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

AFFIRMATION IN OPPOSITION TO PLAINTIFFS-APPELLANTS' LEAVE TO APPEAL TO THE COURT OF APPEALS

LOUISE M. CHERKIS, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the truth of the following under the penalties of perjury and pursuant to CPLR 2106:

1. I am an associate of the firm of Smith Mazure, P.C., attorney for Defendants-Third-Party Plaintiffs-Respondents 200 Park, L.P. ("200 Park") and Tishman Speyer Properties, L.P. ("Tishman"). I am fully familiar with the facts and circumstances surrounding the instant action and make this affirmation in opposition to the motion of Plaintiffs-Appellants Felipe and Martha Ruisech ("Plaintiffs"") for an order granting leave to appeal to the Court of Appeals pursuant to CPLR 5602(a)(1)(i) and Court of Appeals Rule 500.22. To adhere to Court of Appeals Rule 500.1(f), a Corporate Disclosure Statement is annexed as **Exhibit A** on behalf of both 200 Park and Tishman.

2. This motion must be denied due to both procedural and substantive reasons. The requested appeal is not warranted under the CPLR and Rules of the Court of Appeals nor substantively in accordance with the parameters of judicial review by this Court.

ABSENCE OF TIMELINESS

3. Firstly, contrary to Plaintiffs' argument, the motion is untimely. Plaintiff was served with notice of entry of the Order denying the motion to reargue or for leave to appeal to the Court of Appeals on November 22, 2022 (See Amico Affirm., Exhibit "D"). Pursuant to CPLR §5513(b), Plaintiffs then had thirty days to serve a motion for leave to appeal to this Court. However, Plaintiffs failed to serve the motion within thirty days thereof, ultimately

serving it thirty-one days later December 23, 2022 (see Plaintiffs' Affidavit of Service by Tyrone Heath dated December 23, 2022).

4. Having failed to meet this threshold burden for leave to appeal, the motion should be denied based on this procedural error as violative of CPLR §2211. See also "Argument" section below at Point I.

MOTION DOES NOT SATISFY THE REQUISITES OF COURT OF APPEALS RULE 500(b)(4) AS TO WARRANT CONSIDERATION BY THIS COURT

5. The arguments presented by Plaintiffs do not merit the review of this court. To the contrary, Plaintiffs did not satisfy their required submission under Court of Appeals Rule 500 (b) (4). Plaintiffs do not present, as required by the Rule, a novel issue nor one of public importance, one presenting a conflict with prior decisions of this Court, or involving a conflict among the departments of the Appellate Division. Nor did Plaintiffs' submission "identify the particular portions of the record where the questions sought to be reviewed are raised and preserved."

6. Plaintiff Felipe Ruisech, an employee of Third-Party/Fourth Party Defendant-Respondent Appellant A-Val Architectural Metal, LLC ("A-Val"), alleges that his injury occurred while he was in the process of placing a glass partition for installation in a floor cut on the 19th floor of 200 Park Avenue, New York, New York in the course of renovation of tenant space undertaken by sole 19th floor tenant, Defendant-Appellant-Respondent CBRE, Inc. ("CBRE"). The Court may note that at all times relevant to this matter, 200 Park has been the owner of 200 Park Avenue, Tishman its managing agent, CBRE the tenant occupying the 19th floor, Structure Tone Global Services, Inc. ("Structure Tone") the general contractor retained by

CBRE for the renovation, and Structure Tone the subcontractor with A-Val which performed glazier work on the renovation.

