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

Court of Appeals

of the

State of New York

FELIPE RUISECH and MARTHA RUISECH,

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents,

Index No.
159007/13

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

– and –

CBRE INC.,

Defendant-Respondent.

(For Continuation of Caption See Inside Cover)

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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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.

Second Third-Party Index No. 590202/14

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

Third Third-Party Plaintiffs-Respondents,

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent.

Third Third-Party Index No. 595439/18

DISCLOSURE STATEMENT

Structure Tone Inc. is incorrectly named in the caption as Structure Tone Global Services, Inc., and provides the following information pursuant to Court of Appeals Rule 500.1(f):

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., s/h/a Structure Tone Global Services, Inc.

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

COURT OF APPEALS OF THE STATE OF NEW YORK

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Defendants-Respondents,
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METROPOLITAN LIFE INSURANCE COMPANY,

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Third Third-Party Index No. 595439/18

STEVEN ARIPOTCH, an attorney duly admitted to practice before the Courts of this State, affirms the truth of the following under the penalty of perjury:

1. I am of counsel to the law firm of Barry McTiernan & Moore LLC, attorneys for STRUCTURE TONE, INC., i/s/h/a STRUCTURE TONE GLOBAL SERVICES, INC., (hereinafter "Structure Tone") and I am fully familiar with the facts and circumstances of this matter by review of the case file maintained by this office.

2. Structure Tone was a defendant and second third-party plaintiff in the supreme court proceedings. Before the Appellate Division, First Department, Structure Tone was respondent-appellant.

3. This affirmation is submitted in opposition to the plaintiffs' motion which seeks leave to appeal to the Court of Appeals.

4. The plaintiff's motion fails to present any issue that should command the attention of the Court of Appeals.

5. Structure Tone refers to and incorporates by reference herein, the exhibits that are annexed to plaintiff's motion and are designated with letters. Structure Tone also attaches the following exhibits, which shall be numbered exhibits:

Exhibit "1" Affidavit of service of plaintiff's motion

Exhibit "2" First Department order deciding appeal

POINT I

THE MOTION MUST BE DENIED BECAUSE IT IS UNTIMELY

6. Defendant Structure Tone respectfully submits that plaintiff's motion is untimely, leaving this Court without jurisdiction to grant plaintiff the requested relief. Pursuant to CPLR 5513(b), a "motion for permission to appeal must be made within 30 days," computed from the date of service by a party upon the party seeking permission of a copy of the order. Plaintiff previously moved for leave to appeal (or reargue) in the Appellate Division, First Department. That motion was denied by Order dated November 22, 2022, and I served that Order with Notice of Entry on that same day (Exhibit "D"). Thus, if plaintiff wanted to move in this Court for leave to appeal, he had to do so by December 22, 2023, pursuant to the statutory mandate of CPLR 5513(b).

7. The affidavit of service of plaintiff's present motion establishes that this motion was not served until December 23, 2022 (Exhibit "1" hereto). Because

the motion was not served within the statutory period, it is jurisdictionally and irremediably defective.

8. As stated by Arthur Karger in The Powers of the New York Court of Appeals [3d ed rev 2005], § 12:3, at pages 435-436, "since … the statutory time limitations are jurisdictional, an untimely motion for leave to appeal will be denied." (footnote omitted). Accord Gregory M. Bartlett v Tribeca Lending Corp., 37 NY3d 1043 (2021).

POINT II

THERE IS NO ISSUE OF STATEWIDE IMPORTANCE

9. As the judicial body of last resort, the function of this Court is "declaring and developing an authoritative body of decisional law for the guidance of the lower court, the bar and the public, rather than merely correcting errors committed by the courts below." (Karger, Powers of the New York Court of Appeals § 10:3, at 331 [3d ed. rev.] [footnote omitted]). That function clearly will not be served by rehashing the deliberations of the Appellate Division in this case.

