

**Drag v Rector, Church-Wardens & Vestrymen of
Trinity Church in the City of N.Y.**

2026 NY Slip Op 30456(U)

February 3, 2026

Supreme Court, Kings County

Docket Number: Index No. 518761/2018

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 3rd day of February 2026.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

**DECISION
and
ORDER**

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PAWEL T. DRAG, LESZEK KACZMARCZYK,

Plaintiffs,

Index No.: 518761/2018
Mot. Seq. No.: 3-5

-against-

THE RECTOR, CHURCH-WARDENS AND VESTRYMEN OF
TRINITY CHURCH IN THE CITY OF NEW YORK, ST.
PAUL’S CHURCH & THE EPISCOPAL DIOCESE OF NEW
YORK

Defendants.

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After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	NYSCEF DOC. #
Notice of Motion MS#3/Affidavits/Affirmations/Exhibits.....	57-75
Affirmation in Opposition to MS#3 and Notice of Cross-Motion MS#4//Exhibit.....	76-89, 91, 97-100
Memorandum of Law in Reply MS#3/Exhibits.....	108-109
Affirmation in Opposition to MS#4/Exhibits.....	104-105
Reply Affirmation MS#4/Exhibits.....	110-111
Notice of Cross-Motion MS#5/Affidavits/Affirmations/Exhibits.....	92-96
Affirmation in Opposition MS#5/Exhibits.....	106-107
Other.....	

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MONTELIONE, RICHARD J., J.

Procedural History/Background

Plaintiffs Patel T. Drag (Drag) and Leszek Kaczmarczyk (Kaczmarczyk), commenced this action by filing the verified summons and complaint on September 17, 2018, alleging, inter alia, that plaintiff Drag sustained severe injuries due to defendants' negligence upon being exposed to toxic levels of lead while working on premises owned and/or controlled by The Rector, Church-Wardens and Vestrymen of Trinity Church in the City of New York, St. Paul's Church & The Episcopal Diocese of New York ("defendants"). Issue was joined by defendants filing a Verified Answer on February 1, 2019. Plaintiffs filed a Note of Issue on November 24, 2023. The action involving the Episcopal Diocese of New York was discontinued by stipulation filed February 28, 2019. Defendants commenced a third-party action against Nova Restoration, LLC (Nova) by filing a third-party summons and complaint on February 28, 2023. Nova has neither appeared nor answered.

Defendants now move for an order granting summary judgement pursuant to CPLR § 3212, dismissing plaintiffs' claims (MS#3). Plaintiffs move by cross-motion for leave to file a late cross-motion for summary judgement; for an order granting plaintiffs summary judgment pursuant to CPLR § 3212 on the issue of defendants' liability under Labor Law §§ 200, 241(6), and common law negligence (MS#4 & MS#5).

Defendants claim that Nova was hired for a project involving restoration of the steeple, clock, and north and south windows at St. Paul's Chapel. Nova's crews, including Drag (a Nova foreman) and Kaczmarczyk, a workman, performed exterior and window work that required removal of old lead paint some of which was on copper sheet metal; Nova installed plexiglass and plastic sheeting around the windows, and Nova supervised and supplied masks and later respirators. Plaintiffs, by contrast, characterize the interior window work as occurring in a sealed space between plexiglass inside and foil outside, with little or no ventilation, paper or N-95 masks only, no wash facilities, and no hygiene rules, and they contend that a church representative demanded heat guns be used to speed up the paint-removal work.

Defendants argue that: (1) it neither supervised nor controlled Nova's work and therefore cannot be liable under Labor Law § 200; (2) any alleged lead exposure arose from the means and methods of Nova's work rather than a dangerous premises condition; (3) plaintiffs have not tied their claims to any applicable, sufficiently specific Industrial Code regulation for § 241(6); and (4) plaintiffs' toxic-tort theories fail for lack of admissible proof of general or specific causation.

Plaintiffs oppose defendants' motion and, in motion sequence 4 and 5, cross-moves (a) for leave to serve a late cross-motion for summary judgment, and (b) for summary judgment on defendants' liability under Labor Law §§ 200 (a codification of common-law negligence) and 241(6).

Motion Sequence 4&5

Under NY Kings County Supreme Court Uniform Civil Term Rules Pt. C, Rule 6, a motion for

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summary judgment must be made no later than 60 days after the filing of the note of issue, "except with leave of court on good cause shown." (*See and cf.* CPLR 3212[a]).

Plaintiffs filed their respective Notes of Issue on November 24, 2023, making Tuesday, January 23, 2024, the 60th day deadline. Defendants' motion for summary judgment, filed on January 23, 2024, is timely. Drag filed his cross-motion on October 15, 2024 (Motion Seq. #4), and Kaczmarczyk filed his cross-motion on October 18, 2024 (Motion Seq. #5), both over 268 days or almost nine months after the deadline.

Defendants argue that, under *Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004), and *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 786 N.Y.S.2d 379 (2004), strict enforcement of the time limit is required, that the absence of any good-cause showing in plaintiffs' opening cross-motion papers is fatal. Defendants argue that even a one-day delay warrants denial absent a satisfactory explanation citing *St. John's Univ. v. Butler Rogers Baskett Architects, P.C.*, 105 A.D.3d 728, 963 N.Y.S.2d 237 (2d Dept 2013); *Giuliano v. 666 Old Country Rd., LLC*, 100 A.D.3d 960, 954 N.Y.S.2d 691 (2d Dept 2012); *Derby v. Bitan*, 89 A.D.3d 891, 933 N.Y.S.2d 602 (2d Dept 2011).

Plaintiffs ask the Court to entertain his cross-motion notwithstanding *Brill*, contending that the cross-motion is "correctly labeled," seeks essentially the same relief on the same issues as Rector's timely summary-judgment motion, and thus falls within the line of cases permitting courts to search the record under CPLR 3212(b) and to consider untimely cross-motions at least as to those issues already properly before the Court citing *Palomo v. 175th St. Realty Corp.*, 101 A.D.3d 579, 956 N.Y.S.2d 103 (1st Dept 2012), *Conklin v. Triborough Bridge & Tunnel Auth.*, 49 A.D.3d 320, 854 N.Y.S.2d 15 (1st Dept 2008), *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 824 N.Y.S.2d 244 (1st Dept 2006), and the Court of Appeals' discussion in *Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 654 N.Y.S.2d 335 (1996) regarding the court's power to search the record in connection with a timely motion. The court declines to consider the defendants' late motion for summary judgment.

Facts

Plaintiff Drag was a Nova foreman who, starting around August 2015, was assigned to work on the St. Paul's Chapel's project that involved removing old paint from approximately 20–24 stained-glass windows and their sills over a period of months. Plaintiff Drag and co-plaintiff Kaczmarczyk initially removed paint by manual scraping, but that in or about August 2015 began to use heat guns allegedly to expedite the work.

According to plaintiffs Drag and Kaczmarczyk, the interior face of each window was covered with plexiglass "to prevent the odor from going inside the church," while the exterior was sealed with a solid foil or plastic sheeting affixed to the building so that the work would not be visible from the street, thus creating a closed, confined space for them to work within. They state that they used heat guns to soften the old paint while standing between the plexiglass and the foil, and that the heat generated strong, metallic-smelling fumes. No ventilation or respirators were provided. Plaintiffs through their deposition testimony testified that: (1) the only safety equipment initially provided were paper masks, later replaced by N-95 masks after

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plaintiff Kaczmarczyk was diagnosed with lead poisoning; (2) there were no instructions or rules about washing, cleaning, or eating at the job site; (3) plaintiffs were unaware of any wash facilities or clean area where they could remove contaminated clothing; and (4) no lead testing of the chapel's paint was performed until after plaintiff Kaczmarczyk's diagnosis.

There is no question of fact that (1) St. Paul's Chapel is a 256-year-old structure; (2) the steeple restoration involved lead-coated copper; (3) SuperStructures, the retained engineering firm, submitted specifications that took into account the age of the paint and described procedures for paint removal; (4) those specifications were submitted to Trinity for approval; (5) Trinity convened and participated in design-phase meetings; (6) defendant's agent regularly visited the site, including the window-restoration area, where he saw workers removing paint while wearing only masks and hard hats.

The court finds that defendants approving SuperStructures' bid, participating in design-phase meetings, and discussing AEC's scope of asbestos work (the environment group hired) amount only to general project coordination and do not establish the kind of direct supervisory control over the manner and methods of plaintiffs' paint-removal work required for Labor Law § 200 liability under the "means and methods" line of cases. *See Chiriboga-Herrera v Litt*, 2026 NY Slip Op 00344, 2026 WL 216855, at *2 [2d Dept Jan. 28, 2026]:

‘Where ‘a claim arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation’ (*Wilson v. Bergon Constr. Corp.*, 219 A.D.3d at 1382–1383, 195 N.Y.S.3d 800, quoting *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82).

Nova chose and supplied the heat guns and masks, and plaintiffs did not know who made the decision to use heat guns and did not complain to any church representative about work conditions.

The court finds there was no "dangerous condition" of the premises that would be covered by Labor Law § 200. The removal of the lead-containing materials was an integral part of the very work Nova was hired to perform—restoration of lead-coated steeple components and removal of old paint from historic windows. Plaintiffs argue the application of OSHA-based duties, but if OSHA-based duties applied, those duties ran only to Nova as plaintiffs' employer and cannot be used directly against defendants, which was not plaintiffs' employer. *See Wetter v Northville Indus. Corp.*, 185 AD3d 874, 876, 127 NYS3d 521, 522, 2020 NY Slip Op 03946, 2020 WL 3980376 [2d Dept 2020], "...a violation of an OSHA provision does not provide a basis for liability under Labor Law § 241(6) (*see Marl v. Liro Engrs., Inc.*, 159 A.D.3d 688, 689, 73 N.Y.S.3d 202)." This matter is similar to the facts found in *Wilson v City of New York*, 7 AD3d 266, 267, 775 NYS2d 527, 528, 2004 NY Slip Op 03620, 2004 WL 945072 [1st Dept 2004]:

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Plaintiffs, burners or burners' helpers, employed by (sub-contractor) ... to cut steel beams with acetylene torches, allege that, due to the improper abatement of steel painted with lead-based paint, they developed lead poisoning from exposure to fumes. The parties' various motions and cross motions were correctly decided (Owner) had no authority to supervise or control plaintiffs' work, an implicit precondition to liability under Labor Law § 200 (*Rizzuto v. LA Wenger Constr. Co.*, 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 693 N.E.2d 1068). The sections of the Industrial Code rejected by the motion court are not sufficiently specific to support claims under Labor Law § 241(6) (*see Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82).

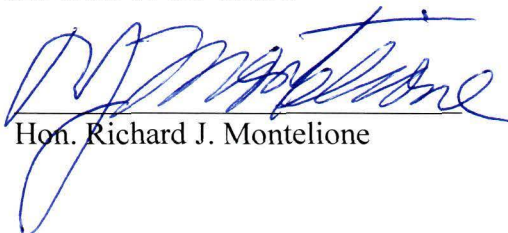
Based on the foregoing, it is

ORDERED that defendants motion for granting summary judgement pursuant to CPLR § 3212, dismissing plaintiffs' claims (MS#3) is GRANTED and the complaint is DISMISSED; and it is further

ORDERED that defendants' motion for leave to file a late cross-motion for summary judgement is DENIED (MS#4 & MS#5); and it is further

ORDERED that any other relief requested is DENIED.

This constitutes the decision and order of the Court.



Hon. Richard J. Montelione

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KINGS COUNTY CLERK
FILED