7. As Plaintiff has left the Court to examine the Record to discover his own testimony as to his accident leaving his motion devoid of clear references to the Record, in this opposition, we take this opportunity to describe Plaintiff's own testimony as we did before the First Department [See 200 Park/Tishman Appellant Brief at 23-24]:

> He testified that then the remaining four men tried to install the glass, and he was located by the center of the glass [R491]. There was a track in place on the floor that A-Val had installed where they would place the glass. Id. The men lifted the glass for the installation, explaining that it had to lean toward them while off the ground, at which point he attested that to avoid the glass coming down on him, "I used all my strength in my body to prevent it from falling on me." [R497]. No suction cup lost contact with the glass [R498]. Although his testimony was that the other men "had to have felt" that there was a loss of control of the glass at that point, "no one had commented on it." [R498], but he continued that by "a team effort," his co-workers pushed the glass away from him. Id.
>
> Asked if he slipped on anything immediately before the accident, Felipe attested that while 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 is something on the ground, it must have been pebbles, it must have been something that when I put my foot down, my foot slipped and that was when I felt something, like something happened" [R499]. Thus, he had taken a step forward with his right foot when he felt slippage [R500] such that his body jolted backwards [R643]. He explained that when his right foot slipped forward it went against the channel on the concrete floor where the glass was being installed [R641, 644]. He therefore had to keep his legs in open position due to the slip [R649].
>
> He further described the "pebbles" [R499] as having been made out of the "cement from the flooring. I guess when the channel was chipped to make the space for the glass," [R503]. He described it as "minute," "small, little rocks. It was something small" [R500-502]. He explained that sometimes the channels were laid recessed in the floor and in some places they were not,

> depending on height" [R503]. Neither he nor his co-workers complained of this condition which was created by chipping done by other A-Val tradesmen, not glaziers [R502-504]. The opening referenced by him was a concrete recessed installation channel in the floor of a quarter inch created by his employer A-Val for the purpose to make a space for the glass [R504-505,644].

8. The Plaintiffs' allegations, fleshed out by discovery, including his own deposition testimony, revealed plaintiff to attribute his alleged slip (he never fell) to be due to a condition (minute concrete pebbles) characterized by him as debris which was created by A-Val co-workers in preparing the floor cut for the very glass installation he was in the course of performing. Such an alleged debris condition in the course of the renovation project created by his A-Val co-workers on the project was not a novel circumstances nor of public importance, nor one presenting a conflict with prior decisions of this Court, nor involving a conflict among the departments of the Appellate Division.

9. Plaintiffs' application therefore fails procedurally under Court of Appeals Rule 500(b) (4) because of absence of split or conflict between the other departments or with this Court on this issue. Rather, decisions of both this Court and the Appellate Divisions agree on the law, supporting that the dismissal of the Complaint was proper.

10. Plaintiff, a glazier, testified that when he injured himself, he was moving glass within open office space, and that the glass was to divide a hallway and an interior office after the project was completed. Plaintiff attributed his injuries to tiny or minute pebbles on the floor: these were a necessary and unavoidable byproduct of the glass installation work of his A-Val co-workers. He admitted that his co-workers from A-Val created the pebbles during their glass installation work which encompassed cutting the track or channel on the concrete floor wherein the glass being carried by Plaintiff Felipe Ruisech and other A-Val co-workers was to

be installed. Plaintiff injured himself on minute pebbles that his A-Val co-workers created during, and in furtherance of, the glass installation work he was performing for the project.

11. This fact pattern was recognized by the First Department as a proper basis by which to dismiss plaintiff's Labor Law §241(6) claim against 200 Park. Labor Law §241.6 had already been dismissed as to Tishman in the Court of original jurisdiction, Supreme Court, New York County. This Court should note that in the Order of the Supreme Court, New York County (Plaintiff's Exhibit "A" at 30 of 31 of this motion), the Court of original jurisdiction had dismissed the plaintiff's Labor Law §241(6) claim brought against "defendant/third-party plaintiff/third third-party plaintiff Tishman Speyer Properties, L.P." Plaintiffs did not appeal from that dismissal such that Plaintiffs' neglect to reference same was a further procedural and substantive error in this motion.

12. Plaintiffs' presentation in their motion misinterprets this Court's decision in *O'Sullivan v. IDI Const. Co.*, 7 N.Y. 3d 805 (2006) so as to assert that the First Department herein made a determination "beyond its intended reach" in eliminating Plaintiffs' Labor Law §241(6) cause of action based on the Industrial Code regulations at 12 NYCRR 23-1.7(d), 12 NYCRR 23-1.7(e) (1) and (2). Plaintiffs' argument that the Appellate Division erred as a matter of law regarding the applicability of these specific industrial code regulations, Industrial Code (12 NYCRR) § 23-1.7(d) and (e) (1) and (2), was a misappropriation of case law as well as misconstruing of the facts.