10. Review of this matter by this Court would add nothing to the existing body of New York State law, as plaintiff's arguments fall apart once the relevant facts are revealed, and the Appellate Division's reasoning is stated in context. Plaintiff's sole policy justification for seeking review is the vague assertion that the

First Department decision "extended a rule of this Court beyond its intended reach." (Amico affirmation, ¶ 8). To the contrary, as the principles of law already are well-established, any effort by this Court in reviewing the five volumes of the record on appeal and the nine briefs, comprising numerous factual and legal issues, would not serve to advance any meaningful appellate purpose.

11. The plaintiff merely dislikes the First Department's decision and sets forth an entirely conclusory argument that fails to state the relevant facts and fails to cite the evidence in the record. Further, some of plaintiff's arguments are plainly inapplicable and irrelevant to the First Department's determination. At the same time, the plaintiff ignores the evidence and legal argument that supported Structure Tone's position, and plaintiff fails to address certain issues that were obviously important to the Court.

12. By launching such a scattershot argument and omitting the relevant facts, the plaintiff's motion requires defendants to restate arguments that were discussed in numerous briefs, across hundreds of pages that the First Department has already fully considered and decided. In light of all the effort the parties and the Appellate Division have expended on this matter, plaintiff's unclear motion is a waste of the Court's resources, and should be denied. This affirmation attempts only to provide an overview of the argument, and an explanation of why further appeal is unnecessary.

POINT II

THE LABOR LAW § 200 CLAIM AGAINST STRUCTURE TONE WAS PROPERLY DISMISSED

A. Summary of Argument

13. In dismissing the Labor Law § 200 and common law negligence claims against Structure Tone, the First Department held that "CBRE and ST [Structure Tone] provide uncontroverted evidence that they did not create the condition at issue, nor did they have notice of the condition." (Exhibit "2", Order, page 5). Plaintiff now seeks leave to appeal by incorrectly asserting that the First Department "did not require the defendant to meet its evidentiary burden on a motion for summary judgement, since the court did not require Defendant Structure Tone to demonstrate that it did not have actual or constructive knowledge of the condition that caused Plaintiff's injuries." (Amico affirmation, ¶ 18).

14. Although plaintiff boldly contradicts the First Department's stated holding, plaintiff fails to provide any factual or legal argument to explain to this Court why the Court of Appeals should accept plaintiff's unsupported assertion. Plaintiff admits that his coworkers created the condition, and plaintiff does not even attempt to argue that there is any evidence which would support a finding of either actual or constructive notice of the condition. Because plaintiff has failed to

present any such evidence to rebut the First Department's explicit holding, no argument should be needed in rebuttal.

15. Plaintiff's other main argument regarding common law negligence and Labor Law § 200 is to point out that Structure Tone was general contractor and was required by contract to "at all times keep the Site … free from accumulation of debris." (Amico affirmation, ¶ 14). Plaintiff, and his expert, insinuate that this language meant that Structure Tone had some duty greater than the usual general contractor's duty of housekeeping, but the usual negligence standards apply. There is no liability unless the general contractor either created the condition, or had actual or constructive notice of the hazard. Plaintiff fails to present either fact or law to disprove the First Department's holding that Structure Tone had no notice of the condition, so plaintiff has admitted the fact for purposes of this appeal. SportsChannel Assoc. v Sterling Mets, L.P., 25 AD3d 314, 315 (1st Dept 2006).

16. Further, the contract regulates "accumulations of debris" but plaintiff fails to rebut Structure Tone's showing that it had no notice of the debris which plaintiff's coworkers had created, and plaintiff admits that the particles were so "minute" that he did not see them. Invisible particles cannot be deemed an accumulation of debris.

17. Even if this Court accepted plaintiff's inviation to redo this appeal, the result would not change because plaintiff essentially admits that Structure Tone

had no notice of the defective condition, and without notice there can be no liability.

