To be Argued by:
RICHARD P. AMICO
(Time Requested: 30 Minutes)

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

Court of Appeals

of the

State of New York

FELIPE RUISECH and MARTHA RUISECH,

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents,

– and –

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

– and –

CBRE INC.,

Defendant-Respondent.

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS FELIPE RUISECH AND MARTHA RUISECH

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

Third-Party Plaintiffs-Respondents,

– against –

CBRE INC.,

Third-Party Defendant-Respondent.

STRUCTURE TONE GLOBAL SERVICES, INC.,

Second Third-Party Plaintiff-Respondent,

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

Second Third-Party Defendant-Respondent.

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

Third Third-Party Plaintiffs-Respondents,

– against –

A-VAL ARCHITECTURAL METAL III, LLC,

Third Third-Party Defendant-Respondent.

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PRELIMINARY STATEMENT

Plaintiff-Appellant Felipe Ruisech ("Plaintiff") respectfully submits this reply brief in further support of his appeal and in response to the various briefs filed by Respondents-Defendants ("Defendants").

ARGUMENT

POINT I: THE APPLICATION FOR LEAVE TO APPEAL WAS TIMELY

As has been addressed in Plaintiff's brief and Plaintiff's opposition papers to Defendants' motion and cross-motion to dismiss, the petition for leave to appeal was timely filed and the appeal should be allowed to proceed.

The Appellate Division First Department does not allow for the filing of a Notice of Entry on the NYSCEF docket for the Appellate Division, but instead requires that a Notice of Entry be filed on the NYSCEF docket of the trial court. That rule necessitates the filing of a Notice of Entry of an Appellate Division order on the trial court docket even though the motion was filed, heard and decided by the Appellate Division.

The potential for a missed docket entry looms large in situations like this one. This quirk in the e-filing system clearly undermines the "notice" portion of a Notice of Entry. If the purpose of a Notice of Entry is to put your adversary on notice of an order and start the appeal deadline clock running, is that end best served in this manner? The inconsistent NYSCEF docketing rules for Notices of Entry of Appellate Division Orders in the various Departments leaves open the possibility of a party missing their deadline without having ever been aware that the deadline was approaching. That runs contrary to the orderly and fair application of the law.

POINT II: PLAINTIFF'S LABOR LAW 241(6)
CLAIM SHOULD NOT HAVE BEEN DISMISSED

Respondent A-Val Architectural Metal III, LLC states in their brief that "Since the pebbles were created as part of the ongoing glass installation work, Plaintiff's claim under Labor Law §241(6) is without basis in law." Respondent Structure Tone Inc. states that "concrete material was integral to the installation of the glass panel". Respondents continue to gloss over the facts of this case to make this case fit under the integral to the work doctrine. The pebbles were not "created" as part of the glass installation work, but rather debris created while carving out the channels in the concrete. Time elapsed between the craving of the channels and the installation of the glass where the pebbles both could and should have been cleaned up. The pebbles are the waste product of carving out the channels. They do not contribute to or assist in the glass installation and are not necessary for the glass to be installed. They are a waste product and nothing more. The pebbles are no different than saw dust, metal shavings, concrete dust or a multitude of other waste products created at a construction site. Debris is a product of construction that should be removed and/or remediated, not something that contributes to the construction process.

Defendants were liable contractually and under the Labor Law to keep the site clean, to remove dirt, debris and other hazards and to warn the workers of said hazards. They failed to do so and, as a result, Plaintiff was injured. Defendants'

desperate attempt to categorize the pebbles as something other than debris illustrates that they know the consequences for failing to remove debris from a construction site under the controlling case law. Finally, covering the floor with sheetrock to protect the glass is certainly not the same as covering it with debris. That argument should be rejected by this Court.

The Industrial Code sections cited by Plaintiff are applicable to the facts of this case. The regulations identify the hazards that endanger "the lives, health and safety" of those so employed. Slipping, tripping, and other hazards are explicitly designated by Rule 23 as risks that materialize from, among other things, "accumulations of dirt and debris:"

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

The Appellate Division First Department improvidently applied its discretion in this case when it determined that the concrete debris that caused

Plaintiff to slip and/or trip was integral to the work being done by Plaintiff at the site. The Court's expansive definition of "integral" to the work would essentially cause the exception to swallow up the situations underlying it. It is important to distinguish between materials integral to the work and debris left behind during the work process.

In Lester v. JD Carlisle Dev. Corp., MD., 156 A.D.3d 577, (1st Dept. 2017), "loose granules on the roof surface that caused plaintiff to slip were not integral to the structure or the work but were an accumulation of debris from which § 23–1.7(e)(2) requires work areas to be kept free." Id. (internal citations omitted) (granting plaintiff summary judgment on § 23–1.7(e)(2)).

In Singh v. Young Manor, Inc., 23 A.D.3d 249, (1st Dept. 2005), the Court classified "debris" as loose material, holding that Industrial Code (12 NYCRR) § 23–1.7(e)(2) was applicable where plaintiff stepped on a nail near a pile of debris in the work area that had been permitted to accumulate for several days, and found no merit to defendant's contention that the hazard must be viewed as having been an integral part of plaintiff's work removing wood paneling. Id.