13. Under Plaintiffs' misguided version of the facts, Felipe Ruisech's employer A-Val becomes devoid of responsibility for the alleged "pebbles" which were created by its employees so as to be integral to and existing within the very midst of its own ongoing

construction activity for insertion of the glass door at the very location where they cut the channel in the floor. To the contrary, under these facts, the pebbles were in fact an "integral part of the construction work" as acknowledged by the First Department. Contrary to Plaintiffs' argument before the First Department, this Court's ruling did not "expand[s] the exception beyond the Court of Appeals' decision in *O'Sullivan* threatening to subsume the regulations entirely." Rather, the pebbles claimed by Plaintiffs to have caused Felipe's unsteadiness and injury were "an integral part of the construction work," distinguishing it from those accumulations of "debris" encompassed in those Industrial Code provisions serving as a basis for a Labor Law 241(6) claim. See Argument, Point II.

14. Plaintiff Felipe Ruisech himself did not create the pebbles nor was he assigned to their removal is of no moment in making a determination here.. Rather, under the clear and consistent precedents of this Court and of New York's Appellate Divisions, the key is that his co-workers created the pebble condition in connection with the work performed by him such that they were an integral part of the construction work rendering Labor Law §241(6) inapplicable as a matter of law. Also, as discussed herein, Plaintiffs have misapplied and overreached in their interpretation of the Industrial Code sections relied upon.

15. In conclusory fashion, unsupported by any evidence, Plaintiffs assert that this case: "involves questions of law that affect innumerable workers in the construction industry and that have significant public importance. Injuries to construction workers have a negative societal impact, just as the prevention of injuries provides a benefit to society as a whole" (Amico Affirm., ¶13). Plaintiffs do not elaborate on the particular significance to society or public importance of this plaintiff having injured himself on debris created by his co-workers in work integral to and in furtherance of a construction project. Indeed, this issue has already been

decided by this Court and the Appellate Divisions. A plaintiff's Labor Law § 241(6) claim fails when the debris that he injures himself on was integral to his work on the project.

16. Notably, Plaintiffs' motion reveals Plaintiffs' target is not 200 Park or Tishman but rather Plaintiff looks to the Labor Law for an improper avenue to pass through to Defendant/Third-Party Plaintiff-Appellant contractor Structure Tone. Plaintiffs' counsel in ¶¶14-16 of the Amico Aff'dt described Structure Tone thusly: "the key contracting party (general contractor Structure Tone) [was] allowed to elude responsibility for the hazardous condition and consequent injury, despite its "express assumption" of a contractual duty to "at all times keep the Site and surrounding areas free from [the] accumulation of debris, waste materials and other rubbish caused by the performance of, or arising in connection with, the Work and Coordination Items" [R1869].

17. Plaintiffs' "broad strokes" are devoid of any facts capable of supporting any viable cause of action as to 200 Park and Tishman, as well as any Labor Law §241(6) cause of action against any defendant. (See Point II, infra).

ARGUMENT

POINT I

PLAINTIFFS' MOTION MUST BE DENIED DUE TO UNTIMELINESS.

18. As identified above, the motion is untimely. Pursuant to CPLR §2211, timeliness is measured from service. A motion on notice is made when a notice of the motion or an order to show cause is served. CPLR §2211; *City Bank Farmers Tr. Co. v. Cohen*, 300 N.Y. 361, 367 (1950) ("It is statutory law that [a] motion is made when a notice thereof or an order to show cause is duly served.")(Internal citations and quotation marks omitted).

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

20. That this motion is untimely is well-settled in the history of this Court. In *Low v. Banker's Trust Co*., 165 NY 264 (1934), this Court stated in pertinent part: "The court has no power to grant an application for leave to appeal unless such application is made within thirty days after notice of entry of the order of the Appellate Division refusing leave to appeal…the application is too late unless noticed for hearing within thirty days after service of notice of entry of the order of the Appellate Division…" Id.