B. The Evidence Established that Structure Tone Neither Created the Condition Nor Did it Have Actual or Constructive Notice

18. It is uncontroverted that plaintiff's alleged injury occurred while he, and his coworkers on the A-Val crew were installing a large panel of glass, which was ten feet tall by four feet wide and weighed as much as 500 pounds (R. 467, 484). Some A-Val workers had installed an aluminum track on the floor, and had recessed the track into the floor by first "chipping" out about ¼-inch of concrete (R. 503). Plaintiff did not know what the tool was to "chip" the concrete, but he testified that the resulting particles were "minute" and so small that he did not see them (R. 499, 501-502, 504).

19. After the first set of A-Val workers installed the aluminum track, plaintiff and some other A-Val workers lifted the panel of glass to insert it into the track. Plaintiff testified that lifting the glass panel into the aluminum track required the efforts of five men, but only four men were lifting the glass panel because plaintiff's foreman had removed one of the men to perform another task. As the four remaining workers were lifting the panel of glass to insert it into the aluminum track, one of the men on the end was having trouble holding the glass

(R. 497), so plaintiff struggled to hold the glass from falling (R. 497, 532). As he struggled to hold the glass, plaintiff stepped forward with his right foot, and he testifies that his foot slipped forward about four inches, causing him to injure his back (R. 512-513, 630-645). He did not fall. Plaintiff claims that his foot slipped on particles of cement debris that his coworkers had chipped out in order to lay the aluminum track for the panel of glass that plaintiff was placing.

20. Plaintiff's testimony herein reveals that the particles he slipped on were so small that he did not see them. When asked how he slipped, plaintiff replied that he "lifted up the glass and when I went to install the glass, you got to take a step towards -- away from you or where you are installing the glass and there was something on the ground, it must have been pebbles, it must have been something that when I put my foot down, my foot slipped and that was when I felt something, like something happened." (R. 499). Plaintiff testified that in the past he had complained if there was debris on the floor where he had to work, but this time he did not complain – because "I didn't know that that was there. It was minute." (R. 501-502).

21. Plaintiff alleges that it was error for the First Department to dismiss the Labor Law § 200 and common law negligence claims against Structure Tone because Structure Tone was the general contractor and assumed a contractual duty to "at all times keep the site and surrounding areas free from accumulations of

debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work and the Coordination Items" (R. 1869)." (Amico affirmation, ¶ 14). Plaintiff and his expert seem to assume that Structure Tone assumed a duty that was absolute and without regard to the standard negligence requirements of either actual or constructive notice of any hazardous condition.

22. Although plaintiff argues that Structure Tone had a contractual duty to keep the work site free from the accumulation of construction debris "at all times," any contractor's duty is bounded by the limits of common sense and does not require Structure Tone to ensure that the floor of the construction site is constantly freshly vacuumed as though it were a home rather than a construction site. Structure Tone's duty does not extend to interrupting a subcontractor's work to clean up every scrap of debris as it lands on the floor. Neither is Structure Tone required to constantly sweep the floor to ensure that there are no particles, and that is certainly true here where the particles were so minute that they were not noticeable. It is a construction site, after all.

23. Notably, plaintiff fails to present an iota of evidence to establish that there was an "accumulation of debris." Plaintiff has only shown that some "minute" particles resulted from his coworkers' work installing the track into which plaintiff and coworkers inserted the glass panel.

24. In dismissing the Labor Law § 200 and common law negligence claims against Structure Tone, the First Department read approximately 300 pages of briefs considering the evidence contained in a five-volume record on appeal, heard oral argument, and held that "CBRE and ST [Structure Tone] provide uncontroverted evidence that they did not create the condition at issue, nor did they have notice of the condition. CBRE and ST also established that they had no control over the means and methods plaintiff used in performing the work." (Exhibit "2", Order, page 5). Contrary to plaintiff's argument on this motion, the First Department determined that the evidence established that Structure Tone did not have notice of the presence of the concrete particles that were created when A-Val installed the recessed floor channel.

25. Plaintiff has not challenged this specific holding, but has instead merely disregarded it. Thus, even if this Court accepted all the arguments that plaintiff makes on this motion, plaintiff still would not be entitled to reversal of the First Department's Order insofar as it dismissed these claims. Plaintiff has failed to show that a further appeal would compel a different result.

