To Be Argued By:
KEVIN J. MURTAGH
Time Requested: 15 Minutes

New York County Clerk's Index No. 158449/17

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

FRANK CIOPPA and LINDA CIOPPA,

Plaintiffs-Appellants,

—against—

ESRT 112 WEST 34TH STREET, L.P., EMPIRE STATE REALTY TRUST, INC., AMERICON CONSTRUCTION INC. and HITT CONTRACTING, INC.,

Defendants-Respondents.

AMERICON CONSTRUCTION INC. and HITT CONTRACTING, INC.,

Third-Party Plaintiffs-Respondents,

—against—

ESS & VEE ACOUSTICAL CONTRACTORS INC.,

Third-Party Defendant-Respondent.

CASE NO. 2023-04810

BRIEF FOR DEFENDANTS-RESPONDENTS ESRT 112 WEST 34TH STREET, L.P. AND EMPIRE STATE REALTY TRUST, INC.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

Statutes

PRELIMINARY STATEMENT

This action arises from injuries allegedly sustained by Plaintiff-Appellant Frank Cioppa (hereinafter "Plaintiff") in a work-related accident at 111 West 33rd Street, New York, New York (hereinafter the "Subject Property"), on June 7, 2017.

Defendants-Respondents ESRT 112 West 34th Street, L.P. and Empire State Realty Trust, Inc. (hereinafter the "Respondents"), were the owners of the Subject Property. In connection with a construction project at said property, the Respondents hired Defendant-Third-Party Plaintiff-Respondent Americon Construction Inc. (hereinafter "Americon") as the general contractor. Americon then hired Third-Party Defendant-Respondent Ess & Vee Acoustical Contractors, Inc. (hereinafter "Ess & Vee") as the sheetrock and framing subcontractor at the Subject Property.

Plaintiff was working for Ess & Vee at the Subject Property on the date of the alleged accident. In his employment with Ess & Vee, Plaintiff performed interior carpentry work.

At some point prior to the alleged accident, Plaintiff provided that the floor of a lobby area where he was working was removed in order to make way for a new floor. On the date of the alleged accident, Plaintiff found construction equipment in the area he was working in and sought help to remove it. His alleged accident occurred when he and a co-worker lifted a piece of plywood in an attempt to

subsequently move a cement mixer. In the process of doing so, Plaintiff allegedly stepped in a hole and fell backwards.

After the alleged trip and fall, Plaintiff commenced the instant action by filing a Summons and Complaint on September 21, 2017, under the color of various Labor Law claims including those premised on alleged statutory violations of §§ 200, 240(1), and 241(6). More relevant to the instant appeal, Plaintiff asserted[1], *inter alia*, a cause of action pursuant to Labor Law § 241(6) based upon a violation of Industrial Code 23-1.7(e)(2).[2]

On or about April 14, 2022, Americon, as well as Defendant-Third-Party Plaintiff-Respondent (hereinafter "HITT"), moved for summary judgment seeking, *inter alia,* dismissal of Plaintiff's Complaint in its entirety. In response, Plaintiff filed a cross-motion on April 17, 2022 which sought partial summary judgment as to liability on Plaintiff's Labor Law § 241(6) claim.

This appeal comes from a Decision and Order by the Hon. Alexander M. Tisch dated September 15, 2023, which, *inter alia,* granted Americon and HITT's motion for summary judgment to the extent that Plaintiff's Labor Law § 241(6) cause of

[1] Plaintiff Linda Cioppa also maintains a derivative loss of consortium claim.
[2] Plaintiff also asserted claims premised on other Industrial Codes under Labor Law § 241(6) as well as alleged violations of Labor Law § 240(1). These claims have been dismissed and, by Plaintiff's own admission, are not being appealed. *See Plaintiff App.* at pg. 2, footnote 3.

action was dismissed in its entirety, and denied Plaintiff's cross-motion for partial summary judgment on its Labor Law § 241(6) cause of action.

The lower court properly dismissed Plaintiff's Labor Law § 241(6) cause of action in its entirety as the plywood that Plaintiff allegedly tripped on is not a tripping hazard under the Industrial Code and, nevertheless, it was integral to the work being performed at the Subject Property such that liability under Labor Law § 241(6) is improper.

Accordingly, and for the reasons that follow, it is respectfully requested that this Honorable Court affirm the lower court's ruling which granted Americon and HITT's motion for summary judgment to the extent that Plaintiff's Labor Law § 241(6) cause of action was dismissed in its entirety and denied Plaintiff's cross-motion for partial summary judgment on its Labor Law § 241(6) cause of action.