21. As such, at the outset, this motion must be denied for untimeliness

POINT II

PLAINTIFFS' MOTION MUST BE DENIED AS IT DOES NOT SATISFY THE REQUISITES FOR CONSIDERATION UNDER THE RULES OF THIS COURT UNDER COURT OF APPEALS RULE 500 (b) (4) AS IT DOES NOT ADDRESS AN ISSUE EITHER NOVEL OR OF PUBLIC IMPORTANCE, AND THERE IS NO SPLIT NOR CONFLICT AMONGST THE COURTS OF THIS STATE ON THE CONTROLLING LAW.

22. As referenced above, Plaintiffs have failed to satisfy the requisites for appeal to this Court under Court of Appeals Rule 500 (b) (4) so as to be procedurally and substantively defective thereby. Section 22 NYCRR 500.22[b][2][ii][4] of this Court's Rules of Practice specifies that a party who seeks permissive Court of Appeals' review should demonstrate why –

in a concise statement – the "questions presented for review … merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division …"

23. Here, where Plaintiff Felipe Ruisech injured himself on debris created by, or an unavoidable byproduct of, the project's work, no novel issue nor issue implicating a matter of public importance that has not already been decided by this Court and the other Appellate Divisions is presented. Additionally, plaintiff's leave application also fails as there is no split or conflict between the other departments or by this Court on this issue. Rather, decisions of other Departments and this Court agree on the law, such that the First Department dismissal was proper.

24. Plaintiff never met this standard because the law is clear in the Appellate Divisions and in this Court as to Labor Law §241(6) and the "integral to the construction" exception. Plaintiff misunderstands that the First Department properly dismissed his Labor Law § 241(6) claim because he fell over pebbles that his A-Val co-workers created during, and in furtherance of, their glass installation work for the project. The pebbles were an unavoidable and inherent result of the project; they were not "simply waste products" (Amico Affirm., ¶ 28). This decision was in accord with appellate case law, as well as precedent from this very Court.

25. Plaintiff's reliance on claiming overreaching from *O'Sullivan,* or support from principles addressed in *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 949 (1993) is meritless. While a viable Labor Law §241(6) cause of action as explained in *Ross* permits statutory liability without need to prove the defendants exercised control or supervision over the worksite, in the instant case, as in *Ross,* Plaintiffs' Labor Law 241(6) claim "must fail because

of the inadequacy of his allegations regarding the regulations defendants purportedly breached." Id at 502.

26. Labor Law §241(6) provides in pertinent part:

> All contractors and owners and their agents… who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. *The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work… shall comply therewith.*
>
> [Emphasis added]

27. The "rules" relied upon by Plaintiffs on this motion include Industrial Code §23-1. 7(d) addressing "Slipping hazards" and Industrial Code § 23-1.7(e) addressing "Tripping and other hazards." [12 NYCRR § 23-1.7 (d) and (e)].

28. Industrial Code §23-1. 7(d) provides:

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

29. Industrial Code § 23-1.7 (e) "Tripping and other hazards" (12 NYCRR § 23-1.7) provides:

> (1) Passageways. All passageways shall be kept free from *accumulations o*f dirt and debris and from any other obstructions

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

30. Plaintiffs did not establish a claim under either provision. Industrial Code 23-1.7(d) referring to a "slip" identified as examples "ice, snow, water, grease and any other foreign substance which may cause slippery footing. Legal precedent in the appellate divisions demonstrates lack of applicability of Industrial Code 23-1.7(d) to the facts of this case.