26. The evidence establishing lack of notice was abundant. It was admitted that plaintiff's coworkers created the concrete particles by installing the aluminum track that plaintiff and his crew needed to hold the panel of glass they were installing (R. 491-492). Importantly, the concrete particles were so small that

they would not have been discovered on a reasonable inspection of the construction site, and if a reasonable inspection would not reveal the purported hazard, then the general contractor will not be charged with constructive notice, regardless of when they last inspected the area. Killeen v Our Lady of Mercy Med. Ctr., 35 AD3d 205, 206 (1st Dept 2006). Plaintiff acknowledged that he could not see the concrete particles because they were "minute" (R. 501-502).

27. Plaintiff testified that the particles he slipped on were so small that he did not see them. When asked how he slipped, plaintiff replied that he "lifted up the glass and when I went to install the glass, you got to take a step towards -- away from you or where you are installing the glass and there was something on the ground, it must have been pebbles, it must have been something that when I put my foot down, my foot slipped and that was when I felt something, like something happened." (R. 499). Plaintiff testified that in the past he had complained if there was debris on the floor where he had to work, but this time he did not complain – because "I didn't know that that was there. It was minute." (R. 501-502).

28. Because the particles were "minute" and not readily apparent to visual inspection, Structure Tone cannot be charged with constructive notice of the condition, and the First Department properly held that Structure Tone cannot be held liable pursuant to Labor Law § 200 or common law negligence claims. Even if this Court determines that the minute particles created by plaintiff's coworkers

were a "condition of the worksite," Structure Tone cannot be charged with constructive notice and cannot be deemed negligent. Indeed, where the defect was not visible and apparent to the plaintiff, the plaintiff cannot claim that the defendant should have noticed the non-obvious condition. See, e.g., Killeen v Our Lady of Mercy Med. Ctr., 35 AD3d 205, 206 (1st Dept 2006), holding that "Plaintiff failed to produce evidence that defendant had actual or constructive notice of the alleged hazard. There were no known complaints of a hazardous condition, and even plaintiff had not noticed the black ice before he fell (see Carricato v Jefferson Valley Mall Ltd. Partnership, 299 AD2d 444 [2d Dept 2002])."

29. In Carricato, supra, the Appellate Division held that the plaintiff's testimony acknowledging that she looked down but did not realize that she was stepping onto black ice established that "there was no proof to support the injured party's claim that the mall had constructive notice of the ice patch. The injured party's deposition established that the ice patch was not visible and apparent even to her as she stepped down on it." Carricato v Jefferson Val. Mall LP, 299 AD2d 444, 444 (2d Dept 2002). So too in the case at bar, the plaintiff testified that he looked down but did not observe the "minute" particles, so plaintiff's testimony established that the particles were not visible and apparent, and thereby established that plaintiff lacked any proof to establish that Structure Tone had constructive

notice. Because plaintiff's evidence fails to establish constructive notice, the Labor Law § 200 and common law negligence claims were properly dismissed as a matter of law, regardless of whether the purported defect is deemed a condition of the worksite, or the means and method of plaintiff's work.

C. The Minute Particles Of Cement Were The Means And Methods Of Plaintiff's Coworkers' Work Which Was Required So That Plaintiff Could Perform His Work

30. Plaintiff complains that the First Department should have accepted plaintiff's expert's opinion that the particles were a condition of the worksite rather than the means and methods of A-Val's work. However, the First Department applied well settled law upon uncontested facts and correctly determined, as a matter of law, that the minute particles of concrete were the means and methods of the work because they resulted when plaintiff's coworkers installed the aluminum track into which plaintiff and his coworkers would place the glass panel. Because the particles were means and methods of the work, Structure Tone would only be subject to liability if it "actually exercised supervisory control over the injury-producing work." Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 144 (1st Dept 2012). Structure Tone's evidence established that it did not exercise control over plaintiff's glass installation work, so it cannot be liable for the means and methods of that work.