COUNTER-QUESTIONS PRESENTED

1. Did the lower court properly dismiss Plaintiff's cause of action based upon an alleged violation of Labor Law § 241(6)?

Answer: Yes.

COUNTER-STATEMENT OF FACTS

A. The Work at the Subject Property

The Respondents were the owners of the Subject Property at the time of the alleged accident. (R. 584-585). In connection with a construction project at said property, the Respondents hired Americon as the general contractor. (R. 280). Americon then hired Ess & Vee as the sheetrock and framing subcontractor at the Subject Property. (R. 555-556).

B. The Alleged Accident

Plaintiff's accident occurred on June 7, 2017 at the Subject Property (which was also known as 112 West 34th Street). (R. 279-280). At the time of his alleged accident, Plaintiff was employed by Ess & Vee performing interior carpentry work at the Subject Property. (R. 279).

At some point prior to his alleged accident, the floor of the lobby where he was working was removed to make way for a new floor. (R. 286-288). Plaintiff and Ess & Vee continued to work in the area despite the floor being removed. (R. 288-289).

On the day of the alleged accident, Ess & Vee was continuing its work from the day prior which included "doing some sheetrock ceilings and framing…in the lobby." (R. 292). When Plaintiff arrived at the lobby area he found "construction

equipment (specifically a cement mixer) and debris" which he needed help removing. (R. 294).

His alleged accident occurred while he and a co-worker were attempting to move the cement mixer. (R. 295). At that point, he and the co-worker lifted a piece of plywood that was "in the way" of moving the cement mixer. *See id.* As Plaintiff "stepped back" he "stepped in a hole, tripped backwards" and "fell onto a ladder, some scaffolding and then [he] fell on the floor." *See id.* His "right foot…stepped in a hole and got caught" causing him to trip and fall. (R. 296).

Plaintiff testified that he did not know who created the hole which his foot got caught in. (R. 297-298). The "hole" in question was located within a piece of plywood which was being used as "protection" for the floor which had been removed. (R. 298-299). Plaintiff later clarified that he "stepped in a hole in the plywood" floor which was above a hole in concrete in the unfinished floor. (R. 346-347, 367). The plywood was placed on top of the unfinished flooring as a protective measure for the on-site workers in response to complaints about the unfinished floor. (R. 357).

Peter Sjolund, Senior Vice President Director of Design and Construction for the Respondents, confirmed that he observed protection on the flooring of the lobby which was present "at all times". (R. 368). He denied ever observing any irregularities with the temporary flooring of the lobby. (R. 369).

Cliff Chow, Americon's Regional Office Leader, would walk through the lobby area and speak with superintendents at the Subject Property. (R. 627-628). He too confirmed that new stone floors were put down in the lobby and then protected with plywood which he testified was a "standard protocol". (R. 632). He denied ever hearing about any complaints regarding the floor in the lobby or the plywood. *See id.* Mr. Chow never recalled noticing any holes or gaps in the temporary plywood flooring in the lobby during any of his site visits. (R. 656).

C. The Subject Motion and the Order Appealed From

On or about April 14, 2022, Americon and HITT, moved for summary judgment seeking, *inter alia,* dismissal of Plaintiff's Complaint in its entirety. (R. 858).[3] In response, Plaintiff filed a cross-motion on April 17, 2022 which sought partial summary judgment as to liability on Plaintiff's Labor Law § 241(6) claim. (R. 1060).

On June 24, 2022, Americon/HITT filed an affirmation in opposition to Plaintiff's cross-motion. (R. 1122). In its papers, these parties argued that Labor Law §241(6), specifically Industrial Code § 23-1.7(e)(2) was inapplicable to the facts of the instant matter as even if the area where Plaintiff fell was considered a floor, Plaintiff still did not trip over loose or scattered material. Further, they argued that

[3] The Respondents also moved for summary judgment (on April 14, 2022) but said motion dealt with issues not pertinent to the instant appeal. (R. 54).

Plaintiff stepped into a hole in a piece of plywood that had been purposefully laid over the floor to protect it thus making it integral to the work being performed. (R. 1128).

On July 11, 2022, the Respondents also filed an affirmation in opposition to Plaintiff's cross-motion arguing that Labor Law §241(6), specifically Industrial Code § 23-1.7(e)(2) was inapplicable to the facts of the instant matter for similar reasons as offered by Americon/HITT. (R. 1172). On this same day, Ess & Vee filed an affirmation in opposition to Plaintiff's cross-motion which too made similar arguments as Americon/HITT. (R. 1307-1308).