31. Plaintiffs rely on this motion on the Supreme Court decision [Amico Aff'dt at Exhibit "A"], as opposed to the First Department decision [Amico Aff'dt at Exhibit B']", in the instant case by claiming that *Pereira v. New School*, 148 AD3d 410 (1st Dept. 2017) is conflicting precedent. However, the lower court's language completely missed the point that the instant case is highly distinguishable from *Pereira*. The First Department decision recognized the lower court's error by its decision. In *Pereira*, the alleged offending condition was "excess wet concrete discarded on the plywood" which satisfied the "slippery condition" language in concrete §23-1.7(d) which the Court did not consider integral to the work. In *Pereira*, Plaintiff who was a carpenter who tripped on rebar which was hidden by plywood testified that he did not work with rebar or concrete in constructing forms. Ruisech, by contrast, used the very channel cut by his co-workers which generated the pebbles, in the performance of his work. There is no conflict with *Pereira.*

32. To the contrary, on the Ruisech appeal, the First Department properly recognized that 12 NYCRR §23-1.7 (d) ("Slipping Hazards") is inapplicable noting that the floor, a concrete 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 *Ruisech v. Structure Tone, Inc,* 201 AD3d 412, 174 N.Y.S.3d 367 (1st Dept. 2022), citing *Cruz v. Metropolitan Tr. Auth.,* 193 AD3d 639, 640, 148 N.Y.S.3d 78 (1st Dept. 2021). In *Cruz,* the First Department found the subsection was not applicable to "loose dirt and debris," the Court noting that it "did not constitute a 'slippery condition' as contemplated by 12 NYCRR 23-1.7(d)." Id at 640.

33. In so determining, the First Department in *Cruz* cited to the Second Department decision in *Miranda v City of New York*, 281 AD2d 403, 721 N.Y.S.2d 391 (2d Dept 2001) which noted the code section's identification of "foreign substance which may cause slippery footing [to] be removed, sanded or covered," so as to reject plaintiff's argument that a sandy surface constituted a slippery condition under the section. Id. at 404. In *Miranda*, the plaintiff alleged that he was in an excavation trench lifting up one end of a 300-pound pipe when the loose sand underneath his feet shifted, causing him to lose his footing and fall.

34. Also cited in *Cruz* addressing conditions not contemplated under the code section was *Fitzgerald v Marriott Intl., Inc*., 156 AD3d 458, 458, 64 N.Y.S.3d 883 (1st Dept 2017) wherein the First Department held that 12 NYCRR 23-1.7 (d) did not apply, as plaintiff did not slip on a "slippery condition" or "foreign substance" within the meaning of that provision. In *Fitzgerald*, the plaintiff slipped and fell on a piece of mud-covered insulation while walking down a wooden ramp during the course of his employment as a steamfitter. Id at 458. See also, *D'Acunti v New York City School Constr. Auth*., 300 AD2d 107, 751 NYS2d 459 (1st Dept 2002)

(no evidence that the accumulations of dirt and debris constituted a "slippery condition" within the meaning of 12 NYCRR 23-1.7 (d)).

35. *D'Acunti* cited to *Greenfield v New York Tel. Co.*, 260 A.D.2d 303, 689 N.Y.S.2d 72 (1st Dept. 1999), lv denied, 94 NY2d 755, 723 N.E.2d 566, 701 N.Y.S.2d 711 (Ct. App 1999) wherein normal dirt and gravel was insufficient to establish, prima facie, "slippery condition" as contemplated by 12 NYCRR 23-1.7 (d). See also, *Nankervis v Long Is. Univ.*, 78 AD3d 799, 911 NYS2d 393 (2d Dept 2010) (accumulation of debris did not constitute a "slippery condition" within the meaning of this code section); *Aguilera v Pistilli Constr. & Dev. Corp*., 63 AD3d 763 (2d Dept 2009) (debris not slippery condition under 23-1.7(d)); *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622, 769 NYS2d 559 (2d Dept. 2003) (demolition debris on which plaintiff slipped was not the type of foreign substance contemplated by this provision); *Rose v. A. Servidone, Inc*., 268 AD2d 516 (2d. Dept 2000) (dirt and pebbles strewn on blacktop was not a slippery condition under 23-1.7(d)).

36. 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).