31. The case Dalanna v City of New York, 308 AD2d 400 (1st Dept 2003), establishes the rule that where the hazard is created by the plaintiff's coworkers as they perform their required tasks, even months before the accident, the hazard is not "a defect inherent in the property," but is instead "created by the manner in which plaintiff's employer performed its work [and] [a]ccordingly, defendants cannot be held liable under section 200 even if they had constructive notice of the protruding bolt [citations omitted]." Plaintiff in Dalanna was a plumber who was directed to install pipes on a tank that was atop an outdoor, 50-foot-long concrete slab, and he tripped over a bolt that protruded from the slab. The Dalanna plaintiff argued that the protruding bolt was a hazardous condition of the worksite, for which defendants would be liable if they had constructive notice of the condition, but the First Department disagreed:

> The record shows that the bolt was one of many that had been put down to temporarily anchor the tank to the concrete slab prior to its installation, and that when the tank was taken off the slab several months prior to the accident, plaintiff's employer was instructed to cut down the protruding bolts so they would be level with the surrounding surface, but it apparently missed the one on which plaintiff tripped. Thus, the protruding bolt was not a defect inherent in the property, but rather was created by the manner in which plaintiff's employer performed its work. Accordingly, defendants cannot be held liable under section 200 even if they had constructive notice of the protruding bolt.

Dalanna v City of New York, 308 AD3d 400, 400 (1st Dept 2003).

32. Structure Tone emphasized the Dalanna decision on this appeal and the First Department cited the case with approval, but plaintiff's motion ignores the case. The rule is that where plaintiff or his coworkers created the hazard as a byproduct of their work, the hazard is due to the methods and manner of the plaintiff's employer, and the general contractor will only be liable if it actually exercised supervision over that method and manner of work. Since Structure Tone did not exercise supervision over A-Val's work, the First Department properly dismissed plaintiff's claims under Labor Law § 200 and common law negligence.

33. Plaintiff insinuates that Structure Tone should have intervened during A-Val's work to remove the debris that resulted from A-Val's methods, but that argument is contrary to the First Department's holding in Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139 (1st Dept 2012). Plaintiff in Cappabianca operated a brick-cutting saw that sprayed water onto the floor around him for an extended period of time, which eventually caused him to slip and be injured. Notwithstanding that the water accumulated for an extended period of time during which the defendants potentially could have acquired constructive notice of the wetness and removed the hazard, the First Department held that the extended period of time did not create a duty in the defendants, because the water hazard resulted from "the manner and means of the work, including the equipment used."

Cappabianca, 99 AD3d 139, 144 (1st Dept 2012). So too in the case at bar, plaintiff's coworkers created the condition he complained of. That condition was not inherent in the worksite, but instead resulted solely from the methods and manners of A-Val's work. Because Structure Tone did not exercise actual supervision over A-Val's methods and manner of work, Structure Tone cannot be held negligent, and the Labor Law § 200 claim was properly dismissed.

34. See also Tighe v Hennegan Constr. Co., Inc., 48 AD3d 201, 202 (1st Dept 2008), wherein the plaintiff electrician claimed that he slipped on debris that had accumulated during demolition at the worksite, and the First Department granted summary judgment dismissing the Labor Law § 200 and common law negligence claims against Hennegan Construction because Hennegan "did not exercise any control or supervision over the demolition work out of which the injury arose (see Singh v Black Diamonds LLC, 24 AD3d 138, 140 [1st Dept 2005])." Thus, even if debris has been allowed to accumulate (which was not shown herein), the debris remains the result of the methods and manner of the work, rather than a condition of the worksite for which the general contractor might be held liable.

POINT III

THE LABOR LAW § 241(6) CLAIMS WERE PROPERLY DISMISSED

35. The main reason for dismissal of the Industrial Code Rule 23-1.7(e)(2) and 23-1.7(d) claims was that "the pebbles were debris that were an integral part of the construction work. The integral to the work defense applies to things and conditions that are an integral part of the construction, not just to the specific task a plaintiff may have been performing at the time of the accident." (Exhibit "2," Order, page 4).

