COURT OF APPEALS
STATE OF NEW YORK

---X

IGOR MISICKI,

Plaintiff-Appellant,

-against-

SALVATORE CARADONNA,

Defendant,

and

430-50 SHORE ROAD CORPORATION,

Defendant-Respondent.

---X

430-50 SHORE ROAD CORPORATION,

Third Party Plaintiff,

-against-

UPGRADE CONTRACTING COMPANY, INC.,

Third Party Defendant.

---X

Appellate Division
Second Department
No.: 2007-03822

Kings County Clerk's
Index Nos.: 28622/02
and 75248/03

NOTICE OF MOTION FOR LEAVE TO SUBMIT AMICUS CURIAE BRIEF

PLEASE TAKE NOTICE, that upon the affirmation of JOSHUA ANNENBERG, ESQ., dated February 3, 2009, and the amicus curiae brief submitted with this motion, the undersigned shall move this Court at a Motion Submission Part, upon submission of papers without oral argument, at the courthouse located at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207-1095, on February 17,

2009, pursuant to Rule 500.23 of this Court, for an order granting leave to submit the within amicus curiae brief by the New York State Trial Lawyers' Association on behalf of plaintiff-appellant Igor Misicki.

Dated: New York, New York
February 3, 2009

____

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(Note: This action was previously discontinued as against Defendant Salvatore Caradonna and Third Party Defendant Upgrade Contracting Company, Inc.)

QUESTIONS PRESENTED

1. Whether New York State Industrial Code Section 23-9.2(a) constitutes a specific, positive command which supports a cause of action under Labor Law §241(6).

The Appellate Division, Second Department, answered this question in the negative and dismissed the instant action.

On behalf of plaintiff-appellant Misicki, the New York State Trial Lawyers' Association ("NYSTLA") respectfully requests that this Court reverse the Appellate Division, Second Department, reinstate Misicki's Complaint and hold that New York State Industrial Code Section 23-9.2(a) constitutes a specific, positive command which supports a cause of action under Labor Law §241(6).

2. Whether New York State Industrial Code Section 23-9.2(a) must be construed as a specific, positive safety command since the legislative history of Labor Law § 241(6), and public policy, favor a broad reading to protect construction workers.

In deciding the underlying appeal, the Appellate Division, Second Department, did not address the legislative history and public policy implications of Labor Law § 241(6). Nevertheless, the Appellate Division, Second Department, dismissed the instant action.

On behalf of plaintiff-appellant Misicki, NYSTLA respectfully requests that this Court reverse the Appellate Division, Second Department, reinstate Misicki's Complaint and hold that the legislative history of Labor Law § 241(6), and public policy, favor reading New York State Industrial Code Section 23-9.2(a) as a specific, positive command which supports a cause of action under Labor Law §241(6).

SUBMISSION OF AMICUS CURIAE BRIEF BY NEW YORK STATE TRIAL LAWYERS' ASSOCIATION ON BEHALF OF <u>PLAINTIFF-APPELLANT IGOR MISICKI</u>

The New York State Trial Lawyers' Association ("NYSTLA") submits the instant amicus curiae brief on behalf of plaintiff-appellant Igor Misicki ("Misicki"). NYSTLA advocates for the legal rights of injured parties who have meritorious causes of action. In the instant litigation, NYSTLA urges this Court to interpret New York State Industrial Code Section 23-9.2(a) in a manner which provides legal redress to Misicki, and other similarly situated construction workers, under New York State Labor Law §241(6).

Accordingly, this amicus curiae brief will assist the Court in deciding whether New York State Industrial Code Section 23-9.2(a) constitutes a specific, positive command which supports a cause of action under Labor Law §241(6). NYSTLA's amicus curiae brief addresses: 1) the divergent rulings of the Appellate Divisions in interpreting New York State Industrial Code Section 23-9.2(a) in the context of Labor Law §241(6); 2) rules of statutory interpretation which demonstrate that Industrial Code Section 23-9.2(a) is a specific, positive command which supports a cause of action under Labor Law §241(6); and 3) the legislative history of Labor Law §241(6) and public policy which favor a liberal construction of the Industrial Code.

JURISDICTIONAL STATEMENT

By order dated September 16, 2008, this Court granted Misicki's motion for leave to appeal. Misicki commenced the instant action in Supreme Court, Kings County. The underlying order of the Appellate Division, Second Department, is a final order which determined the action as it dismissed Misicki's Complaint as a matter of law. Therefore, this Court has jurisdiction over the instant appeal pursuant to CPLR 5602(a)(1)(I).

Additionally, pursuant to CPLR 5501(b), this Court has jurisdiction over the instant appeal as it concerns a question of law only. The question of law raised for this Court's determination is whether New York State Industrial Code Section 23-9.2(a) constitutes a specific, positive command which supports a cause of action under Labor Law §241(6). This legal issue was raised previously in the summary judgment motion before the lower court (R. 6-11.3; 454-460) and in the appeal before the Appellate Division, Second Department.[1] Thus, this Court has jurisdiction to entertain the instant appeal.

PROCEDURAL HISTORY

A. The Pleadings.

On July 23, 2002, Misicki commenced the instant action in Supreme Court,

[1] See, Misicki v. Cardonna, 51 A.D.3d 644, 645, 857 N.Y.S.2d 672, 673 (2d Dept. 2008).

Kings County, by filing and serving a Summons and Verified Complaint. R. 74-84. Subsequently, Misicki interposed an amended Summons and amended Verified Complaint. R. 93-102. In his pleading, Misicki alleged causes of action pursuant to common law negligence and New York State Labor Law §§200, 240(1) and 241(6).[2] R. 93-102. The defendant-respondent 430-50 Shore Road Corporation ("Shore Road Corp.") served an Answer and commenced a third party action. R. 103-163.

B. Misiciki's Supplemental Bill of Particulars which alleged violation of New York State Industrial Code Section 23-9.2(a).

In support of his cause of action pursuant to Labor Law §241(6), Misicki's Supplemental Verified Bill of Particulars alleged that defendant-respondent Shore Road Corp., the owner of the subject premises, violated New York State Industrial Code Section 23-9.2(a). R. 71.

C. The Summary Judgment Motion before Justice Schmidt of Supreme Court, Kings County.

On or about September 19, 2005, defendant-respondent Shore Road Corp. moved for summary judgment and dismissal of Misicki's Labor Law 241(6) claim. R. 23-658. The Honorable David Schmidt of Supreme Court, Kings County, granted defendant's motion for summary judgment and dismissed Misicki's action. R. 454-460. Thereafter, Misicki moved for reargument. R. 12-658. Upon reargument,

[2] The instant appeal only concerns Misicki's cause of action pursuant to Labor Law §241(6) as he previously withdrew the other causes of action. R. 455.

Justice Schmidt denied Shore Road Corp.'s motion for summary judgment and vacated his prior order which dismissed Misicki's action. R. 6-11.3.

Significantly, Justice Schmidt held that New York State Industrial Code Section 23-9.2(a), at issue in Misicki's Labor Law 241(6) claim, "is a specific positive command that is applicable to the facts of the instant case." R. 10.

D. The ruling of the Appellate Division, Second Department, and this Court's order granting leave to appeal.

On appeal, the Appellate Division, Second Department, reversed the lower court and held:

> "Contrary to the Supreme Court's determination, 12 NYCRR 23-9.2(a) does not support the plaintiff's claim under Labor Law §241(6), as that provision merely establishes general safety standards which do not give rise to a non-delegable duty."

Misicki v. Cardonna, 51 A.D.3d 644, 645, 857 N.Y.S.2d 672, 673 (2d Dept. 2008).

Subsequently, by order dated September 16, 2008, this Court granted Misicki's motion for leave to appeal. R. 664-665.

STATEMENT OF FACTS

On October 26, 2001, Misicki sustained severe facial lacerations during the course of his employment with third party defendant Upgrade Contracting Company, Inc. R. 468-469. At the time of his accident, Misicki utilized an electric grinder/saw to repair and renovate the pool deck of a residential co-op owned by defendant-

respondent Shore Road Corp. R. 468-469. The grinder/saw, however, lacked a handle necessary for proper grip and control. Misicki reported this condition to his supervisor and complained that the grinder/saw was dangerous without the handle. Misicki's supervisor could not locate the missing handle and, therefore, directed Misicki to continue working with the grinder/saw despite the missing handle. R. 275-284; 293-294; 468-469.

Misicki, however, could not properly hold and/or control the grinder/saw without the missing handle. R. 276; 468-469. Therefore, the grinder/saw kicked back causing the saw's blade to strike Misicki's face, resulting in severe facial lacerations. R. 468-469. Further, pursuant to the affidavit of an expert, Robert Grunes, P.E., the missing handle was vital to the proper control of the grinder/saw. R. 470-473. Indeed, the manufacturer's "Product Detail" lists a "3-Position side handle" as one of the "features" of the grinder/saw. R. 475. Notably, the manufacturer's Product Detail describes this handle as "Specifically designed and angled for maximum comfort *and control.*" R. 475 (emphasis added).

SUMMARY OF APPELLATE ARGUMENT

On behalf of appellant Misicki, NYSTLA respectfully urges this Court to reverse the Appellate Division, Second Department, which dismissed the instant action. The Second Department erroneously held that New York State Industrial Code

Section 23-9.2(a) is not a specific, positive safety command to support Misicki's Labor Law §241(6) claim.

The Second Department erred in failing to follow this Court's jurisprudence in statutory construction. The Second Department did not address canons of statutory construction nor this Court's holding that wording must be parsed to determine whether a specific Industrial Code provision constitutes a specific, safety command. Indeed, pursuant to this Court's approach to statutory construction, the second and third sentences of Industrial Code Section 23-9.2(a) are positive safety commands which support Misicki's Labor Law §241(6) claim. Significantly, the Appellate Division, Fourth Department, has a long history of construing Industrial Code Section 23-9.2(a) as a specific, positive command which supports liability under Labor Law §241(6).

Further, this Court has recognized the legislative history of Labor Law §241(6) demonstrates a clear intent to protect construction workers, such as appellant Misicki, from injuries caused by unsafe working conditions. Thus, to deny Misicki legal redress under Industrial Code 23-9.2(a) and Labor Law §241(6) is tantamount to repudiating the legislative history underlying Labor Law §241(6) and the sound public policy of construction worker protection.

POINTS OF LAW

POINT I

NEW YORK STATE INDUSTRIAL CODE SECTION 23-9.2(A) CONSTITUTES A SPECIFIC, POSITIVE COMMAND WHICH SUPPORTS A CAUSE OF ACTION UNDER LABOR LAW §241(6).

Labor Law §241(6) imposes vicarious liability upon owners and/or general contractors where a subcontractor's violation of a specific, positive safety command of the New York State Industrial Code proximately causes a worker's injury. Rizzuto v. L.A. Wenger Contracting Co., 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998); Comes v. New York State Electric and Gas Corp., 82 N.Y.2d 876, 631 N.E.2d 110, 609 N.Y.S.2d 168 (1993); Ross v. Curtis-Palmer Hydro-Electric Co., 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).

Here, Misicki's Supplemental Verified Bill of Particulars alleges that defendant-respondent Shore Road Corp., the owner of the subject premises, is vicariously liable under Labor Law §241(6) due to its violation of New York State Industrial Code Section 23-9.2(a). R. 71.

New York State Industrial Code Section 23-9.2(a), codified at 12 N.Y.C.R.R. 23-92(a), states:

> "All power-operated equipment shall be maintained in good repair and in proper operating condition at all times. *Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon*

> *discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.* The servicing and repair of such equipment shall be performed by or under the supervision of designated persons. Any servicing or repairing of such equipment shall be performed only while such equipment is at rest."

12 N.Y.C.R.R. 23-92(a) (emphasis added).

The Appellate Division, Fourth Department, has a long history of construing Industrial Code Section 23-9.2(a) as a specific, positive command which supports liability under Labor Law §241(6). Piccolo v. St. John's Home for the Aging, 11 A.D. 3d 884, 782 N.Y.S.2d 475 (4th Dept. 2004); Tillman v. Triou's Custom Homes, Inc., 253 A.D.2d 254, 687 N.Y.S.2d 506 (4th Dept. 1999); Webber v. City of Dunkirk, 226 A.D.2d 1050, 641 N.Y.S.2d 927 (4th Dept. 1996); Zacher v. Niagra Frontier Services, Inc., 210 A.D.2d 897, 621 N.Y.S.2d 1015 (4th Dept. 1994).

Indeed, Zacher held that the language of Industrial Code Section 23-9.2(a) "imposes upon owners, contractors and their agents *an affirmative duty of maintenance and inspection of power-operated equipment*." Id. at 898, 621 N.Y.S.2d 1015 (4th Dept. 1994)(emphasis added).

The Fourth Department's holdings are consistent with the canons of statutory interpretation utilized by this Court. In construing a statute, this Court has held that "the starting point in any analysis must be the plain meaning of the statutory language.

We have recognized that meaning and effect should be given to every word of a statute. 'Words are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning.'" Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104, 761 N.E.2d 1018, 1024, 73 N.Y.S.2d 291, 297 (2001) (citations omitted), quoting Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 100, 550 N.E.2d 410, 412, 551 N.Y.S.2d 157, 159 (1989).

Here, the first sentence of Industrial Code Section 23-9.2(a) is too general to qualify as a specific, positive command for Labor Law §241(6) liability[3]. However, as "meaning and effect"[4] must be given to "every word of a statute"[5], the second and third sentences of Section 23-9.2(a) are positive safety commands which support Misicki's Labor Law §241(6) claim. Thus, the operative language of Section 23-9.2(a) states:

> "Sufficient inspections of adequate frequency shall be made of such equipment to insure such maintenance. Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement."

12 N.Y.C.R.R. 23-9.2(a).

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[3]. The first sentence of Section 23-9.2(a) states: "All power-operated equipment shall be maintained in good repair and in proper operating condition at all times."

[4]. Id.

[5]. Id.

These two sentences invoke mandatory "inspections" and "maintenance" of power-operated equipment as well as "correct[ive]" action "by necessary repairs or replacement." 12 N.Y.C.R.R. 23-9.2(a). Thus, the Fourth Department properly held Industrial Code Section 23-9.2(a) "imposes upon owners, contractors and their agents *an affirmative duty of maintenance and inspection of power-operated equipment*." Zacher v. Niagra Frontier Services, Inc., 210 A.D.2d 897, 898, 621 N.Y.S.2d 1015 (4th Dept. 1994) (emphasis added).

Similarly, this Court has parsed wording and divided phrases of a sentence to determine whether a specific Industrial Code provision constituted a specific, safety command. Morris v. Pavarini Construction, 9 N.Y.3d 47, 51, 874 N.E.2d 723, 726, 842 N.Y.S.2d 759 (2007). Indeed, in Morris, this Court held that the latter part of an Industrial Code provision "imposed more specific requirements" than the preceding wording. Id. Thus, this Court has endorsed the Fourth Department's approach of reading the second and third sentences of Industrial Code Section 23-9.2(a) as *"imposing...an affirmative duty of maintenance and inspection of power-operated equipment*." Zacher v. Niagra Frontier Services, Inc., 210 A.D.2d 897, 898, 621 N.Y.S.2d 1015 (4th Dept. 1994) (emphasis added).

In deciding the Misicki appeal, the Appellate Division, Second Department, however, erred in failing to follow this Court's jurisprudence in statutory construction.

The Second Department did not address canons of statutory construction pursuant to Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104, 761 N.E.2d 1018, 1024, 73 N.Y.S.2d 291, 297 (2001) or this Court's nuanced analysis of the Industrial Code in Morris v. Pavarini Construction, 9 N.Y.3d 47, 51, 874 N.E.2d 723, 726, 842 N.Y.S.2d 759 (2007). Instead, the Second Department simply relied upon its own prior decisions which hold that Industrial Code Section 23-9.2(a) "merely establishes general safety standards which do not give rise to a non-delegable duty" under Labor Law §241(6). Misicki v. Cardonna, 51 A.D.3d 644, 645, 857 N.Y.S.2d 672, 673 (2d Dept. 2008).

"The interpretation of the regulation [Industrial Code] presents a question of law...." Morris v. Pavarini Construction, 9 N.Y.3d 47, 51, 874 N.E.2d 723, 726, 842 N.Y.S.2d 759 (2007). This Court, therefore, must resolve the divergent rulings of the Appellate Divisions in interpreting New York State Industrial Code Section 23-9.2(a) in the context of Labor Law §241(6). Resolution of this legal issue is presented by this Court's own approach to statutory construction and analysis of the Industrial Code as exemplified by Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104, 761 N.E.2d 1018, 1024, 73 N.Y.S.2d 291, 297 (2001) and Morris v. Pavarini Construction, 9 N.Y.3d 47, 51, 874 N.E.2d 723, 726, 842 N.Y.S.2d 759 (2007).

Accordingly, through this amicus curiae brief, NYSTLA respectfully requests that

this Court reverse the Appellate Division, Second Department, and hold New York State Industrial Code Section 23-9.2(a) is a specific, positive command which supports liability under Labor Law §241(6).

POINT II

NEW YORK STATE INDUSTRIAL CODE SECTION 23-9.2(A) MUST BE CONSTRUED AS A SPECIFIC, POSITIVE COMMAND SINCE THE LEGISLATIVE HISTORY OF LABOR LAW § 241(6), AND PUBLIC POLICY, FAVOR A BROAD READING TO PROTECT CONSTRUCTION WORKERS.

This Court has recognized that the legislative history of Labor Law § 241(6) demonstrates "the Legislature's intent to...protec[t] workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.'" Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 520, 482 N.E.2d 898, 901, 493 N.Y.S.2d 102, 105 (1985), quoting 1969 NY Legis. Ann., at 407. Thus, the New York State Legislature clearly intended to provide construction workers, such as Misicki, legal redress for construction site injuries caused by unsafe conditions.

In conjunction with the amendment of Labor Law §241(6), the Commissioner of Labor promulgated Industrial Code Section 23-9.2(a) to mandate the safe operation of power-operated equipment, including the power saw/grinder used by Misicki. Section 23-9.2(a) specifically requires inspection of power tools "to insure such

maintenance" and commands remedial action to correct "any structural defect or unsafe condition in such equipment." 12 N.Y.C.R.R. 23-9.2(a).

Here, Misicki has attested that the power grinder/saw was structurally defective and dangerous due to the missing handle. R. 276; 469. Further, the Product Advisory for the saw/grinder describes a "3-Position side handle" which is "Specifically designed and angled for maximum comfort *and control.*" R. 475. Misicki, however, could not properly hold and/or control the grinder/saw without the missing handle. R. 276; 468-469. Therefore, the grinder/saw kicked back causing the saw's blade to strike Misicki's face, resulting in severe facial lacerations. R. 468-469.

Significantly, Misicki's supervisor knew about the missing handle and yet directed Misicki to continue working with the dangerous grinder/saw despite the missing handle. R. 275-284; 293-294; 468-469. Surely the power grinder/saw and its known dangerous condition comes within the ambit of Industrial Code 23-9.2(a). To deny Misicki legal redress under Industrial Code 23-9.2(a) and Labor Law §241(6) is tantamount to repudiating the legislative history underlying Labor Law §241(6) and the sound public policy of construction worker protection.

Moreover, the use of power tools is commonplace in today's construction industry. This ever-expanding genre of tool allows for greater speed and efficiency in construction tasks. In exchange, however, power tools bring heightened levels of

danger. Therefore, Misicki, together with construction workers who must operate power tools to build New York State's infrastructure, are entitled to the remedial intent of the Legislature's 1969 amendment to Labor Law § 241(6): worker protection "by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.'" Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513, 520, 482 N.E.2d 898, 901, 493 N.Y.S.2d 102, 105 (1985), quoting 1969 NY Legis. Ann., at 407.

Accordingly, NYSTLA respectfully requests this Court interpret Industrial Code Section 23-9.2(a) as a specific, positive command which supports Misicki's cause of action pursuant to Labor Law §241(6).

CONCLUSION

On behalf of plaintiff-appellant Misicki, NYSTLA respectfully requests that this Court reverse the Appellate Division, Second Department, reinstate Misicki's Complaint and hold that New York State Industrial Code Section 23-9.2(a) constitutes a specific, positive command which supports a cause of action under Labor Law §241(6).

Respectfully submitted,

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