37. Industrial Code §23-1.7(e) also does not apply: this was not a passageway under § 23-1.7(e)(1), and the pebbles, the alleged "debris" which were within the "working area" were an integral part of the construction work so as to be excluded from application of §23-1.7(e)(2). As this Court has held, 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).

38. 12 NYCRR 23-1.7(e) (2) is specifically written so as to exempt that which encompasses material used in "work being performed" in the "working area." The regulation does not apply where the object on which plaintiff claims to have tripped was an integral part of work being performed. The floor cutout area including the pebbles was the location on which plaintiff was working at the time of the occurrence and the condition existed due to the preparations by his co-workers for the task he was performing. *Alvia v. Teman Elec. Contr., Inc.*, 287 A.D.2d 421, 423 (2d Dept. 2001) (regulation does not apply where "the object on which plaintiff tripped … was an integral part of the work he was performing")

39. Industrial Code §23-1.7(e)(2), which applies to tripping hazards in working areas is inapplicable to the pebbles created by Ruisech's coworkers as those pebbles were an integral part of the work being performed to install the glass door partition when they cut the channel at which Plaintiff was installing the glass at the time of his stumble. In *Krzyzanowski*, the First Department addressed the "integral-to-the work" defense raised by defendants, finding it equally applies to Industrial Code § 23-1.7 (e) (1), as well as section 23-1.7 (e) (2), noting *O'Sullivan,* supra at 805-806, excluded application of the code section to that which was "an integral part of the construction." Id. *Krzyzanowski,* supra at 480-481, also explained that the 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. Id at 481.

40. In *Smith v New York City Hous. Auth*., 71 AD3d 985, 987, 897 N.Y.S.2d 232 (2d Dept 2010), the Second Department held that NYCHA demonstrated, prima facie, that 12 NYCRR 23-1.7(e)(2), which requires owners and contractors to maintain working areas free from tripping hazards such as, inter alia, debris and scattered materials "insofar as may be consistent with the work being performed," did not apply. In *Smith*, the evidence submitted by

NYCHA demonstrated that the materials that the injured plaintiff alleges he tripped over were integral to the work being performed. Plaintiff had claimed that after broken brick and cinder block were piled up onto scaffolding, laborers would remove it, but at the time plaintiff tripped on the broken pieces had not yet been removed from the scaffolding when the accident occurred. Id. at 986-987.

41. Therefore, the Second Department also recognizes the exception. The pebbles were equally integral to the work of Plaintiff and his A-Val co-workers as to be consistent with the work being performed in effectuating the installation of the glass door partition. See *Solis v. 32 Sixth Ave. Co. LLC*, 38 A.D.3d 389 (1st Dept. 2007) (the integral part of that work exception was applied by the First Department under §23-1.7(e)(2) to brick debris covering the scaffold where plaintiff and a co-worker were performing masonry work); *Salinas, supra at 662*; *Barrney Skanska Constr. Co.*, 2 AD3d 619, 622, 769 NYS2d 559 (2d Dept. 2003);

42. Plaintiff Felipe explained the condition existing due to the co-workers' creation of the recessed channels (the minute pebbles) as enabling the very installation he was performing as the source of his purported instability. Whether described by him as pebbles or as debris, they were created by A-Val co-workers in the course of preparing the location for his very installation. Both tasks were integral to the installation. Plaintiffs own testimony established that this channel and minute pebbles created by it were integral to his work at the time of the incident. By his movements and the actions of his co-workers in preparing the opening for installation of the glass, the condition was an "inherent result" of the A-Val work being performed. See *Cabrera v. Sea Cliff Water Co.*, 6 AD3d 315 (1st Dept. 2004) (location where plaintiff fell was more a work area then a passageway, and appearance of sheetrock dust and sawdust appear to have been unavoidable and inherent result of cutting of sheetrock and plywood

by co-workers did not constitute hazard under 12 NYCRR 23-1.7(e)(2)). See also, *Torres v. Triborough Bridge and Tunnel Authority*, 193 AD3d 665 (1st Dept. 2021) (alleged debris resulted directly from the ongoing work being performed so as to constitute an integral part of the work); *Ghany v. BC Tile Contractors, Inc.*, 95 AD3d 768 (1st Dept. 2012) (small stone was unavoidable an inherent result of work being performed at the site); *Stafford v. Viacom*, 32 AD3d 388 (2d Dept. 2006) (glue was an integral part of work activity); *Adams v. Glass*, 212 AD.2d 972 (4th Dept. 1995) (where a plaintiff tripped over wire mesh on which concrete was to be poured, the court found it to be an integral part of the work so as not to come under the prohibition as to accumulation of dirt, debris, scattered tools or materials in work areas).