36. The First Department correctly held that the concrete particles were integral to plaintiff's work because the particles were created by plaintiff's coworkers while installing the aluminum track into which plaintiff and his coworkers had to insert the glass panel. Where the condition that led to plaintiff's injury was integral to his employer's work, there is no violation of the Labor Law. Defendant establishes the defense by demonstrating that the substance that allegedly caused plaintiff's accident was created by plaintiff's work or his employer's work. Solis v 32 Sixth Ave. Co., 38 AD3d 389 (1st Dept 2007); Giglio v Turner Constr. Co., 190 AD3d 829 (1st Dept 2021). The "integral-to-work" defense applies to things and conditions that are an integral part of the construction, not just to the specific and isolated task a plaintiff may be performing

at the time of the accident." Krzyzanowski v City of New York, 179 AD3d 479, 481 (1st Dept 2020).

37. The determination of whether a specific condition is inherent in a plaintiff's work, or integral to his employment, is an issue of law required to determine whether a duty exists, and therefore must be determined by the court, rather than by a jury. Messina v City of New York, 300 AD2d 121, 123 (1st Dept 2002); Bombero v NAB Constr. Corp., 10 AD3d 170, 172 (1st Dept 2004).

38. Plaintiff argues that the First Department's decision in Pereira v New Sch., 148 AD3d 410 (1st Dept 2017), mandates a different result because in that case the Court held that the concrete debris over which the plaintiff tripped was not integral to the work, but that concrete debris was not created by either plaintiff or his coworkers. That holding is inapplicable to the case at bar, where the substance that caused plaintiff's injury was created by plaintiff's coworkers, who were part of the same glass installation project that plaintiff was performing when he was injured.

39. Plaintiff's current reliance on the case Lester v JD Carlisle Dev. Corp., 156 AD3d 577, 578 (1st Dept 2017), is also inapposite because that case did not involve debris that resulted from the work of plaintiff or his coworkers. Instead, the plaintiff slipped on loose granules that had accumulated on a garage roof where plaintiff was installing a video screen. The Court held that the granules

were not integral to the structure because they were particles that had sloughed off over time, and accumulated. The particles were not created by the plaintiff's work installing a video screen, and were not a byproduct of video screen installation, so they "were not integral to the structure or the work [citations omitted]"

40. Plaintiff seems to be arguing that any time a worker slips on scraps that result from anyone's work at a construction site, they have demonstrated a violation of Industrial Code Rules 23-1.7(d) and 23-1.7(e)(2), but the "integral-to-the-work" defense applies when the substance was a byproduct of plaintiff's work.

41. Plaintiff argues that the case Singh v Young Manor, Inc., 23 AD3d 249 (1st Dept 2005), requires a conclusion that defendants cannot establish that a condition is integral to plaintiff's work unless they prove exactly when the plaintiff's employer deposited the debris, but that is not the rule. Instead, defendants in Singh established prima facie that the nail plaintiff stepped on was integral to his work because it was debris from plaintiff's own work removing wood paneling. However, the plaintiff presented evidence that the nail was part of a debris pile that had been "permitted to accumulate for several days" and plaintiff thereby rebutted the integral-to-the-work defense. Here, plaintiff has failed to present any evidence of when his employer created the dust, and provides only speculation that the condition of unseeable concrete particles had been present for some period of time to create a duty for Structure Tone to have removed it.

Plaintiff seeks to evade the "integral" defense and render it meaningless by putting the burden onto defendants in every instance to prove when plaintiff's employer created the substance. That burden is properly placed upon plaintiff and his employer. In any event, the presence of unseeable concrete particles on a construction site is a condition entirely different than a large pile of debris that had been permitted to accumulate for several days.

