSCEF on either docket would have generated the same email notification of filing which would be sent to counsel's same registered e-mail address.[16]

Structure Tone's electronic filing of the Notice of Entry of the Appellate Division Order on November 22, 2022, constituted valid service under CPLR § 5513(b), triggering the 30-day period for Plaintiff-Appellant to move for permission to appeal, *i.e.*, December 22, 2022.

Indeed, as reflected above, Plaintiff-Appellant has repeatedly represented to this Court that the appeal is timely based upon service of written Notice of Entry of the Appellate Division Order denying their motion for leave to appeal made via NYSCEF on November 22, 2022. Consequently, Plaintiff-Appellant waived any grounds for challenging the adequacy of such service. *See e.g.,* Deygoo v. Eastern Abstract Corp., 204 A.D.2d 596, 596 (2d Dept.

[16] The Court may take judicial notice of the electronic appearances registered at the Supreme Court, New York County Index No. 159007/2013 and Appellate Division, First Department Index No. 2021-00357.

1994) (defendant waiving its objection to any defect in the form of the Notice of Entry by failing to return it within two days after receiving it).

All told, there can be no dispute that since Plaintiff-Appellant's motion for leave to appeal was made 31 days after service of Notice of Entry of the Appellate Division Order, the appeal is untimely and this Court lacks jurisdiction over it, requiring its dismissal.

Accordingly, it is respectfully submitted that the appeal should be dismissed as untimely pursuant to the clear dictates of New York law. Should the Court agree, it need not reach the balance of this brief.

POINT II

PLAINTIFF'S UNPRESERVED ARGUMENTS SHOULD BE STRICKEN

On December 14, 2020, by Decision and Order, the Supreme Court granted the summary judgment motions of Structure Tone, Tishman Speyer and CBRE dismissing the Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(1) but denied dismissal of the Labor Law § 241(6) claim predicated on Industrial Code §§ 23-1.7(d) and 23-1.7(e)(2). (27-28, 43-45).[17]

[17] In the principal brief, Plaintiff-Appellant refers solely to the denial of the defendants' summary judgment motions. (Pl. App. Brf. 16).

The plaintiff did not file a notice of appeal from the Decision and Order. (15-47).

On August 16, 2022, by Decision and Order, the Appellate Division Order directed dismissal of the Labor Law § 241(6) claim predicated on Industrial Code §§ 23-1.7(d) and 23-1.7(e)(2). (2639).

Since the plaintiff failed to timely file a notice of appeal from the December 14, 2020, Order dismissing the plaintiff's Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(e)(1), this issue is not properly before this Court. *See* Hecht v. City of New York, 60 N.Y.2d 57, 59, 61 (1983) ("[g]enerally, an appellate court cannot grant affirmative relief to a nonappealing party… [t]he power of an appellate court to review a judgment [or order] is subject to an appeal being timely taken"), *citing* CPLR 5513, 5515; *see*, *e.g.*, Omansky v. 64 N. Moore Assocs., 269 A.D.2d 336, 337 (1st Dept. 2000) (court lacked jurisdiction to review and grant relief from an order where none of the parties filed a notice of appeal).

In opposition to the underlying defendants' summary judgment motions, the plaintiff argued that the Labor Law § 241(6) claim was predicated, in part, on Structure Tone's purported breach of its contractual obligations to clean the Project site. (1854-57). On appeal before the Appellate

Division, the plaintiff abandoned this argument and instead addressed only the applicability of Industrial Code §§ 23-1.7(d) and 23-1.7(e)(2) to these facts.[18] In their principal brief, the plaintiff erroneously states that, "[*a]lthough the issue was raised on appeal*, the Appellate Division did not address the general contractor's express assumption of duty for the precise condition protected against by the Industrial Code… The failure to enforce the general contractor's express assumption of duty to the Plaintiff (evidenced by the construction contract itself) deprived [plaintiff] of the protections of… Labor Law § 241(6)…" (Pl. App. Brf. 28) (emphasis added).

It is readily apparent that the Appellate Division did not address this issue because the plaintiff abandoned it. *See* East Harlem Bus. & Residence Alliance, Inc. v. Empire State Dev. Corp., 273 A.D.2d 33, 34 (1st Dept. 2000); In re Estate of Pessano, 269 A.D. 337, 341, *aff'd* 296 N.Y. 564 (1st Dept. 1945); *see also* McKee v. Cohoes Bd. of Education, 99 A.D.2d 923, n.1 (3d Dept. 1984).

Accordingly, it is respectfully submitted that the plaintiff's arguments pertaining to the merits of the Labor Law § 241(6) claim predicated on

[18] The Court may take judicial notice of the Brief for Plaintiffs-Respondents, Appellate Division, First Department Docket No. 2021-00357, e-filed February 4, 2022, NYSCEF Doc. No. 32.

Industrial Code § 23-1.7(e)(1) and the argument that Structure Tone's contractual obligations define the scope of its statutory liability under Labor Law § 241(6) should not be considered by this Court and the portions of the plaintiff's principal brief containing these arguments (Pl. App. Brf. 7, 11, 13-15, 28, 34) should be stricken.

POINT III

THE PLAINTIFF HAS NO STANDING TO ENFORCE STRUCTURE TONE'S CONTRACTUAL OBLIGATIONS TO PROJECT OWNER AND CONTRACT TERMS ARE IMMATERIAL TO STRUCTURE TONE'S STATUTORY AND COMMON-LAW LIABILITY ON LABOR LAW §§ 241(6), 200 AND COMMON-LAW NEGLIGENCE CLAIMS

Despite having ample opportunity to do so, Plaintiff-Appellant has never proffered any substantive justification for the chief argument on this appeal that Structure Tone's contractual obligation to CBRE to clean the Project site "at all times" defines the scope of Structure Tone's enforceable duty of care to workers, such as Mr. Ruisech, on the Labor Law §§ 241(6) and 200 and common-law negligence claims as a matter of law. (Pl. App. Brf. 27-29, 37-39, 44; R. 2625).

Plaintiff-Appellant's chief argument contravenes basic principles of contract and statutory interpretation, this Court's well-documented analysis of the legislative history and purpose of Labor Law § 241(6) and it prescribes liability on the Labor Law § 200 and common-law negligence claims based on conduct that far exceeds the general contractor's common-law duty to provide a safe place to work.

Plaintiff-Appellant's chief argument, which affects every argument in the principal brief with respect to Structure Tone, lacks any reasonable basis in law and it should be disregarded in its entirety as moot.