43. In *Harvey v. Morse Diesel Intern., Inc.*, 299 A.D.2d 451, 453 (2d Dep't 2002), the worker, an electrician, was injured when she tripped on a six-inch piece of electrical cable which was on the floor below the ladder she was descending. The appellate court held the trial court improperly denied defendants' summary judgment motion with respect to the cause of action pursuant to Labor Law § 241(6) based on an alleged violation of 12 NYCRR § 23-1.7(e)(2). The Second Department explained that said regulation, requiring working areas, such as a floor, to be kept clear of debris and scattered tools and materials insofar as consistent with the work being performed, did not apply where the object on which a plaintiff tripped was an integral part of the work the plaintiff was performing. *Harvey*, supra at 452.

44. Plaintiff's attempt to claim conflict between the Appellate Divisions has no merit. Aside from the fact that Plaintiff's reliance on cases was ill-conceived, the other Appellate Departments support the "integral" exception applicable here. Indeed, in *Cooper v. Sonwil Distrib. Ctr., Inc.*, 15 A.D.3d 878 (4th Dep't 2005), the owner was granted summary judgment dismissing all claims including plaintiffs' Labor Law §241(6) claim, which claim was premised

on defendant's alleged violation of 12 NYCRR 23-1.7 (e) (1) and (2) where he had a construction manager present daily. In *Cooper*, Defendant owner was not liable for violating the regulations where plaintiff "tripped over demolition debris created by him and his coworkers, which was an integral part of the work being performed"; *Salinas*, supra at 662; *Cabrera*, supra at 316; see also, *Bond v York Hunter Constr*., 270 AD2d 112, 113, 705 NYS2d 40 (1st Dept., 2000), aff'd 95 NY2d 883, 738 NE2d 356, 715 NYS2d 209 (2000).

45. In *Harris v. Rochester Gas & Elec. Corp*., 11 A.D.3d 1032 (4th Dep't 2004), the Fourth Department affirmed the Order dismissing plaintiff's Labor Law § 241 claim under similar facts. There, plaintiff used a jack hammer during an ongoing construction project, which created the "loose debris" that contributed to his accident. Id. at 1033. The Court dismissed the Labor Law § 241 claim because, like here: [t]he accumulation of the concrete debris in the work area 'was an unavoidable and inherent result of [the] work at a[n] ongoing [construction project]. Id. at 1033.

46. To this end, in addition to *Pereira*, the few cases relied upon by Plaintiffs do not support a finding of conflict. Plaintiffs cite to *Singh v. Young Manor, Inc*., 23 AD3d 249 (1st Dept. 2015) for the proposition that the pebbles were accumulated debris not integral to the plaintiff's work, and to *Tighe v. Hennegan Constr. Co*., 48 AD3d 201 (1st Dept. 2008) for the proposition that "debris accumulated as a result of demolition" is not integral to the construction work not only disregards the actual facts related to the minute pebbles, but ignores the distinction between minute pebbles created by his coworkers, which was an integral part of the work being performed, and accumulated piles of debris for days not integral to the construction work performed by Plaintiff and his co-workers.

47. So too, contrary to plaintiff's contentions (Amico Affirm., ¶27), there is no internal split on this issue within the First Department as the cases relied upon by plaintiff on this point are factually inapplicable, which notably is the reason for their having not been addressed in the First Department decision in dismissing the Complaint.