42. The case Tighe v Hennegan Constr. Co., Inc., 48 AD3d 201 (1st Dept 2008), also does not support plaintiff's argument. In that case, the First Department held that a "readily observable" accumulation of sheetrock debris that had "accumulated during the ongoing interior demolition work" was not an integral part or "inherent in the work being performed by plaintiff, an electrician, at the time of the accident (see Bombero v NAB Constr. Corp., 10 AD3d 170, 171 [1st Dept 2004])." Tighe, 48 AD3d at 202, 203 [holding stated in majority opinion, fact regarding sheetrock debris stated in dissenting opinion by Justice Andrias]. The plaintiff electrician was stringing electric lighting while the sheetrock debris resulted from ongoing demolition (performed by a different contractor), so the demolition was not related to plaintiff's employment at the site, and not integral to his work.

43. Rule 23-1.7(d) is intended to protect workers against working surfaces that are in a slippery condition due to "[i]ce, snow, water, grease and any other

foreign substance which may cause slippery footing [and directs that such conditions] shall be removed, sanded or covered to provide safe footing." Here, the substance that plaintiff alleges created a slippery surface was "chipped" cement, in particles so "minute" and fine that the plaintiff did not even see it. In other words, plaintiff claims there was a small amount of sand where he was working. Since applying sand is one of the remedial measures specified by Rule 23-1.7(d), it would be nonsensical to also consider sand as one of the slippery conditions, which might be ameliorated by adding – sand.

44. In any event, the amount of minute particles that plaintiff claims was present here was so miniscule that plaintiff did not even see it, so it cannot be deemed an "accumulation of dirt and debris" within the purview of Industrial Code Rule 23-1.7(e)(2). That provision mandates that working areas "shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed." As the First Department held in Mooney v BP/CG Ctr. II, LLC, 179 AD3d 490 (1st Dept 2020), a single screw that had fallen on the floor did not constitute an accumulation of dirt and debris, nor could it be construed to be a sharp projection within the meaning of the rule. It is even more obvious that the small quantity of minute granules of cement in this case are neither an

accumulation of debris, nor a sharp projection with the meaning of Rule 23-1.7(e)(2), so this rule is simply inapplicable to the facts of this case.

45. Because neither provision of the Industrial Code applies to the facts of this case, the plaintiff's Labor Law § 241(6) cause of action was properly dismissed as a matter of law.

POINT IV
PLAINTIFF FAILS TO SHOW ANY REASON WHY THE COURT OF APPEALS SHOULD BE CONCERNED WITH THIS MATTER

46. Section 1250.16 (d)(3) (i) of the rules of the Appellate Division requires the party moving for leave to appeal to the Court of Appeals to "briefly set forth the questions of law sought to be reviewed by the Court of Appeals and the reasons that the questions should be reviewed by the Court of Appeals." The rules of the Court of Appeals require the movant to explain "why the questions presented merit review by [the Court of Appeals], such as that the issues are novel or of public importance, present a conflict with prior decisions of [the Court of Appeals], or involve a conflict among the departments of the Appellate Division." Although plaintiff alleges that the decision somehow shows a conflict among the departments of the Appellate Division, plaintiff fails even to attempt to demonstrate that a conflict exists. Plaintiff's motion neither cites nor discusses a

single case from any Department except the First Department. A review of the motion shows that plaintiff fails to cite any case from the Second, Third or Fourth Departments.

47. In any event, a review of the briefs shows that parties have already cited cases from other Departments to the same effect. For example, in Cody v State of New York, 82 AD3d 925, 926-927 (2d Dept 2011), the Second Department considered the Labor Law § 200 and § 241(6) claims of a carpenter that twisted his leg when he stepped onto a scrap of lumber debris that had been left by one of his coworkers, and was left on the floor "as a result of, and during the course of ongoing construction work at the construction site [citations omitted]." The Second Department dismissed the Labor Law § 200 claim, holding that the scrap of wood debris was a result of the "manner in which the work was performed" because it was created by plaintiff's coworkers. Because the defendant did not control the methods of the plaintiff's work, the defendant could not be liable for the debris, regardless of whether the defendant had notice that the debris was present.