On September 1, 2022, Plaintiff filed its reply papers to both Americon/HITT and the Respondents, respectively. (R. 1457, 1466).

On September 15, 2023, the Hon. Alexander M. Tisch issued an Order, which, *inter alia,* granted Americon and HITT's motion for summary judgment to the extent that Plaintiff's Labor Law § 241(6) cause of action was dismissed in its entirety, and denied Plaintiff's cross-motion for partial summary judgment on its Labor Law § 241(6) cause of action. (R. 10). It is from this Decision and Order that the Plaintiff presently appeals.

To wit, Plaintiff filed a Notice of Appeal on September 25, 2023. (R. 3).

Plaintiff then filed its Appellant's Brief on June 23, 2023. In said brief, the Plaintiff argues that the lower court erred in denying its cross-motion, *solely* as to its Labor Law § 241(6) claim premised on Industrial Code § 23-1.7(e)(2).

The Respondents herein submit, in reply, this Respondent's Brief.

ARGUMENT

Summary Judgment Standard

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue[.]" *Rotuba Extruders, Inc. v. Ceppos,* 46 NY.2d 223, 231 (1978) (citation omitted).

A proponent of a summary judgment motion, "must make [a] prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Winegrad v. N.Y. Univ. Med. Ctr.,* 64 N.Y.2d 851, 853 (1985); Andre *v. Pomeroy,* 35 N.Y.2d 361, 364 (1974); *Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320 (1986). "Failure to make such prima facie showing warrants denial of the motion, regardless of the sufficiency of the opposition papers." *Alvarez, supra* at 324; *Winegrad, supra* at 853.

Critically, it must clearly appear that no material and triable issue of fact is presented. *See Matter of New York City Asbestos Litig.,* 33 N.Y.3d 20, 25 (2019), *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 404 (1957). Indeed,

Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. *Matter of New York City Asbestos Litig., supra* at 25.

In assessing a motion for summary judgment, the facts should be viewed in the light most favorable to the opponent of the motion. *See Judice v. DeAngelo,* 272 A.D.2d 583, 583 (2000); *see also Robinson v. Strong Mem. Hosp.,* 470 N.Y.S.2d 239, 239 (1988). Indeed, the Court must accept as true the evidence presented by the nonmoving party and the motion must be denied if there is even arguably any doubt as to the existence of a triable issue. *See Baker v. Briarcliff School District,* 205 A.D.2d 652, 613 N.Y.S.2d 660 (2nd Dept. 1994).

POINT I

PLAINTIFF'S LABOR LAW § 241(6) CLAIM WAS PROPERLY DISMISSED

Labor Law § 241(6) "requires that owners and contractors 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor'." *Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494 (1993) (citing New York Labor Law § 241(6)). The non-delegable duty to comply with the rules set forth by the Commissioner is set out in the Industrial Code. *See Misicki v. Caradonna,* 12 N.Y.3d 511 (2009).

In order to successfully establish the statutory cause of action under Labor Law § 241(6), a plaintiff must show the applicability of a specific provision of the Industrial Code to the relevant work, a violation of the regulation, and that such violation was a proximate cause of plaintiff's injuries. *See Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343 (1998).

A plaintiff must also establish that a violation of the relevant statute proximately caused its accident. *See Pavlou v. City of New York,* 8 N.Y.3d 961 (2007); *Maman v. Marx Realty & Improvement Co., Inc.,* 161 A.D.3d 558 (1st Dept. 2018).

In its appeal, Plaintiff asserts, *solely*, that the lower court erred in dismissing its Industrial Code § 23-1.7(e)(2) claim in this matter. This section, which pertains to debris and scattered tools and materials, states as follows:

> 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.
>
> NYCRR § 23-1.7(e)(2).

Importantly, the lower court, in dismissing this claim in its entirety, reasoned as follows:

> "…Industrial Code § 23-1.7 (e) (2) lacks evidentiary support for its application concerning plaintiff's accident because the defective piece of plywood does not qualify as a tripping hazard under the Industrial Code, and the

> plywood, defective or not, was consistent with the work being performed. Plaintiff testified that Americon would rip the existing floors up with the intention of putting new floors down, and that the plywood was used as a temporary floor until the new floor was provided (NYSCEF Doc. No. 79, plaintiff's EBT, 27-28: 9-16). The plywood was therefore "purposefully installed on the floor as an integral part of the renovation project,' and consistent with the work being performed [case citations omitted.]"
>
> (R. 15).