48. In *Lester v. JD Carlisle Dev. Corp., MD.*, 156 A.D.3d 577 (1st Dep't 2017) referred to in this motion (Amico Affirm., ¶ 27), the "loose granules" that plaintiff fell over had nothing to do with, and were not created by, the project's work. Id. at 578. Instead, those granules were a part of a "waterproof membrane" that "was slippery because it contained granules, i.e., a 'ball bearing' or sand like substance" that was completely unrelated to the work of "constructing a steel frame for a movie screen on top of a roof." By contrast, here Plaintiff testified that the pebbles were the result of the track or channel work performed by other A-Val co-workers, which was necessary to install the glass into these tracks or channels during the course of the project [R490-492, 485, 501, 503-504, 616].

49. Plaintiffs' reliance on *Singh*, supra, is meritless as well. *Singh* is inapplicable as in that case the plaintiff slipped on a random "nail near a pile of debris" in his work area "that had been permitted to accumulate for several days" *Singh*, supra at 249]. In the instant case, Plaintiff Felipe claimed to have tripped over pebbles intentionally and recently created by his co-workers in the course of A-Val's work in which he was a participant [R485, 490-492, 501, 503-504, 616].

50. In *Tighe,* (Amico Affirm., ¶27), plaintiff injured himself when he fell over "debris accumulated as a result of the demolition" performed by a contractor during plaintiff's electrical work for a separate contractor. Id. at 202. Thus, *Tighe* is inapposite because plaintiff's work

there was not related to the debris he fell over, whereas here plaintiff fell over pebbles directly related to and caused by his employer's work on the project [R485, 490-492, 501, 503-504, 616].

51. Plaintiff also incorrectly claims that the jury or his own expert should decide whether the particular industrial codes allegedly at issue here apply. To the contrary, the Courts of this State have repeatedly determined that interpretation of an Industrial Code regulation to a particular condition with a particular set of facts presents a question of law for the Courts to decide. The interpretation of an Industrial Code regulation and determination as to whether a particular condition is within the scope of the regulation present questions of law for the court. See *Pruszko v. Pine Hollow Country Club, Inc.*, 149 A.D.3d 986, 988 (2d Dep't 2017); *Kelmendi v. 157 Hudson St., LLC,* 137 A.D.3d 567, 568 (1st Dep't 2016); *Penta v. Related Companies, L.P.*, 286 A.D.2d 674, 675 (2d Dep't 2001); *Messina v. City of New York*, 300 A.D.2d 121, 123 (1st Dep't 2002).

52. There is no legal issue justifying intervention by this court. From lack of timeliness to other failure to adhere to this Court's Rules to legal precedent in this Court as well as in the Appellate Divisions (notably, Plaintiff does not even discuss all Appellate Divisions), soundly supporting the decision rendered by the First Department herein, and the denial of reargument or leave to appeal to this Court also rendered by the First Department, there lacks a meritorious basis to engage this Court.

CONCLUSION

53. Based on the foregoing, this Court should deny plaintiff's motion in its entirety.

WHEREFORE, it is respectfully requested that the Court deny the instant motion in its entirety and grant such other and further relief as to the Court may seem just, proper, and equitable.

Dated: New York, New York
January 17, 2023

Louise M Cherkis

LOUISE M. CHERKIS

LMC/lmc
ARCH-00759.1/131

EXHIBIT A

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 500.l(f) and 500. I 3 (a) of the New York Court of Appeals Rules of Practice, Defendants-Appellants' 200 Park, L.P. and Tishman Speyer Properties, L.P. respond as follows:

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

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

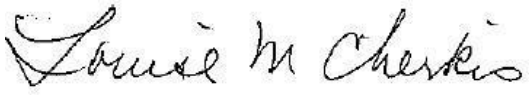
200 Park has no subsidiaries.

Tishman Speyer Properties, L.P. Subsidiaries are:

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

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

Dated: New York, New York
January 15, 2023



Louise M. Cherkis

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT**
COUNTY OF NEW YORK	)		**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 or at

On January 17, 2023

deponent served the within: **Opposition to 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, 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

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

T. Heath

Job# 318083

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