48. In Cody, supra, the Second Department also dismissed the Labor Law § 241(6) claim premised upon violation of Industrial Code Rule 23-1.7(e)(2). Although the plaintiff claimed that he tripped over lumber debris, the Court noted that the Rule requires that working areas be kept "free from accumulations of dirt

and debris … insofar as may be consistent with the work being performed," and held that the rule is "inapplicable because the material over which the claimant alleges he tripped was integral to the work being performed (see O'Sullivan v IDI Constr. Co., Inc., 7 NY3d 805, 806 [2006]; Smith v New York City Hous. Auth., 71 AD3d 985, 987 [2010])." Cody, 82 AD3d 925, 928. Indeed, the Second Department is applying the same rule that this Court applied in this case, and both Courts deem this interpretation to be in accord with the Court of Appeals decision in O'Sullivan v IDI Constr. Co., Inc., 7 NY3d 805 (2006).

49. Plaintiff admits there is no conflict with the Court of Appeals decision in O'Sullivan v IDI Construction Co. Inc., 7 NY3d 805 (2006), but plaintiff posits that the rule is an unwarranted expansion of the O'Sullivan rule. Since all four Department agree that the debris of plaintiff's own employer's work is "method and manner" of the plaintiff's employer's work, and an integral part of that employer's work, plaintiff has failed to show any reason why this Court should consider this issue at this time.

WHEREFORE, it is respectfully requested that plaintiff's motion be denied in its entirety. Leave to appeal should be denied.

Dated: New York, New York
January 17, 2023

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EXHIBIT 1

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

AFFIDAVIT OF SERVICE BY MAIL

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

On December 23, 2022

deponent served the within: Motion for Leave to Appeal

upon:

See attached service list

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on December 23, 2022

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

Job# 317968

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EXHIBIT 2

FILED: APPELLATE DIVISION - 1ST DEPT 08/16/2022 10:45 AM 2021-00357
NYSCEF DOC. NO. 39 RECEIVED NYSCEF: 08/16/2022

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

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

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

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

-against-

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

CBRE, INC.,
Defendant-Appellant-Respondent.

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

-against-

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

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

-against-

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

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

-against-

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

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

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

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

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

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

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

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

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

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

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

Plaintiff's Labor Law § 200 and common-law negligence claims should also be dismissed as against P&T, CBRE and ST as well. "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the

manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). Where the injury arises from the manner in which the work was performed, the owner or general contractor is not liable, unless "it actually exercised supervisory control over the injury-producing work" (*see id.)*. CBRE and ST provide uncontroverted evidence that they did not create the condition at issue, nor did they have notice of the condition. CBRE and ST also established that they had no control over the means and methods plaintiff used in performing the work. Park established that it was an out-of-possession landlord and although it had a right of re-entry to maintain and repair, it was not involved in the project and there are no allegations that the conditions alleged to have caused plaintiff's accident constituted a significant structural or design defect that violated a specific safety statute (*see Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538, 539 [1st Dept 2018]). As for the Labor Law § 241 (6) claim, Tishman established that it was not Park's statutory agent, for purposes of the Labor Law (*see e.g. Venter v Cherkasky*, 200 AD3d 932, 932-933 [2d Dept 2021]). Although Orsini, ST's general manager, did regular walk throughs of the work site, regular inspection of the site or the authority to stop any unsafe work is a general level of supervision that is not sufficient to warrant holding ST liable under Labor Law § 200 (*Singh v 1221 Ave. Holdings, LLC*, 127 AD3d 607, 608 [1st Dept 2015]). The concrete pebbles were not an existing defect or dangerous condition of the property, but rather were created by plaintiff's employer's work and the manner in which it was performed (*see also Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ENTERED: August 16, 2022

Susanna Molina Rojas
Clerk of the Court

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

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

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

On January 17, 2023

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

upon:

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

Sworn to before me on January 17, 2023

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

Job# 318135