On appeal, Plaintiff does little, if anything, to establish that the lower court erred in holding that the plywood temporary floor Plaintiff allegedly fell on was integral to the work at the Subject Property. This is significant as a plaintiff cannot maintain a Labor Law § 241(6) claim premised on Industrial Code § 23-1.7(e)(2) where the material upon which the plaintiff fell was integral to the work being performed. *See Rajkumar v Budd Contracting Corp.,* 77 A.D.3d 595, 596 (1st Dept 2010) ("plaintiff did not trip over loose or scattered material, but ... over brown construction paper that was purposefully laid [to protect new floors] ... [s]uch paper covering constituted an integral part of the ... renovation project, and could not be construed to be a misplaced material over which one might trip.").

Instead, Plaintiff cites several readily distinguishable cases in an attempt to misapply the law with respect to the integral to the work doctrine.

First, the case of *Giza v. New York City Bd. of Educ.,* involved a piece of plywood that had been placed outdoors to protect asphalt and had been warped by

weather conditions such that it was raised three inches above the floor. N.Y. Misc. LEXIS 3331 (Sup. Ct. County of Kings 2004) at 2. The court's reasoning in that case was premised, specifically, on the warped nature of the plywood. In the instant matter, there is no evidence that the plywood was warped. Rather, and as acknowledged by multiple parties, there were no irregularities as to the physical form of the plywood board that Plaintiff allegedly fell on. (R. 369, 656). Notwithstanding this, Plaintiff has also failed to allege, much less mention, that a condition present on the premises would have resulted in damage to the plywood, as in *Giza,* where the plywood was placed outside and potentially warped as a result of weather conditions.

Next, the Second Department case of *Tompkins v. Turner Constr. Co.,* 221 A.D.3d 745 (2nd Dept. 2023) is misplaced for similar reasons. First, there is no indication that the plaintiff therein even relied on an alleged violation of Industrial Code § 23-1.7(e)(2). Nonetheless, the Court merely held that "the defendants failed to raise a triable issue of fact as to whether a *raised or bowed piece* of Masonite board was an integral part of the construction." *See id.* at 746 (emphasis added). Here, as stated above, there is *no* evidence of any damage to the plywood that would otherwise bring it into the same realm as something such as a warped piece of Masonite.

Similarly, the Second Department case *of Lopez v. New York City Dept. of Envtl. Protection,* 123 A.D.3d 982 (2nd Dept. 2014) is readily distinguishable as well. In that case, the plaintiff was injured when he fell backward and was impaled by an *uncapped piece of a vertical rebar*. *See id.* at 983 (emphasis added). A secured plywood floor with no evidence of external damage is simply not equivalent to an uncapped piece of rebar that resulted in an individual being impaled and requiring lifelong medical treatment.

Moreover, the case of *Rossi v. 140 W. JV Mgr. LLC,* 171 AD3d 668 (1st Dept. 2019) is inapplicable. In *Rossi,* the plaintiff tripped over *debris, consisting of cables from elevator shaft demolition*. *See id.* at 668. Here, Plaintiff stepped in a hole in the temporary flooring and Plaintiff has not established how temporary flooring should be considered debris.

Furthermore, Plaintiff's reliance on cases such as *Maza v. University Avenue Dev. Corp.,* 13 A.D.3d 65 (1st Dept. 2004) (plaintiff tripped over snow and ice); *Canning v. Barneys New York,* 289 A.D.2d 32 (1st Dept. 2001) (plaintiff's foot became ensnared in the remnants of a coil of tie wire); and *Dalanna v. City of New York,* 308 A.D.2d 400 (1st Dept. 2003) (plaintiff was injured when he tripped over a protruding bolt embedded in the ground and Court determined it was not "dirt," "debris," "scattered tools or materials," or a "sharp projection[ ]") are similarly

distinguishable. To wit, Plaintiff in the present matter did not slip on ice, trip on construction debris, or trip over an embedded bolt.

