To be Argued by:
ARTIE VENTI
(*Time Requested: 10 Minutes*)

Supreme Court of the State of New York
Appellate Division – First Department

Case No.: 2023-04810

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.

(See inside cover for continuation of caption)

BRIEF FOR THIRD-PARTY DEFENDANT-RESPONDENT

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AMERICON CONSTRUCTION INC. and HITT CONTRACTING INC.,

Third-Party Plaintiffs-Respondents,

- against -

ESS & VEE ACOUSTICAL CONTRACTORS INC.,

Third-Party Defendant-Respondent.

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PRELIMINARY STATEMENT

Third-Party Defendant-Respondent ESS & VEE ACOUSTICAL CONTRACTORS, INC. ("ESS & VEE" or "This Respondent"), respectfully submits this brief in response and opposition to Plaintiffs' appeal from the order of Hon. Alexander M. Tisch, JSC, of the Supreme Court, New York County, dated September 15, 2023, which granted Defendant-Respondent Americon Construction Inc ("Americon") and This Respondent's motions for summary judgment and dismissal of the McKinney's Labor Law §241(6) claim predicated on a violation of 12 NYCRR §23-1.7(e)(2) because Industrial Code § 23-1.7 (e) (2) lacks evidentiary support for its application concerning Plaintiff's accident because the allegedly 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 of setting up the work area.

For the reasons to follow, the orders appealed from should be affirmed as Plaintiff failed to demonstrate that the trial Court abused its discretion in granting said portions of Defendant-Respondent Americon and This Respondent's motions for summary judgment and dismissal of the McKinney's Labor Law §241(6) claim predicated on a violation of 12 NYCRR §23-1.7(e)(2).

COUNTERSTATEMENT OF MATERIAL FACTS

The underlying action is based upon claims of negligence and violations of the Labor Law as alleged in a lawsuit commenced by Plaintiffs-Appellants in the New York County Supreme Court under index number 158449/2017.

On June 7, 2011, Plaintiff Frank Cioppa, an employee of ESS & VEE, was working as a carpentry foreman at a construction project located at 111 West 34th Street, New York, NY ("Project". Defendants ESRT 112 West 34th Street, LP and Empire State Realty Trust, Inc. are the owners of the project who retained Americon as the general contractor. Americon retained Plaintiff's employer ESS & VEE as the sheetrock and framing subcontractor. At the time of the accident, Plaintiff was not performing sheetrock, framing, drywall, or carpentry work. Plaintiff testified he was injured while attempting to move a cement cutting machine and construction materials to clean an area of the lobby with an employee of AMERICON and then he stepped into a small hole in the plywood laid on the floor as a protective covering.

> Q. When you got to the job site, did you have to go to the gang box to get any equipment for the work you were supposed to do?
>
> A. We would always open up the gang box to get ready to go to work, but this particular morning we had to clean out this area before we started actually to take our tools to that area.
>
> Q. What did you do to clean out that area?
>
> A. We were continuing to do the work for the next day, and I got a whole -- it was a lot of equipment there, a lot of debris, a lot of construction material, so I got the foreman from Americon, Dennis, he was a labor foreman, to help me clean the area out.

Q. Was there any equipment in the area that you had to clean out, sir?

A. Yes.

Q. What type of equipment did you have to clean out?

A. There was cement cutting machine there, that was the biggest piece of equipment that we needed to move.

Q. Did you and Chris move that cement cutting machine out of the area?

A. No.

Q. Why not, sir?

A. Because I had Dennis with me.

Q. So, it was you and Dennis that moved the cement cutting machine out?

A. Yes. Well, we tried to, and there was a piece of plywood in there, so we tried to move the piece of plywood. What happened was we went to the area, it was really, like, had a lot of material there, and there was a cement cutting machine. We tried to move the machine, and the machine wouldn't move. So it was a piece of plywood in the way, so Dennis was like where he is standing, so –

Q. Counsel, pointing to counsel?

A. Yes, and he grabbed the end of the plywood, I grabbed this end of the plywood. I stepped back, stepped in a hole, tripped backwards, fell over my left, I fell on to a ladder, some scaffolding, and then I fell on the floor. (293-295) [These numbers in parentheses refer to pages of the record on appeal.]

QUESTION PRESENTED

1. Did the Court below correctly Defendant-Respondent Americon Construction Inc ("Americon") and This Respondent's motions for summary judgment and dismissal of the McKinney's Labor Law §241(6) claim predicated on a violation of 12 NYCRR §23-1.7(e)(2) because the piece of plywood that Plaintiff tripped over was integral and consistent with the work since it was used as a temporary floor until the new floor was installed?