A. The Plaintiff Lacks Standing To Enforce Structure Tone's Obligations Under The CBRE-Structure Tone Agreement

Plaintiff-Appellant seeks to establish a "breach of [] contractual duty action" due to Structure Tone's purported failure to comply with a provision in the CBRE-Structure Tone Agreement pertaining to cleaning the Project site. (Pl. App. Br. 27-28, 39; 1853-54, 1864).

There is no direct contractual relationship between Plaintiff-Appellant and Structure Tone and/or CBRE and, by its express terms, the Agreement states that "[n]o Subcontractor shall be, or be deemed to be, a third party beneficiary of this Agreement." (1135-36). Thus, as a matter of basic contract law, Plaintiff-Appellant lacks privity and has no standing to enforce Structure Tone's contractual obligations. *See* Leonard v. Gateway II, LLC, 68 A.D.3d 408, 408 (1st Dept. 2009); Dormitory Authority of the State of New York v. Samson, 30 N.Y.3d 704, 710 (2018) ("[w]ith respect to construction contracts, we have generally required express contractual language stating that the contracting parties intended to benefit a third party by permitting that third

party to enforce a promisee's contract with another.") (citation and internal quotation marks omitted).

The provision that expressly excludes subcontractors as third-party beneficiaries of the Agreement proves that Plaintiff-Appellant had no reasonable basis in law or fact to argue that Structure Tone "owed a duty to the injured Plaintiff" based upon the terms of the Agreement. (Pl. App. Br. 4, 9-10, 12-13, 15, 27, 33). There is no reasonable explanation for Plaintiff-Appellant's failure to address this dispositive provision in its principal brief.

It is common sense that a project owner's interests and expectations for the cleanliness of a Project site are inherently different from a worker on the Project site, especially given the safety implications. It is also common sense that a general contractor retains specific trades as subcontractors because they have the knowledge and expertise to perform their work without direct supervisory control, such as whether a floor should be cleaned before beginning work.

Moreover, Plaintiff-Appellant's attempt to enforce Structure Tone's contractual obligations for his personal benefit is manifestly frivolous given the protections afforded to workers under the Labor Law and common-law. Structure Tone agreed to "take all reasonable and necessary precautions for

the safety of its employees and all other persons in or about the Site or at any locations where the Work is being performed" (1118, ¶ 9), which is consistent with its common-law duties as a general contractor. The Agreement contemplates that Structure Tone will retain subcontractors to satisfy its contract obligations and, in turn, Structure Tone's subcontractors are obligated to be bound by the terms of the Agreement. (1124, ¶ 3). This is consistent with the non-delegable duty imposed under Labor Law § 241(6), which permits a general contractor held vicariously liable for a violation of Labor Law to obtain indemnification from the party actually responsible for the incident. *See* Toussaint v. Port Authority of New York and New Jersey, 8 N.Y.3d 89, 93 (2022).

Thus, Plaintiff-Appellant lacks standing to enforce Structure Tone's purported contractual obligations under the CBRE-Structure Tone Agreement.

B. Statutory Duty Under Labor Law § 241(6) Must Be Predicated On Industrial Code Provision That Mandates Compliance With Concrete Safety Specifications

Plaintiff-Appellant's contention that Structure Tone's contractual obligation to CBRE to clean the Project site constitutes an enforceable "duty" under Labor Law § 241(6) (Pl. App. Brf. 27-29, 33) is a clear misstatement of

law.

To establish liability under Labor Law § 241(6), "[p]laintiff must allege that defendant violated an Industrial Code regulation that sets forth a specific standard of conduct and is not simply a recitation of common-law safety principles." Toussaint v. Port Authority of New York and New Jersey, 8 N.Y.3d 89, 94-95 (2022) (citations omitted).

In Toussaint, this Court reiterated the rationale in Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993) that "permitting plaintiffs to circumvent the requirement in section 200(1) that the defendant have control over the work by using a broad, nonspecific regulatory standard as predicate for an action against a nonsupervising owner or general contractor under Labor Law § 241(6) would seriously distort the scheme of liability for unsafe working conditions. Such a result… could not have been within the Legislature's intention…" 8 N.Y.3d at 94 (citation omitted). Thus, only "provisions of the Industrial Code mandating compliance with concrete specifications" give rise to a nondelegable duty under Labor Law § 241(6). *Id.*

Plaintiff-Appellant amply demonstrates these concerns by conflating liability standards under Labor Law 200 and common-law negligence with

Labor Law § 241(6). For example, Plaintiff-Appellant contends that the Appellate Division erred in failing to require Structure Tone "[t]o demonstrate that it did not have actual or constructive knowledge of the condition which led to Plaintiff's accident…" (Pl. App. Brf. 28, 33). This is a clear misstatement of the law. "Since a general contractor's vicarious liability under Labor Law § 241(6) is not dependent on its personal capability to prevent or cure a dangerous condition, the absence of actual or constructive notice sufficient to prevent or cure must also be irrelevant to the imposition of Labor Law § 241(6) liability." 91 N.Y.2d 343, 348-49, 352 (1998). Moreover, as discussed below, since the alleged accident arose out of A-Val's means and methods, notice of the alleged dangerous condition is immaterial. *See* Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 272 (1st Dept. 2007).

C. Contractual Obligations Exceed Structure Tone's Common-Law Duty Of Reasonable Care Owed To Workers On The Project And Cannot Serve As A Basis For Imposing Liability

Plaintiff-Appellant manifestly errs in presuming – without citing any applicable law – that Structure Tone's duty of care owed to him under the Labor Law § 200 and common-law negligence claims is defined by the provision in the CBRE-Structure Tone Agreement pertaining to keeping the

Project site free from accumulation of debris "at all times." (Pl. App. Brf. 38-39; 1120, ¶ 16(a)).

Plaintiff-Appellant provides no explanation or justification why "[t]his contractual duty sets this case apart from every other typical Labor Law § 200 claim." (Pl. App. Brf. 38-39). *See* Moran v. Regency Savings Bank, F.S.B., 20 A.D.3d 305, 307 (1st Dept. 2005) (sanction proper due to "minimal appellate briefs… containing sparse legal discussion as to why the summary judgment rulings were erroneous… infrequent citation to the record, and no citation to relevant case law").

Labor Law § 200, which requires all places of work to 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," codifies a general contractor's common-law duty to provide workers with a reasonably safe place to work. *See* Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 352 (1998).