Likewise, in Tighe v. Hennegan Const. Co., 48 A.D.3d 201 (1st Dept. 2008), 23-1.7(e)(2) was applicable where "debris accumulated as a result of the demolition—. . .was not inherent in the work being performed by plaintiff, an electrician, at the time of the accident." Id.

In the instant case, while the trial court held that issues of fact were present, the Appellate Division decided as a matter of law that the debris on which the Plaintiff slipped was "an integral part of the construction work," despite that accumulations of "debris" is one of the hazards from which the code expressly seeks to protect workers. That holding is inconsistent with the reasoning underlying the "integral part of the construction" exception. The Appellate Division's decision below applies in expansive view of the "integral to the construction" exception for defense to the industrial code regulations at issue, which goes beyond this Court's holdings in prior cases. That interpretation and application of the case law should be rejected by this Court. The Appellate Division's holding not only defeats specific industrial code regulations designed to promote the safety of construction workers, but it also usurps the fact-finding function of a jury on such matters as what constitutes "debris," "foreign substance," "slippery condition," and "passageway."

Additionally, the general contractor expressly contractually assumed a duty to remediate the type of condition which caused Plaintiff's injuries. The failure to enforce the general contractor's express assumption of duty to the Plaintiff (evidenced by the construction contract itself) deprived Mr. Ruisech of the protections of Labor Law §200, in addition to those of Labor Law §241(6), effectively shifting all responsibility to the State and social institutions.

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

POINT III: PLAINTIFF'S LABOR LAW §200 CLAIM SHOULD NOT HAVE BEEN DISMISSED

The pebbles that caused Plaintiff's incident were debris from the installation process, not inherent to the work. The channels could be carved, the debris cleared and then the installation completed. The fact that Defendants proceeded with the installation without assuring a safe work environment should be borne by Defendants, not by Plaintiff.

On the issue of notice, the case law is clear that the initial burden is on Defendants on a motion for summary judgement to prove that they were free of notice, not vice versa. Courts have required specific details about inspections to satisfy this burden and none of the Defendants could state with certainty when they last inspected the area. Defendants, therefore, cannot meet their burden and the motion should have been denied.

Here, there has been no evidence that the Defendants had inspected the area or that any inspection procedures were in place to warrant a lack of constructive notice. The Plaintiff's expert has explained in his affidavit that the failure to inspect for dangerous conditions such as the concrete debris the Plaintiff fell violates normal

custom and practice on a construction site. The debris posed an elevated risk to the glazers given the weight and difficulty of installing the glass in the area.

In addition, the owner contractually imposed upon the general contractor the duty to keep the work site free from the accumulation of construction debris "at all times." (emphasis added). This contractual duty sets this case apart from the typical Labor Law §200(1) claim. The contract required the general contractor to remove such debris as work was being performed. Defendant was contractually obligated to inspect the work site and remedy any dangerous or defective conditions which would constitute hazards within the meaning of the contractual obligation. Structure Tone has failed to put forth any evidence that it conducted inspections or performed the work under the agreement. The workers did not prepare inspection logs or document cleanup work despite Structure Tone having assumed the duty by contract to provide a reasonably safe place to work and breached that duty owed to the plaintiff and other tradesmen.

Respondent Structure Tone argues that the above provision does not create a duty to Plaintiff, but instead only to the owner. Structure Tone argues that Plaintiff and the owner would have differing expectations arising from that provision. What would be the purpose of the provision other than to assure safety at the site? Who else would the provision be protecting other than constructions workers since they are the only ones on the site during construction? The provision was clearly added

to the contract as an additional means of assuring that the general contractor kept the site in a safe and hazard-free condition. The argument made by Respondent would render the contractual term meaningless because it would create a duty to no one on the site. It is certainly not "common sense that a project owner's interests and expectations for the cleanliness of a Project site are inherently different from a worker on the Project site, especially given the safety implications". The exact opposite is true – the interests of the owner and workers are identical as they both need and desire a safe work environment.

Defendants collectively owed a non-delegable duty to eliminate all hazards that would cause unsafe footing under the Industrial Code and the defendant-Structure Tone was contractually bound to provide laborers to remove debris from the construction areas. The are clearly questions of fact as to whether Defendants are liable for causing the Plaintiff's injuries sustained after he lost his footing carrying a 500-pound panel of glass.

CONCLUSION

There are issues of fact regarding the Defendants' liability to Plaintiff under Labor Law §§200, 241(6), the construction contract which delegated the responsibility to clean the floor where the Plaintiff slipped to the general contractor, as well as general negligence. For the reasons stated herein, Plaintiff-Appellant respectfully requests that the Order of Appellate Division First Department, which reversed the decision of the Supreme Court which had denied Defendants' motions for summary judgment as to Plaintiff's Labor Law 241(6) claims (specifically as to violations 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e)(2)) and Labor Law § 200, be reversed.

Dated: May 31, 2024
Rochester, New York

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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

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Dated: May 31, 2024

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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 June 3, 2024

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the address(es) designated by said attorney(s) for that purpose by depositing **3** 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 this 3rd day of June, 2024.

MARIANA BRAYLOVSKIY
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