This question should be answered in the affirmative. The trial Court correctly found that Industrial Code § 23-1.7 (e) (2) lacks evidentiary support for its application concerning Plaintiff's accident because the defective piece of plywood did not qualify as a tripping hazard under the Industrial Code, and the plywood, defective or not, was consistent with the work being performed.

Accordingly, we respectfully submit that the Order of the Court below was correctly made as to this question, and that His Honor's Order should be Affirmed in these respects.

ARGUMENT

POINT I

THE DECISION FOR SUMMARY JUDGMENT THAT DISMISSED PLAINTIFF'S LABOR LAW § 241(6) CAUSE OF ACTION WAS PROPERLY GRANTED

On a motion for summary judgment the "proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Med. Center, 64 N.Y.2d 851, 853 (1985). Once the proponent has made the showing the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

"Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law…[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided…" See Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974). However, failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Winegrad v. New York University Med. Center, 64 N.Y.2d 851, 853 (1985).

Here, it is clear that Plaintiff's accident did not occur out of a violation of 12 NYCRR §23-1.7(e)(2) because the relied upon Industrial Code § 23-1.7(e)(2) lacks evidentiary support for its application concerning Plaintiff's accident because the defective piece of plywood did not qualify as a tripping hazard under the Industrial Code, and the plywood, defective or not, was consistent with the work being performed.

The Industrial Code Section 23-1.7(e) states as follows:

> *(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.*

Industrial Code Section 23-1.7(e)(2) is inapplicable to the facts of this case as it requires working areas, such as a floor, to be kept clear of debris and scattered tools and materials. In the present matter, Plaintiff alleges that he tripped when his foot became stuck in a hole in the piece of plywood being used as temporary flooring. Based upon settled case law in the First Department, this would not constitute a violation of Industrial Code Section 23-1.7(e)(2).

In Romeo v. Property Owner (USA) LLC, 61 A.D.3d 491 (1st Dept. 2009), the plaintiff was walking when a floor tile was dislodged, causing the plaintiff's right foot to fall through an opening and strike a sub-floor. The court found that to the extent the plaintiff relied upon an Industrial Code Section 23-1.7(e)(2)

violation as a predicate for a Labor Law §241(6) violation, the provision was inapplicable, as the plaintiff was not injured as a result of tripping over, or slipping on accumulated debris, dirt, tools or materials. Id. at 492.

Similarly, here, Plaintiff was not injured as a result of tripping over, or slipping on accumulated debris, dirt, tools or materials, as he stepped into hole in the plywood floor. Thus, Industrial Code Section 23-1.7(e)(2) is not applicable to Plaintiff's accident.

Plaintiff specifically testified that he stepped in a hole as follows: "A. Yes, from when I -- yes, when I stepped backwards, it got stuck in the hole, my right foot was stuck in the hole. That's why I fell to my left." (522)

Industrial Code §23-1.7(e)(2) serves to "protect against tripping hazards and sharp projections on floors and platforms 'insofar as may be consistent with the work being performed.'" Fura v. Adam's Rib Ranch Corp., 15 AD3d 948, 948 (4th Dept. 2005). This Industrial Code only recognizes "dirt and debris or scattered tools and materials" as tripping hazards, rather than any item that may cause an individual to trip and fall while on a construction worksite. Yerel v. Ferguson Elec. Const. Co., 41 AD3d 1154, 1157 (4th Dept 2007). Moreover, in addition to determining whether this Industrial Code is applicable concerns whether the item that caused the individual to trip and fall was consistent with the work being performed. Consistent with the work being performed does not simply refer "to the

specific task a plaintiff may be performing at the time of the accident," but "applies to things and conditions that are an integral part of the construction" project. Krzyzanowski v. City of New York, 179 AD3d 479, 481 (1st Dept. 2020).

The temporary plywood flooring was a protective covering that was integral to the work at the construction site. The Courts have established that protective covering is integral to work performed at a construction. See Rajkumar v. Budd Contr. Corp., 77 A.D.3d 595 (1st Dept. 2010) [plaintiff tripped over brown construction paper that was purposefully laid over newly installed floors to protect and such paper covering constituted an integral part of the floor work on the renovation project, and could not be construed to be a misplaced material over which one might trip]; Thomas v. Goldman Sachs Headquarters, LLC, 109 A.D.3d 421 (1st Dept. 2013) [the protective Masonite covering had been purposefully installed on the floor as an integral part of the renovation project. As such, it cannot be construed as accumulated debris or scattered materials].

Similarly, in the present matter, the temporary plywood flooring was placed to protect the work and workers in the lobby of the Project. Furthermore, it was never established that there were alternative protective coverings that were familiar, previously-used options that would have achieved the goal of protecting the worker from injuries caused by a potential hazard of the uneven floor

underneath the plywood. Cf. Bazdaric v. Almah Partners LLC, N.Y.3d 310, 318 (2024).