A claim pursuant to Labor Law § 200 is tantamount to a common-law negligence claim in a workplace context. *See* Cappabianca v. Skanska Inc., 99 A.D.3d 139, 149 (1st Dept. 2012) (citation and internal quotation marks omitted).

On Labor Law § 200 and common-law negligence claims, a general contractor's duty is to provide "reasonable care" under the circumstances, regardless of the applicable liability standard (*i.e.*, means and methods of the performance of the work, dangerous premises condition). *See* Gambella v. John A. Johnson & Sons, Inc., 285 A.D. 580, 582 (2d Dept. 1955) ("The general contractor owes to employees of a subcontractor only the duty of making safe by reasonable care the places of work provided for by [the general contractor] and the ways and approaches… A general contractor is not obliged to protect employees of [the] subcontractors against the negligence of their employees…").

The duty is governed by the "generally applicable standards of the prudent person, the foreseeability of harm and the rule of reason." *See* Employers Mut. Liability Ins. Co. of Wis. v. Di Cesare & Monaco Concrete Const. Corp., 9 A.D.2d 379, 382 (1st Dept. 1959).

Plaintiff-Appellant contends that Structure Tone had an affirmative duty to keep the Project site free from any accumulation of debris "at all times," including "as work was being performed," such that it was liable for the existence of any debris, even as a byproduct of A-Val's work. (Pl. App. Brf. 27-28, 38-39).

There is no common-law authority prescribing this obligation. *See generally* Gilson v. Metropolitan Opera, 5 N.Y.3d 574, 577 (2005). As discussed below, Industrial Code § 23-1.7(e)(2) permits accumulations of debris and materials "consistent with the work performed."

Where a party voluntarily assumes a duty higher than what is owed under common law, the heighted duty cannot serve as a basis for imposing liability. *See*, *e.g.*, Crosland v. New York Transit Authority, 68 N.Y.2d 165, 168-69 (1986); *see also* Gilson, 5 N.Y.3d at 577 ("[d]efendant cannot be an insurer of the safety of its patrons, and its duty is only to exercise reasonable care for their protection") (citation and internal quotation marks omitted).

Adopting Plaintiff-Appellant's duty would require a standard of care which transcends the traditional common-law standard of reasonable care under the circumstances and the Industrial Code regulations.

Thus, the Appellate Division did not err in declining to adopt Plaintiff-Appellant's draconian interpretation of Structure Tone's duty of reasonable care in providing a safe place to work, for purposes of liability on the Labor Law § 200 and common-law negligence claims. (Pl. App. Brf. 29).

Also, Plaintiff-Appellant erroneously concludes that Structure Tone was obligated to "prepare inspection logs or document cleanup work" as part

of its contracted work and this failure "breached that duty owed to the plaintiff and other tradesmen." (Pl. App. Brf. 39). There is no common-law authority prescribing this obligation. *See generally* Gilson, *supra*, 5 N.Y.3d at 577. Plaintiff-Appellant fails to identify how documentation of inspections or the cleanup work performed comports with Structure Tone's obligation to maintain a reasonably safe work site.

Moreover, Plaintiff-Appellant errs in concluding that Structure Tone did not submit evidence that it conducted inspection "or performed the work under the agreement." (Pl. App. Brf. 39). To the contrary, Structure Tone submitted Construction Superintendent Bryan Orsini's testimony that he walked the Project site on a daily basis. (1048-49; 1088).

Mr. Orsini's testimony about his custom and practice is of limited value, of course, given Plaintiff-Appellant's six-day delay in reporting his alleged fall and his failure even at that time to indicate that he allegedly slid on debris. (513:18-21, 520:23-25). By failing to timely report the alleged accident or to document it in any way, Plaintiff-Appellant ensured the spoliation of relevant evidence, thereby precluding any investigation by Structure Tone or documenting the events of the day when they were still fresh in the mind. It is notable that other parties would be curtailed from establishing

a pattern of accidents on the Project site if they, too, failed to timely and fully report the circumstances of their accidents.

Plaintiff-Appellant's expert Ernest J. Gailor, P.E. intimates that Structure Tone was obligated to "produce a witness that could testify about the work performed or the condition on the job site on June 2, 2011" (1873). There is no common-law authority prescribing this obligation. *See generally* Gilson, *supra*, 5 N.Y.3d at 577.

POINT IV

LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE CLAIMS WERE PROPERLY DISMISSED

The Labor Law § 200 and common-law negligence claims were properly dismissed because there is no basis for the imposition of liability under either standard as a matter of law.

A. Structure Tone Did Not Exercise Supervisory Control Over The Plaintiff's Work

In the principal brief, Plaintiff-Appellant begrudgingly and obliquely concedes that the alleged accident occurred when he was installing a glass panel and stepped on "concrete spoils," comprised of pebble-shaped material "left over" from work performed by his fellow A-Val co-workers "grinding

out" the concrete floor to create recessed channels for the glass panels that Plaintiff-Appellant was installing. (Pl. App. Brf. 6, 13-15).

Since this "construction debris" was not an inherent premises condition but arose instead as a result of the means and methods of A-Val's work, the "means and methods" analysis is clearly the appropriate standard for determining liability on the Labor Law § 200 and common-law negligence claims. *See* Villanueva v. 114 Fifth Avenue Assoc., 162 A.D.3d 404, 406 (1st Dept. 2018) ("[w]here a defect is not inherent but is created by the manner in which the work is performed, the claim under Labor Law § 200 is one for means and methods and not one for a dangerous condition existing on the premises"); *see*, *e.g.*, Maddox v. Tishman Construction Corp., 138 A.D.3d 646, 646 (1st Dept. 2016); Cody v. State of New York, 82 A.D.3d 925, 926-27 (2d Dept. 2011).

Plaintiff-Appellant failed to address the Appellate Division's dismissal of the Labor Law § 200 and common-law negligence claims under the means and methods standard. (2640) ("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") (citation omitted).

Instead, Plaintiff-Appellant cites numerous decisions involving defective premises conditions, which are facially inapposite. (Pl. App. Brf. 39-43). *See*, *e.g.*, Dirschneider v. Rolex Realty Co. LLC, 157 A.D.3d 538, 539 (1st Dept. 2018) (factual issues whether fall on staircase was due to the defective condition of the premises, including debris on the staircase, inadequate lighting and the lack of a handrail).