As to *Egan v. West Square Corp.,* N.Y. Misc. LEXIS 6681 (Sup. Ct. County of Kings 2018), such a decision weighs against established precedent and is nonbinding on this Honorable Court. Rather, where a material, such as plywood or Masonite, was being used to protect floors and was thus an integral part of the work being performed, it was reasoned that it is irrelevant whether the Masonite could be considered a "sharp projection" because, even if it was, it was an integral part of the work being performed. *See Thomas v. Goldman Sachs Headquarters, LLC,* N.Y. Misc. LEXIS 2601 at 7 (Sup. Ct. New York County 2012) *aff'd* in part *Thomas v. Goldman Sachs Headquarters, LLC,* 109 A.D.3d 421 (1st Dept. 2013) (reasoning that, regardless of whether plaintiff was using Masonite for his work when the accident occurred, the protective covering had been purposefully installed on the floor as an integral part of the renovation project and therefore, it cannot be construed as accumulated debris or scattered materials. Thus, dismissing Plaintiff's Labor Law §241(6) claim based on Industrial Code §23-1.7(e)(2)).

As to *Chmela v. Toll NY II,* (Sup. Ct. County of NY 2024)[4] – another nonbinding lower court case – Plaintiff misconstrues the holding. While the lower

[4]Please note that this case is not available on LexisNexis but can be found at https://iapps.courts.state.ny.us/nyscef/HomePage under Index No. 151526/2020.

court reiterated that the integral to the work doctrine does not "absolve a defendant of liability for the use of an avoidable dangerous condition or for failure to mitigate the danger", Plaintiff fails to understand that this is *not* a case where the material Plaintiff fell on (i.e. the plywood) was defective. *See* Chmela Decision at 2 quoting *Bazdaric v. Almah Partners LLC,* NY Slip Op 00847 (Ct. App Feb. 20, 2024).

Indeed, the lower court in *Chmela* went on to reason that issues of fact remained as to whether the relevant plywood was integral to the work *"because as in Bazdaric there remains a question of fact as to whether a safer alternative existed to accomplish the same goal i.e., one piece of plywood without sharp edges…."* See Chmela Decision at 2-3 (emphasis added). Here, conversely, and as stated above, multiple parties confirmed that there were no irregularities as to the physical form of the plywood board that Plaintiff allegedly fell on. (R. 369, 656).

Unlike the inapposite distinctions posed by these cases, this Honorable Court has reasoned that, where a plaintiff trips over a construction material, there is no liability under Industrial Code § 23-1.7(e)(2) where the material was an integral part of the work being performed and thus not debris, scattered tools and materials, or a sharp projection. *See e.g. Tucker v. Tishman Constr. Corp. of N. Y.,* 36 A.D.3d 417, 417 (1st Dept. 2007).

Further, and akin to the facts of this case, where a plaintiff tripped over brown construction paper that was purposefully laid over newly installed floors to protect

them, it was concluded that such a paper covering constituted an integral part of the floor work on the renovation project and thus, defendants were not liable pursuant to §23-1.7(e)(2). *See Rajkumar, supra* at 595-596. The *Rajkumar* holding is particularly on point as the incident in *Rajkumar* also occurred in a lobby wherein material that was "purposefully placed over newly installed floors to protect them" caused the alleged incident.

Additionally, this Honorable Court has also held that where a protective Masonite covering had been purposefully installed on the floor as an integral part of a relevant renovation project, it could not be construed as accumulated debris or scattered materials. *See Thomas, supra* at 422.

In the instant matter, the plywood, like the brown construction bag in *Rajkumar* and the Masonite covering in *Thomas*, was purposefully installed and secured as temporary flooring, thus making it an integral part of the construction work at the Subject Property. Plaintiff's arguments that a protective covering is not integral to the work performed is unconvincing and it has failed, again, to demonstrate that the specific temporary plywood flooring implored was not integral to the work performed at the Subject Property.

Accordingly, it is clear that the subject plywood in the instant matter was integral to the work being performed at the Subject Property and, as such, it is

respectfully submitted that the lower court's Order dismissing Plaintiff's Labor Law § 241(6) claim in its entirety should be affirmed.

CONCLUSION

For the reasons set forth above, the Defendants-Respondents ESRT 112 West 34th Street, L.P. and Empire State Realty Trust, Inc. respectfully request that this Honorable Court enter an Order affirming the Order issued by the Honorable Alexander M. Tisch, J.S.C, dated September 15, 2023 insofar as it dismissed Plaintiff's Labor Law § 241(6) claim in its entirety.

Dated: Albertson, New York
September 4, 2024

Respectfully Submitted,

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PRINTING SPECIFICATION STATEMENT

This computer-generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14 Point

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specification statement, or any authorized addendum is 3,752.