Considering the above, the lower Court properly found that Industrial Code § 23-1.7(e)(2) lacks evidentiary support for its application concerning Plaintiff's accident because the defective piece of plywood did not qualify as a tripping hazard under the Industrial Code, and the plywood, defective or not, was consistent with the work being performed. Plaintiff himself admitted that the plywood was used as a temporary floor until the new floor was provided. The lower Court properly concluded that the plywood was therefore "purposefully installed on the floor as an integral part of the renovation project," and consistent with the work being performed. Thomas v. Goldman Sachs Headquarters, LLC, 109 AD3d 421 , 422 (1st Dept. 2013); see also Johnson v. 923 Fifth Ave. Condo., 102 AD3d 592, 593 (1st Dept. 2013) ["plaintiff did not trip over loose or scattered material [h]e tripped over a piece of plywood that had been purposefully laid over the sidewalk to protect it and that therefore constituted an integral part of the work"]. Accordingly, Plaintiff's claim in relation to this section was properly dismissed as Plaintiff's accident did not meet the specific requirements of Industrial Code §23-1.7(e)(2).

Concerning the Plaintiff’s arguments comparing the present matter to the plaintiff’s circumstances in Bazdaric v. Almah Partners LLC, N.Y.3d 310 (2024),

the circumstances surrounding Plaintiff Frank Cioppa's accident are clearly distinguishable. Especially since Plaintiff Frank Cioppa was not necessarily performing carpentry work at the time of his accident, but instead setting up an area for work to be performed.

In Bazdaric, the Court held that although the use of some painting cover was integral to the injured Plaintiff's assignment to paint around an escalator, it did not mean that any cover used, even one that was inherently slippery, was necessarily integral, where a safer alternative would have accomplished the same goal. Id. at 321. The Court determined that the particular plastic covering that was placed on the escalator was not integral to the paint job because it made that injured plaintiff's work area slippery, creating one of the hazards that the cover was intended to avoid, and that the cover was not merely a poor choice of material but an inherently dangerous one. Id. The Court further opined that the defendant was in a position to avoid this danger because there were alternative covering that were "familiar, previously-used options that would have achieved the goal of protecting the worker from injuries caused by a slipping hazard and also protected the escalator from possible damage." Id.

Here, Plaintiffs-Appellants argue that Defendants-Respondents may have been "in a position to avoid this danger" by using "alternative" flooring "options that would have achieved the goal of protecting the worker from injuries caused by

a [tripping] hazard" whether from the temporary plywood flooring or the wavy concrete subfloor underneath. Id. However, the use of plywood in this instance was not inherently dangerous and did protect from the wavy concrete subfloor. It was also not established what alternative to the plywood was and could be available to provide similar protection. To maintain that protective plywood was required, at all times, to be perfectly and seamlessly joined with no elevated overlap or any gaps between boards whatsoever is not only a heavy burden for an active construction site, but a relative impossibility that would require hours of preparation and set up to avoid a relatively minimum chance at hazard. Furthermore, it can be argued that Plaintiff Frank Cioppa was in the act of performing the work of setting up the work area, which would include his own self-delegated duty of preparing the work area to be free from hazards. So, by electing to stray from his duties of performing sheetrock, framing, drywall, or carpentry work, and instead performing the cleaning and set up work of an Americon laborer, Plaintiff Frank Cioppa took it upon himself to make the plywood an integral part of his work. Similarly, if the injured plaintiff in Bazdaric was instead injured in the process of setting up the plastic covering, and not in the act of painting, the Court would have likely determined the covering was integral to the work of setting up the covering.

Moreover, Defendants-Responsdents' summary judgment dismissal of this claim should be affirmed on alternative grounds. Under Labor Law § 241,

plaintiffs must "me[e]t his burden of showing that these provisions applied; that [someone] violated the specific commands of these provisions; that the violations constituted negligence; and that the violations proximately caused plaintiff's injuries." Lourenco v. City of New York, 228 A.D.3d 577 (1st Dept. 2024). Here, Plaintiffs-Respondents have not conclusively established either applicability of Industrial Code § 23-1.7(e) or negligence, and in fact they conclusively cannot establish applicability of that provision as a matter of law such that the trial court should be affirmed on alternative grounds.

Accordingly, we respectfully submit that the holding of the lower Court was correct in these and all other regards.

CONCLUSION

For all of the foregoing reasons we respectfully submit that the Order and Judgment of the Court below in the foregoing respects should be Affirmed.

Dated: Brooklyn, New York
September 4, 2024

Respectfully submitted,

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Dated: Brooklyn, New York
September 4, 2024

Artie Venti
By: Artie Venti, Esq.