Where a plaintiff's claim arises out of the means and methods of the work, a general contractor cannot be liable under Labor Law § 200 and for common-law negligence "unless it is shown that [the general contractor] exercised some supervisory control" over the activity that gave rise to the accident. *See* Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505 (1993); Cappabianca v. Skanska Inc., 99 A.D.3d 139 (1st Dept. 2012).

"[G]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the contractor controlled the manner in which plaintiff performed [their] work, *i.e.*, how the injury-producing work was performed." Hughes v. Tishman Constr. Corp., 40 A.D.3d 305, 306 (2007) (citations omitted, emphasis in original); *see*, *e.g.*, McLean v. Tishman Constr. Corp., 144 A.D.3d 534, 535-36 (1st Dept. 2016); Bisram v. Long Is. Jewish Hosp., 116 A.D.3d 475, 477 (1st Dept. 2014);

Enriquez v. B&D Development, Inc., 63 A.D.3d 780, 781 (2d Dept. 2009).

Plaintiff-Appellant's own testimony establishes that his work on the Project was supervised and controlled exclusively by A-Val personnel, including A-Val acting glazier foreman Tom Condy, who assigned Plaintiff-Appellant's work on the date of the alleged accident, and no one from Structure Tone told him how to perform his work. (462-63; 469-70; 473-74; 560-64; 568-71; 820-21). *See*, *e.g.*, Estrella v. GIT Industries, Inc., 105 A.D.3d 555, 556 (1st Dept. 2013) ("[d]ismissal of the Labor Law § 200 and common-law negligence claims as against Broadway was proper in light of the lack of evidence that Broadway supervised or controlled plaintiff's work. Plaintiff [] testified that nobody directed the manner in which he performed his work").

Since Structure Tone did not exercise any actual control over the manner or method of Plaintiff-Appellant's work on the Project, dismissal of the Labor Law § 200 and common-law negligence claims should be affirmed.

B. Concrete Material Was An Inherent Part Of The Glass Installation Work Plaintiff-Appellant Was Performing At The Time Of The Alleged Accident

There is clearly no merit to Plaintiff-Appellant's argument that Structure Tone was negligent because, during its inspection of the Project site,

it did not independently discover and dispose of the concrete material that A-Val workers created. (Pl. App. Brf. at 38-39).

Structure Tone retained A-Val to perform arch metal and glass work on the Project and A-Val agreed to "furnish all labor, materials, supervision and items required for the proper and complete performance of the Work." (400-18; 1345).

"[A] basic, underlying ground for the imposition of any liability under… the common law is the authority of the defendant to remedy the dangerous or defective condition at issue." Chowdhury v. Rodriguez, 57 A.D.3d 121, 129-30 (2d Dept. 2008); *see also* Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 317, 317 (1981) ("[a]n implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition").

Structure Tone did not bear any responsibility for supervising, directing and controlling A-Val's means and methods of performing its contracted work and it did not actually exercise supervisory control over A-Val's work.

Therefore, the contention that Structure Tone is liable for failing to inspect and discover debris in A-Val's work area is clearly contrary to existing

law, as evidenced by Plaintiff-Appellant's failure to cite any supporting authority. (Pl. App. Brf. 29, 34, 39).

Structure Tone cannot be held liable for not performing work it had no legal obligation to perform, including discovering A-Val's defective work. *See* Buccini v. 1568 Broadway Assocs., 250 A.D.2d 466, 469 (2nd Dept. 1998); Peay v. New York City School Const. Authority, 35 A.D.3d 566, 567 (2d Dept. 2006); *see*, *e.g.*, Letterese v. A&F Commercial Bldrs., LLC, 180 A.D.3d 495, 495 (1st Dept. 2020); Cooper v. Sonwil Distribution Center, Inc., 15 A.D.3d 878, 878-79 (4th Dept. 2005).

Plaintiff-Appellant failed to prove that an affirmative act of negligence by Structure Tone created or exacerbated a condition that proximately caused his fall. *See*, *e.g.*, Maldonado v. Liberty El. Corp., 213 A.D.3d 493, 494 (1st Dept. 2023); McDaniel v. City of New York, 211 A.D.3d 535, 536 (1st Dept. 2022).

Moreover, a general contractor's duty to provide a safe place to work "does not extend to hazards which are 'part of or inherent in the very work being performed or to those hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience.'" Bombero v. NAB Const. Corp., 10 A.D.3d 170, 171 (1st Dept.

2004), *quoting* Gasper v. Ford Motor Co., 13 N.Y.2d 104, 110 (1963).

Any concrete debris that was a byproduct of A-Val workers grinding out the concrete floors to create recessed channels was an inherent result of the ongoing glass installation work performed by Plaintiff-Appellant and his A-Val co-workers. *See*, *e.g.*, Bond v. York Hunter Constr., 270 A.D.2d 112, 113 (1st Dept. 2000), *aff'd* 95 N.Y.2d 883 (2000).

Since Structure Tone did not exercise any actual control over the manner or method of Plaintiff-Appellant's work on the Project, dismissal of the Labor Law § 200 and common-law negligence claims should be affirmed.

C. Plaintiff-Appellant's Own Testimony Proves That The Concrete Material Was Not Visible And Apparent

Even if the premises defect standard of liability is applied, the record evidence establishes that liability may not be established as a matter of law.

In order to defeat Structure Tone's summary judgment motion, it was incumbent upon the plaintiff to prove "the existence of a bona fide issue raised by evidentiary fact." Rotuba Etruders v. Ceppos, 46 N.Y.2d 223, 231 (1978); Schiraldi v. U.S Min. Prods., 194 A.D.2d 482, 483 (1st Dept. 1993) ("[a] party opposing a motion for summary judgment must assemble, lay bare, and reveal [their] proofs…") (citation and internal quotation marks omitted).

Notably, Plaintiff-Appellant did not submit any evidence that raises a triable issue of fact whether the concrete material had been present for a sufficient duration to constitute a premises condition. *See*, *e.g.*, Mayer v. Conrad, 122 A.D.3d 1366, 1368 (4th Dept. 2014); Singh v. Young Manor, Inc., 23 A.D.3d 249, 249 (1st Dept. 2005).

There is no merit to Plaintiff-Appellant's contention that Structure Tone may prove its entitlement to judgment as a matter of law based solely upon evidence of its last inspection. (Pl. App. Brf. 38-44). It is well settled that a defendant may rely upon the plaintiff's own testimony to negate liability and to establish its lack of notice. *See*, *e.g.*, Wellington v. Manmall, LLC, 70 A.D.3d 401, 402 (1st Dept. 2010); DeMasi v. Radbro Realty, 261 A.D.2d 354, 354 (2d Dept. 1999).

