

**Barbosa v Avalon Yonkers ATI Site, LLC**

2025 NY Slip Op 33917(U)

October 10, 2025

Supreme Court, New York County

Docket Number: Index No. 160733/2019

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. PAUL A. GOETZ PART 47**

*Justice*

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SANDRA CARNEIRO BARBOSA,  
Plaintiff,

- v -

AVALON YONKERS ATI SITE, LLC, AVALON YONKERS  
SUN SITES, LLC, AVALONBAY COMMUNITIES,  
INC., YONKERS INDUSTRIAL DEVELOPMENT AGENCY,

Defendants.

-----X

AVALON YONKERS ATI SITE, LLC, AVALON YONKERS SUN  
SITES, LLC, AVALONBAY COMMUNITIES, INC., YONKERS  
INDUSTRIAL DEVELOPMENT AGENCY

Plaintiffs,

-against-

NATIONWIDE MECHANICAL, INC., TONY CASALE, INC.,

Defendants.

-----X

AVALON YONKERS ATI SITE, LLC, AVALON YONKERS SUN  
SITES, LLC, AVALONBAY COMMUNITIES, INC., YONKERS  
INDUSTRIAL DEVELOPMENT AGENCY

Plaintiffs,

-against-

NATIONWIDE MECHANICAL & PLUMBING LLC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 185, 188, 190, 192, 194, 195, 196, 197, 198, 199, 200, 203, 204, 205, 206, 207, 208, 209

were read on this motion to/for JUDGMENT - SUMMARY.

**INDEX NO.** 160733/2019  
**MOTION DATE** 06/18/2025,  
06/18/2025  
**MOTION SEQ. NO.** 004 005

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595902/2021

Second Third-Party  
Index No. 595190/2023

The following e-filed documents, listed by NYSCEF document number (Motion 005) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 186, 189, 191, 193, 201, 202, 210

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

ORDERED that the portion of plaintiff's motion (MS #4) seeking summary judgment on her Labor Law § 240(1) cause of action as asserted against Avalon Yonkers ATI Site, LLC, Avalon Yonkers Sun Site, LLC, and AvalonBay Communities, Inc, (collectively "the Avalon defendants") is denied as "Labor Law § 240(1) relates only to special hazards presenting elevation-related risk[s]" (*Hensel v Aviator FSC, Inc.*, 198 AD3d 884 [2d Dept 2021]), and here while plaintiff alleges that her foot slipped into a drainage hole, she did not suffer from an "elevation related hazard" as contemplated by Labor Law § 240(1) (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009] ["[H]eight differential from the bottom to the top was at most 12 to 18 inches, we agree with defendants that plaintiff was not exposed to an elevation-related hazard as contemplated by section 240(1)"]; *see also* Plaintiff's EBT, NYSCEF Doc No 154 at 63:14 – 63:18 ["Q: How deep was the hole? A: I don't know. No idea. Q: was it more than one foot deep? A The depth I couldn't tell you because I don't know how drains work. So I would have no idea."]), and furthermore contrary to plaintiff's argument the surface of the floor, is not considered a "safety device" within the purview of Labor Law § 240(1) (*see Avelino v 26 R.R. Ave., Inc.*, 252 AD2d 912 [3d Dept 1998]); and it is further

ORDERED that the portion of plaintiff's motion (MS #4) seeking summary judgment on her Labor Law § 241(6) cause of action as asserted against the Avalon defendants is denied because plaintiff asserts a violation of 12 NYCRR § 23-1.7(b)(1), as a predicate to her Labor Law § 241(6) claims, however this section "is inapplicable, because the hole that plaintiff stepped into, as [s]he described it, was not large enough for a person to fit through" (*Cerverizzo v*


*City of New York*, 111 AD3d 535, 536 [1st Dept 2013]), and upon searching the record summary judgment is awarded to defendants on plaintiff's Labor Law § 241(6) claim and it is dismissed (*see Ruggiero v Cardella Trucking Co.*, 16 AD3d 342 [1st Dept 2005]); and it is further

ORDERED that the portion of plaintiff's motion (MS #4) seeking summary judgment on her Labor Law § 200, and common law negligence claims is denied, because there is a triable issue of fact as to whether the defendants had notice of the dangerous condition, that is the open drain pipe covered only by a tarp (*see Molloy v 750 7th Ave. Assoc.*, 256 AD2d 61 [1st Dept 1998]); and it is further

ORDERED that the portion of plaintiff's motion (MS #4) seeking summary judgment dismissing the affirmative defenses regarding her allegedly culpable conduct is denied as premature at this juncture, as there are triable issues of fact regarding plaintiff's potential comparative fault that pertain to her Labor Law § 200 and common law negligence claims (*see Drago v New York City Tr. Auth.*, 227 AD2d 372, 373 [2d Dept 1996] ["Comparative negligence is a viable defense to a cause of action asserted under either Labor Law §§ 200 or 241(6)"]; *however also see Hogan v 590 Madison Ave., LLC*, 194 AD3d 570 [1st Dept 2021] ["comparative negligence ... not a defense to a Labor Law § 240(1) claim"]); and it is further

ORDERED that the Third-Party Defendant NATIONWIDE MECHANICAL INC.'s ("NMI") motion (MS #5) is denied in its entirety because NMI has failed to establish that it was free from negligence to warrant dismissal of the common law negligence and contribution third-party claims and cross-claims asserted against it by the Avalon defendants and Third-Party co-defendant Tony Casale Inc., respectively (*see Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493 [1st Dept 2004]), and NMI also fails to establish that the accident did not arise out of plaintiff's work as to warrant the dismissal of the contractual indemnification claims asserted

against it (*see Zayed v New York City Dept. of Design and Constr.*, 219 AD3d 1241 [1st Dept 2023]).

  
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10/10/2025  
DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE