

<b>Espinoza v M&amp;R Constr. Group Inc.</b>
2026 NY Slip Op 31227(U)
March 19, 2026
Supreme Court, Kings County
Docket Number: Index No. 513911/2022
Judge: Devin P. Cohen
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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 513911/2022  
Seqs. 006, 007

Part LL1M

\_\_\_\_\_  
ANGEL RAFAEL MONTERO ESPINOZA,

Plaintiff,

against

M&R CONSTRUCTION GROUP INC.,  
SHOREWOOD REAL ESTATE GROUP LLC D/B/A  
SWDM MYRTLE LLC, AND SPENCERAN, INC.,

**DECISION/ORDER**

Defendants.

\_\_\_\_\_  
M&R CONSTRUCTION GROUP INC.,  
SHOREWOOD REAL ESTATE GROUP LLC D/B/A  
SWDM MYRTLE LLC, AND SPENCERAN, INC.,

Third-Party Plaintiffs,

against

RISE CONCRETE LLC,

Third-Party Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion, by reference to the New York State Courts Electronic Filing System docket numbers: NYSCEF ## 158-167, 169-203, 206-207.

Upon the foregoing papers, plaintiff’s motion for summary judgment (Seq. 006) and defendants’ cross-motion for summary judgment (Seq. 007) are decided as follows:

**Procedural Posture and Factual Background**

Plaintiff commenced this action to recover for damages he claims to have sustained on April 28, 2022 when he was struck by a stone that fell from an excavator while performing work at 1100 Myrtle Avenue (the premises). It is undisputed that Spenceran, Inc. (Spenceran) owned

the premises. Shorewood Real Estate Group LLC d/b/a SWDM Myrtle LLC (Shorewood) is designated as an agent of the Owner in the construction management agreement (§ 1.48).

It is undisputed that M&R Construction Group Inc. (M&R) was the construction manager for the project. M&R's construction management agreement, *inter alia*, contain obligations to “directly enforce the Subcontracts and all warranties and guarantees required by the contract documents and supervise and/or perform any work performed in connection therewith” (*see* §§ 4.3.33.1 – 4.3.33.9). M&R sub-contracted third-party defendant Rise Concrete LLC (Rise), plaintiff's employer. That sub-contract empowers M&R to “abate any hazard or correct any violation” (§ 5.3.1).

On February 28, 2025, the court denied defendants' motion to amend their pleadings to assert an affirmative defense and a counter-claim of fraud. Now, both parties move for summary judgment.

The plaintiff testified as follows: On the date of the incident, plaintiff was performing carpentry work in preparation for a cement pour (plaintiff EBT at 44). Part of this work involved building boxes or frames into which the cement could be poured (*id.*). Plaintiff was carrying a 10-foot long 2x8 piece of wood to the area where the box was being constructed (*id.* at 49). Excavation work was ongoing at the premises, and the excavator was being operated while plaintiff was constructing the boxes (*id.* at 50). Plaintiff testified that he “was in the area first” to retrieve the wood he needed to perform his work and the excavator operator drove to where plaintiff was working (*id.* at 59). The excavator basket was approximately 10 feet above plaintiff's head (*id.* at 50). The operator was breaking up “cement parts that were no good anymore and . . . placing” them “in containers” when a piece of stone fell from the machine onto

plaintiff's head (*id.* at 50). The stone was a little bit bigger than a regulation #3 soccer ball (*id.* at 54), which is slightly smaller than a standard soccer ball.

Non-party Angel Suazo, the excavator operator, was also deposed. Mr. Suazo testified that it was common for debris to fall from the bucket onto workers and that he was not concerned because it did not “really hurt them” (Suazo EBT at 11). Mr. Suazo saw a stone hit plaintiff on the hardhat (*id.*).

### Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

#### **Shorewood's Status as a Labor Law Defendant**

As an initial matter, Shorewood contends that it is not a proper Labor Law defendant because Shorewood was not an agent of the owner with respect to authority to supervise, control, or direct the work being performed (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–318 [1981]). However, as previously noted, Shorewood is designated as an “Owner entity” in the construction management agreement (CMA at § 1.48). Furthermore, Alma Hot, project manager for M&R, testified that Shorewood was the owner's “rep” (Hot EBT at 11). In light of the uncontroverted evidence, Shorewood's arguments are unavailing.

In its moving papers, Shorewood relies on the following purported authority: “*Parrelli v Temple Beth El of Great Neck*, 304 A.D.2d 788, 789 [2d Dept 2003]” (defendants' aff in supp at 14). However, as plaintiff's counsel notes, this case does not exist. The court can find no case

that contains this caption; the nearest Second Department case is *Berger v Temple Beth El of Great Neck*, a defamation action involving none of the issues at dispute in this case. The citation leads to the middle of a Second Department decision in a declaratory judgment matter involving proper land use of a parcel in the County of Westchester.

In light of this apparently fabricated caselaw, a sanctions hearing will be scheduled in the decretal section of this decision.

**Labor Law § 240 (1)**

Liability under Labor Law § 240 (1) is “absolute” where the failure of a safety device enumerated by the statute is a proximate cause of the plaintiff’s accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 N.Y.3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 500 (1993)]). In order to recover for an injury caused by a falling object, a plaintiff must show that the object was being hoisted, secured, or required securing for the purpose of the undertaking (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]). A worker is recalcitrant if he “(1) had adequate safety devices available, (2) knew both that the safety devices were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice”; mere comparative fault is not a defense to Labor Law § 240 (1) (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167–1168 [2020]).

It is undisputed that the plaintiff was struck by debris that fell from the bucket of the excavator that was working above his head—defendants only dispute the size of the stone. Therefore, based on his testimony that he was struck by an unsecured, falling stone, plaintiff has

demonstrated his prima facie entitlement to summary judgment (*see e.g. Kretowski v Braender Condominium*, 57 AD3d 950 [2d Dept 2008]).

Defendants' arguments in opposition, and in support of their own cross-motion, are unavailing. Even if it were accepted *arguendo* that plaintiff was instructed not to work near the excavator (which is not supported by the record) and the court disregarded plaintiff's testimony that he was in the area working before the excavator arrived, "an instruction not to be in a particular area 'is not a safety device in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment'" (*Rivera v 26 W. 56, LLC*, 241 AD3d 844, 846 [2d Dept 2025]). Defendants' arguments about the size of the stone and plaintiff's alleged subsequent actions do not bear on the issue of liability.

Therefore, plaintiff's motion is granted with respect to his Labor Law § 240 (1) claim; defendants' cross-motion is denied.

#### **Labor Law § 241 (6)**

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) a proximate cause of which was a violation of an Industrial Code provision (*Moscato v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff alleges violations of, *inter alia*, 12 NYCRR 23-1.7 (a), 4.2 (k), and 9.5 (c). Each of these is sufficiently specific to support a cause of action under Labor Law § 241 (6).<sup>1</sup>

The testimony of plaintiff and Mr. Suazo are sufficient to demonstrate plaintiff's prima facie entitlement to summary judgment on his Labor Law § 241 (6) claim. Mr. Suazo admitted

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<sup>1</sup> Although the Second Department is the only Department to find 23-4.2 (k) sufficiently specific, it has consistently done so (*Zaino v Rogers*, 153 AD3d 763, 765 [2d Dept 2017], citing, *inter alia*, *Garcia v Silver Oak USA*, 298 AD2d 555, 555 [2d Dept 2002]).

that debris frequently fell from the excavator bucket onto workers; therefore, Rule 1.7 (a)'s requirements for areas ordinarily exposed to falling materials applies. There was neither overhead protection nor was the area beneath the excavator barricaded to prevent workers from entering the area. Additionally, since plaintiff was not part of an excavation crew or a pitman; therefore, Rules 4.2 (k) and 9.5 (c) were violated. Defendant has not produced evidence that rebuts plaintiff's arguments. The arguments advanced by defendant are inconsistent. Defendant first argues that plaintiff was the sole proximate cause because he "chose to walk in close proximity to the excavator," but then argues in the same section that "plaintiff was required to be in the controlled access zone (CAZ)." On defendants' own arguments, it appears that either Rule 1.7 (a) was violated due to the lack of proper protection around the excavator or Rule 4.2 (k) and 9.5 (c) were violated because plaintiff was improperly required to work near the excavator.

Therefore, plaintiff's motion is granted with respect to his Labor Law § 241 (6) claim; defendants' cross-motion is denied.

### **Labor Law § 200**

Plaintiff's motion for summary judgment does not include Labor Law § 200, and defendants' cross-motion was filed 142 days after the note of issue was filed, well past the 60-day deadline. Since the plaintiff's motion does not implicate Labor Law § 200, this portion of defendants' cross-motion cannot be deemed timely because it was made on a "nearly identical basis" to the primary motion (*see e.g. Grande v Peteroy*, 39 AD3d 590, 592 [2d Dept 2007], *as amended* [Dec. 18, 2007]). "Absent a satisfactory explanation for the untimeliness, constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits" (*Navarro v Damac Realty, LLC*, 202 AD3d 1100, 1101 [2d Dept 2022]).

Therefore, defendant's cross-motion for summary judgment on this claim is denied.

**Conclusion**

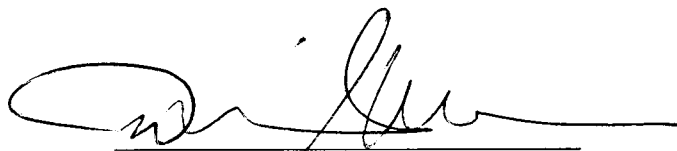
Plaintiff's motion for summary judgment (Seq. 006) is granted.

Defendants' cross-motion for summary judgment (Seq. 007) is denied. A sanctions hearing is scheduled for April 10, 2026 at 10:00am.

This constitutes the decision and order of the court.

March 19, 2026

**DATE**



**DEVIN P. COHEN**

Justice of the Supreme Court