It is immaterial whether Structure Tone submitted evidence of its last inspection of Plaintiff-Appellant's work area because the Plaintiff-Appellant's own observations establish that the concrete material was so "minute.. [and] small" that he "didn't know that that was there." (501-02; 823). *See*, *e.g.*, Atashi v. Fred-Doug 117 LLC, 87 A.D.3d 455, 456 (1st Dept. 2011) (lower court erred in denying the defendant's summary judgment motion for failing to provide "sworn testimony from a person with knowledge

as to when the area was last inspected before plaintiff's fall" because "plaintiff's own deposition testimony established that about five hours before the accident, he did not see any objects in the corridor where he alleges he later tripped and fell"); Trujillo v. Riverbay, 153 A.D.2d 793, 795 (1st Dept. 1989).

Plaintiff-Appellant failed to adduce any evidence of who created the track channels and how long they existed prior to the alleged accident, even though he worked on the Project site for more than five hours prior to his fall and he laid down sheetrock dunnage on the floor of the office in preparation for the glass panel installation prior to transporting the glass panel to the work area. (599-602; 827).

Given the total lack of evidence on the issue of the length of time the concrete material was present, "there is no evidence from which a jury could infer that such condition existed for a sufficient period of time to allow [defendants] to discover and remedy it." Gibbs v. Port Auth. of New York, 17 A.D.3d 252, 255 (1st Dept. 2005). Thus, Plaintiff-Appellant was necessarily precluded from establishing a *prima facie* Labor Law § 200 and common-law negligence claims as a matter of law. *See* DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d 623, 626 (1st Dept. 2015).

Moreover, if Plaintiff-Appellant claims that the concrete condition was of the nature and degree that it should have been discovered and remedied, then had Plaintiff-Appellant made reasonable use of his senses by looking where he was walking and standing, he would have observed the concrete material on the floor and avoided it. Since the Plaintiff-Appellant's own testimony establishes that he was best placed to observe the concrete condition and he did not – despite observing the empty office when staging the glass panel and when standing within four-inches of the track immediately prior to the alleged accident, this constitutes proof that Structure Tone could not have had actual notice of the allege concrete material condition. *See*, *e.g.*, Molyneaux v. City of New York, 28 A.D.3d 438, 439-40 (2d Dept. 2006) (dismissed Labor Law § 200 and common-law negligence claims against construction manager where the evidence "indisputably showed that the [defective condition] had never been observed before the occurrence of the plaintiff's accident. Thus, the moving defendants could not possibly have had notice of the cause of the accident, nor could they be found responsible for creation of the dangerous condition").

Therefore, there can be no liability as against Structure Tone under Labor Law § 200 or for common-law negligence. Accordingly, the Appellate

Division properly dismissed the Labor Law § 200 and common-law negligence claims.

POINT V

THE LABOR LAW § 241(6) CLAIM PREDICATED ON AN ALLEGED VIOLATION OF INDUSTRIAL CODE § 23-1.7(d) WAS PROPERLY DISMISSED

The Appellate Division properly dismissed the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code § 23-1.7(d).

Industrial Code § 23-1.7(d) does not apply to these facts because the accident occurred in an open area rather than a "passageway" or "walkway" contemplated by the regulation. Plaintiff-Appellant also failed to prove that the concrete material was a "foreign substance" that caused the floor to be in a "slippery condition."

A. Industrial Code § 23-1.7(d) Is Inapplicable Because The Accident Occurred In An Open Area, Not A Passageway or Interior Walkway Contemplated By The Regulation

Structure Tone established that Industrial Code § 23-1.7(d) does not apply to these facts because the accident occurred in an open area rather than a "passageway" or "walkway" contemplated by the regulation, and the plaintiff-appellant was not using the area as a passageway or walkway when the accident occurred.

Although "passageway" is not defined in the Industrial Code, courts have consistently interpreted the term narrowly to mean "*a defined walkway* or pathway used to traverse between discrete areas as opposed to an open area," synonymous with a hallway or corridor. Quigley v. Port Authority of New York, 168 A.D.3d 65, 67 (1st Dept. 2018) (emphasis added, citation and internal quotation marks omitted); *accord* Steiger v. LPCiminelli, Inc., 104 A.D.3d 1246 (4th Dept. 2013) (collecting cases); *see*, *e.g.*, Harasim v. Eljin Constr. of NY, Inc., 106 A.D.3d 642, 643 (1st Dept. 2013) (permanent staircase where the accident occurred was a passageway within the meaning of Industrial Code § 23-1.7(d) because it "was the sole means of access to the work site").

The existence of a passageway or walkway within the meaning of Industrial Code § 23-1.7(d) is supported by evidence proving its exact location and dimensions, the manner in which it was demarcated and whether it was the sole means of access to a work area. *See*, *e.g.*, Aragona v. State of New York, 147 A.D.3d 808, 809 (2d Dept. 2017) ("[t]he testimony and evidence established that the two-to-three foot wide corridor in which the claimant tripped was created by piles of lumber and materials on each side, and was used by the claimant to get from one point of the barge to another. Based on

this evidence, the court did not err in concluding that the claimant tripped in a passageway [under Industrial Code § 23-1.7(e)(1)]"); Lois v. Flintlock Construction Services LLC, 137 A.D.3d 446, 447-48 (1st Dept. 2016) ("[the plaintiff's] testimony that he fell while walking on a two- or three-foot space between two large piles of debris, and that he was required to pass through that area in order to access the window being repaired, established that the accident occurred in a 'passageway' [under Industrial Code § 23-1.7(e)(1)]").

Moreover, Industrial Code § 23-1.7(d) does not apply when the plaintiff is not using the area as a passageway or walkway at the time of the accident. *See*, *e.g.*, Hertel v. Heuber-Breuer Constr. Co., Inc., 48 A.D.3d 1259, 1260 (4th Dept. 2008) (plaintiff was unrolling a blanket to protect the concrete slab from becoming covered with snow overnight). The rationale is that a worker using the passageway or walkway would not have encountered the same conditions. *See generally* Steiger v. LPCiminelli, Inc., 104 A.D.3d 1246, 1251 (4th Dept. 2013).

Plaintiff-Appellant's deposition testimony proves that the accident did not occur within a passageway or walkway contemplated by Industrial Code § 23-1.7(d). Plaintiff-Appellant's crew was installing an interior, floor-to-ceiling glass panel wall, which divided "an open office space" from an internal

hallway. (466-67; 615-16; 619; 748; 751; 828-29). Despite his familiarity with the Project site, Plaintiff-Appellant was unable to describe where the subject office was situated within the premises, its general area (*e.g.*, corner, middle of the hallway) or the purpose of the office space. (794; 827-29). The sole evidence of the layout of the area is Plaintiff-Appellant's testimony that he and his crew retrieved the glass panel from a stack leaning against a sheetrock wall and carried it approximately 10 feet to the area where it was to be installed. (473; 485-89; 550; 554; 558-59; 572; 574-75; 596; 598-99). The glass panel was to be installed adjacent to a similarly-sized glass panel, forming a total width of eight-to-ten feet. (792-94). The opposite side of the glass panel Plaintiff-Appellant's crew was installing was empty. (792-99). Thus, this is the sole evidence of fixed objects in the area where Plaintiff-Appellant was working.

At the time of the accident, Plaintiff-Appellant's crew was tilting the glass panel to move it into the overhead track - Plaintiff-Appellant and one crew member stood on the hallway side of the glass panel and two crew members stood on the office side of the glass panel as they moved the panel. (620; 623-24; 627).

The record evidence establishes as a matter of law that Plaintiff-Appellant was not working in a passageway or defined walkway contemplated by the regulation. The sole fixed object that Plaintiff-Appellant identified was one glass panel installed adjacent to the subject track. (792-94). *See*, *e.g.*, Canning v. Barneys New York, 289 A.D.2d 32, 34-35 (1st Dept. 2001) (although the plaintiff was required to pass through an area to transport his materials, since the path from the materials shed to the room in which he was assigned to work was "essentially a straight line," the accident location did not constitute a passageway [under Industrial Code § 23-1.7(e)(1)]). Moreover, Plaintiff-Appellant's testimony proves that he was not using the area as a passageway or walkway at the time of the accident.

In opposition to Structure Tone's *prima facie* evidence supporting the dismissal of the Labor Law § 241(6) claim, Plaintiff-Appellant merely claimed that he was "required to carry the panel from a staging area through a *narrow area* to place the panel in a channel cut into the concrete." (App. Brf. 14, *quoting* 1875, ¶ 10; *see also* 1861, ¶ 16). Plaintiff-Appellant failed to cite any record evidence supporting this description of the accident location.

This unsupported opposition fails to satisfy Plaintiff-Appellant's burden of presenting admissible evidence sufficient to raise a triable issue of

fact as to the applicability of Industrial Code § 23-1.7(d). Thus, there is no merit to Plaintiff-Appellant's contention that the issue of whether he fell in a "passageway" should be resolved by a jury. (Pl. Br. 27). *Cf.*, Prevost v. One City Block LLC, 155 A.D.3d 531, 535 (1st Dept. 2017) (conflicting evidence).

Plaintiff failed to raise a triable issue of fact regarding the applicability of this provision of the Industrial Code

Accordingly, the Labor Law § 241(6) claim was properly dismissed because the accident did not occur within a passageway or walkway as contemplated by Industrial Code § 23-1.7(d).

B. Industrial Code § 23-1.7(d) Is Inapplicable Because The Concrete Floor Was Not In A Slippery Condition Nor Was The Loose Concrete Material A Foreign Substance Which May Cause Slippery Footing Within The Meaning Of The Regulation

The Appellate Division correctly dismissed the Labor Law § 241(6) claim on the grounds that "[t]he 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)."

Structure Tone satisfied its initial burden of establishing that Industrial Code § 23-1.7(d) is inapplicable to these facts because the plaintiff did not testify that the accident occurred due to a "slippery condition" on the concrete

floor nor did he allege that his accident occurred due to a "foreign substance." (2550).

Evidence that the plaintiff slipped on loose material is not sufficient to prove *prima facie* that the floor was in a "slippery condition" as contemplated by the regulation. *See*, *e.g.*, Cruz v. Metropolitan Transportation Auth., 193 A.D.3d 639, 640 (1st Dept. 2021) ("[t]he berm consisting of loose dirt and debris on which plaintiff and his coworker were standing… did not constitute a slippery condition as contemplated by [Industrial Code § 23-1.7(d)]") (citation and internal quotation marks omitted); D'Acunti v. New York City School Construction Auth., 300 A.D.2d 107, 107 (1st Dept. 2002); Greenfield v. New York Telephone Company, 260 A.D.2d 303, 303-04 (1st Dept. 1999).

Materials that are inherent in the work being performed or debris generated as a byproduct of the work do not constitute a "foreign substance" within the meaning of Industrial Code § 23-1.7(d). *See*, *e.g.*, Kowalik v. Lipschutz, 81 A.D.3d 782, 784 (2d Dept. 2011) (where the plaintiff slipped on sawdust "and other construction debris" while using a table saw, defendant made a *prima facie* showing that Industrial Code § 23-1.7(d) did not apply to the facts; "[w]here, as here, the substance naturally results from the work being performed, it is not generally considered a 'foreign substance' under this

provision"); Smith v. Nestle Purina Petcare Co., 105 A.D.3d 1384, 1386 (4th Dept. 2013) (regulation inapplicable because grain dust "was the very condition [plaintiff] was charged with removing and thus was an integral part of the task plaintiff was performing") (citations and internal quotation marks omitted); Salinas v. Barney Skanska Construction Co., 2 A.D.3d 619, 622 (2d Dept. 2003) (regulation inapplicable where the plaintiff demolition worker slipped on debris created during his removal of a duct); Basile v. ICF Kaiser Engineers Corp., 227 A.D.2d 959, 959 (4th Dept. 1996) (regulation inapplicable to stack of pipes waiting to be cleaned because "[t]he slippery substance was an integral part of the pipes").

In opposition, Plaintiff-Appellant merely cited cases that are factually inapposite because they involve foreign substances completed by Industrial Code § 23-1.7(d), such as ice and grease. *See*, *e.g.*, Temes v. Columbus Centre, LLC, 48 A.D.2d 281, 281 (1st Dept. 2010) (ice); Zito v. Occidental Chemical Corp., 259 A.D.2d 1015, 1016 (4th Dept. 1999) (grease).

Plaintiff-Appellant also cited the conclusions of his expert, Ernest J. Gailor, P.E., who summarily concluded that concrete material constituted a foreign substance which would cause slippery footing. (1861). As discussed

below, Mr. Gailor's affidavit does not constitute competent, admissible evidence.

In the principal brief on this appeal, Plaintiff-Appellant makes only glancing reference to this Court's recent decision, Bazdaric v. Almah Partners LLC, 2024 N.Y. LEXIS 71, 2024 NY Slip Op 000847, 2024 WL 674245 (Feb. 20, 2024). (Pl. App. Brf. 25).

In Bazdaric, this Court reiterated that, in order to establish a *prima facie* Labor Law § 241(6) claim, a plaintiff must demonstrate that their injuries were proximately caused by the violation of an applicable Industrial Code regulation which sets forth a concrete standard of conduct rather than a mere recitation of "common law safety principles." 2024 N.Y. LEXIS 71, at *7-8, *citing* Rizzuto v. L.A. Wenger Constr. Co., 91 N.Y.2d 343, 350-51 (1998). Further, it must be shown that a negligent violation of a concrete specification in an Industrial Code regulation proximately caused the injuries at issue. *Id.*, 2024 N.Y. LEXIS 81 at *8 (citations omitted).

In a concurring opinion, Justice Garcia clarified that, although Industrial Code § 23-1.7(d) "mandates a distinct standard of conduct… the first sentence is clearly a general reiteration of common law principles. To qualify as mandating compliance with a 'concrete specification,' the 'slippery

condition' referenced in the first sentence must be caused by the 'foreign substance' described in the second." That is, employees shall not be permitted to use any floor, etc. which is in a slippery condition *due to* "[i]ce, snow, water, grease [or] any other foreign substance" and such substance must be removed "to provide safe footing." *Id.*, 2024 N.Y. LEXIS 81 at *19-20 (citations omitted) (Garcia, J., concurring). "A contrary reading of 12 NYCRR 23-1.7(d) would indeed create common law negligence liability under the first sentence of the provision." *Id.*, 2024 N.Y. LEXIS 81 at *20 (citation omitted).

In Bazdaric, this Court determined that a plastic covering placed over a stopped escalator for painting during a renovation project constituted a foreign substance under Industrial Code § 23-1.7(d), in part because the plastic covering "*was not a component of the escalator*" and, based on the defendant's concession that the plastic sheeting was "admittedly a poor choice for the purpose it was used," that "*this foreign substance created a slippery condition*." 2024 N.Y. LEXIS 81 at *9-10 (emphasis added).

Plaintiff-Appellant's mere contention that the concrete materials at issue are "like" the plastic sheet in Bazdaric is perfunctory and unavailing. (*Id.*). Plaintiff-Appellant does not acknowledge the inherent distinction

between plastic sheeting applied to an escalator and the subject concrete material that was an inherent byproduct of the concrete flooring.

Thus, the plaintiff in Bazdaric proved that the plastic sheeting was a foreign substance because it was not a component of the escalator, but Plaintiff-Appellant is precluded from satisfying this *prima facie* element because the concrete material was inherent and integral to the concrete floor.

Moreover, in Bazdaric, this Court noted that the substances specifically identified in the regulation "are, by their nature, types of material that are slippery when in contact with an area where someone walks, seeks passage, or stands, and, when the substance is present, would make it difficult if not impossible to use the area safely, necessitating one of the affirmative mitigating measures set forth in section 23-1.7(d) as a means to provide safe footing." 2024 N.Y. LEXIS 81 at *11-12.

In opposition to the defendants' summary judgment motions, Plaintiff-Appellant relied solely upon his expert, Ernest J. Gailor, P.E., to establish that the concrete material was a foreign substance. Specifically, Mr. Gailor concluded that, because the construction debris [*i.e.*, loose concrete material] that the plaintiff slipped on "reduced the friction between the floor and the plaintiff's work boots… such construction debris comes under the definition

of a 'foreign substance which may cause slippery footing'" (1875, ¶ 10). The plaintiff did not submit any admissible evidence to establish that the concrete material would have caused the floor to be in a slippery condition, as contemplated by the regulation. Therefore, Plaintiff-Appellant failed to raise a triable issue of fact as to the applicability of Industrial Code § 23-1.7(d).

In light of the *prima facie* standards outlined in Bazdaric, it is notable that Plaintiff-Appellant's evidence that the concrete materials constitute a "foreign substance which may cause slippery footing" within the meaning of Industrial Code § 23-1.7(d) falls far short of the evidence required to support a common-law negligence claim for a "slippery condition."

It is well settled that flooring material that is inherently slippery is not, by itself, actionable negligence. *See* Cietek v. Bountiful Bread of Stuyvesant Plaza, Inc., 74 A.D.3d 1629, 1629-30 (3d Dept. 2010); Ciccarelli v. Cotira, Inc., 24 A.D.3d 1276, 1276 (4th Dept. 2005) (the mere fact that a smooth wood floor may be slippery does not support a cause of action to recover damages for negligence") (citations and internal quotation marks omitted).

In order to establish a *prima facie* negligence claim for a slippery floor, a plaintiff must submit expert evidence demonstrating that the floor was slippery for a reason other than the inherently slippery nature of the floor, such

as a violation of applicable regulations or codes or a deviation from relevant industry standards. *See* Waiters v. Northern Trust Company of New York, 29 A.D.3d 325, 326-27 (1st Dept. 2006) (absent proof of the reason for plaintiff's fall other than the "inherently slippery" condition of the floor, no cause of action for negligence can properly be maintained).

The Appellate Division properly disregarded the affidavit of Mr. Gailor. (Pl. App. Brf. 28; 1870-76). The affidavit is defective on its face because it rests entirely on Mr. Gailor's unsupported conclusions and improper legal conclusions. *See* Colon v. Rent-A-Center, 276 A.D.2d 58, 61-62 (1st Dept. 2000).

Mr. Gailor's opinions should be rejected as speculative because he failed to identify the records and foundational facts supporting his opinion. *See* Romano v. Stanley, 90 N.Y.2d 444, 451-52 (1997) (plaintiffs' expert's affidavit, which was "devoid of any reference to a foundational scientific basis for its conclusions," lacked any probative value); *see*, *e.g.*, Ioffe v. Hampshire House Apartment Corp., 21 A.D.3d 930, 931 (2d Dept. 2005).

Mr. Gailor failed to cite any corroborating evidence for his assertion that "[t]he construction debris reduced the friction between the floor and the plaintiff's work boots" (1875, ¶ 10). This evidence would be insufficient to

support a common-law cause of action for negligence. *See*, *e.g.*, Sarmiento v. C & E Associates, 40 A.D.3d 524, 526-28 (1st Dept. 2007) (rejected expert's affidavit for failing to identify the basis for the coefficient-of-friction value he used as a standard, and the remaining statutory and Code violations cited by plaintiffs do not raise a triable issue as to defendant's negligence as too general to support a negligence action).

Therefore, Plaintiff-Appellant failed to raise a triable issue of fact as to the applicability of Industrial Code § 23-1.7(d). The Labor Law § 241(6) claim predicated upon this regulation was properly dismissed.

POINT VI

THE LABOR LAW § 241(6) CLAIM PREDICATED ON AN ALLEGED VIOLATION OF INDUSTRIAL CODE § 23-1.7(e)(2) WAS PROPERLY DISMISSED

The Appellate Division properly dismissed the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code § 23-1.7(e)(2).

The Appellate Division's determination that Industrial Code § 23-1.7(e)(2) "does not apply as this was not a passageway" (2639) is a simple error because the regulation applies to "working areas." Structure Tone does not contest that the accident location constitutes a "working area" within the meaning of the regulation, rather than a passageway. *See*, *e.g.*, Amaya v.

Purves Holdings LLC, 194 A.D.3d 536, 537 (1st Dept. 2021) ("[t]he hallway where plaintiff fell must be considered more of a work area than a passageway, as this is where he was actively applying a plaster compound to the sheetrocked walls") (citation and internal quotation marks omitted).

The Appellate Division correctly determined that Industrial Code § 23-1.7(e)(2) is inapplicable because the concrete material on which Plaintiff-Appellant allegedly slipped was "an integral part of the construction work." (2639).

Industrial Code § 23-1.7(e)(2) does not provide any basis for liability if the alleged hazard is "consistent with," and thus an integral part of the ongoing work being performed.

See O'Sullivan v. IDI Constr. Co., Inc., 7 N.Y.3d 805, 806 (2006) ("[t]here is no liability under section 241(6) where the injury-producing object is an integral part of what is being constructed"); *see*, *e.g.*, DeLiso v. State of New York, 69 A.D.3d 786, 786-87 (2d Dept. 2010); Isola v. JWP Forest Electric Corp., 267 A.D.2d 157, 158 (1st Dept. 1999).

Based on the uncontested evidence that Plaintiff-Appellant slipped on concrete material that was a byproduct of A-Val "grinding out" the concrete floor to create a recessed channel for the track supporting the glass panel that

Plaintiff-Appellant was installing at the time of the accident, the integral-to-the-work defense clearly applies to the concrete material because it is "consistent with" the work being performed and it was essential to completing the glass panel installation.

It is immaterial that A-Val workers performed this "grinding out" work some time earlier because the glass panel installation was obviously still ongoing at the time of the accident. Consistent with work-in-progress, if the recessed channel or track had to be adjusted or corrected, then the A-Val workers that created it would have returned to the area and likely generated more cement material remedying any issues. Moreover, there is clearly no temporal limitation because Plaintiff-Appellant would not have been able to complete the installation of the glass panel unless and until the A-Val workers had installed the track on which it rested.

Plaintiff-Appellants' objections to the dismissal of the Labor Law § 241(6) claim are unfounded and easily refuted.

One, Plaintiff-Appellant's inability to prove a violation of Industrial Code § 23-1.7(e)(2) as a matter of law based on the facts particular to this action does not justify the baseless and unsupported claim that the Appellate Division "extended a rule of this Court beyond its intended reach" and applied

an "expansive definition" of "integral" to the work. (Pl. App. Brf. 24). Plaintiff-Appellant cites numerous cases that are factually inapposite, without any explanation of their relevance. (Pl. App. Brf. 24-26, 29-30). These cases simply demonstrate that the integral-to-the-work defense applies to the facts of some actions but not others.

Two, Plaintiff-Appellant erroneously conflates "debris" covered under Industrial Code § 23-1.7(e)(2) with debris under the integral-to-the-work defense. (Pl. App. Brf. 26, 29). Any dirt, debris, tools or materials that are an "integral part" of the work being performed are necessarily not a violation of Industrial Code § 23-1.7(e)(2). *See*, *e.g.*, Tucker v. Tishman Construction Corp. of New York, 36 A.D.3d 417, 417 (1st Dept. 2007) ("[t]he rebar steel over which plaintiff tripped was an integral part of the work being performed, not debris, scattered tools and materials…").

Three, there is no merit to Plaintiff-Appellant's contention that the integral-to-the-work defense applies only to debris created by the plaintiff or if the plaintiff was tasked with cleaning up debris. (Pl. App. Brf. 32-33). Plaintiff-Appellant merely cherry picks cases to reach these conclusions.

The integral-to-the-work defense applies whether the condition was created by the plaintiff or the plaintiff's co-workers. (Pl. App. Brf. 32-33).

This aligns with the plain language of Industrial Code § 23-1.7(e)(2), which refers to conditions "consistent with the work being performed." *See* Krzyanowski v. City of New York, 179 A.D.3d 479, 481 (1st Dept. 2020) (the integral-to-the-work defense "[a]pplies 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").

Four, Plaintiff-Appellant contends that "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," "such dirt and debris are, by definition, substances that must be discarded to reduce the risk of harm to human beings" and that it is incongruous for debris to be an integral part of construction work. (Pl. App. Brf. 26, 29, 33). This, however, directly conflicts with the plain language of Industrial Code § 23-1.7(e)(2), which expressly permits accumulations of dirt, debris, tools and materials "consistent with the work being performed." *See* Matter of Rodriguez v. Perales, 86 N.Y.2d 361, 366 (1995) (in interpreting a regulation, the court "must assume that the promulgating agency did not deliberately place a phrase in the regulation which was intended to serve no purpose and

each word must be read and given a distinct and consistent meaning") (citation and internal quotation marks omitted).

Plaintiff-Appellant failed to raise a triable issue of fact as to the applicability of Industrial Code § 23-1.7(e)(2). Accordingly, the dismissal of the Labor Law § 241(6) claim predicated on an alleged violation of Industrial Code § 23-1.7(e)(2) should be affirmed.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the appeal should be dismissed as untimely, the Appellate Division order dismissing the complaint should be affirmed, and for such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 14, 2024

Respectfully submitted,

Allison A. Snyder

Allison A. Snyder

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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

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