

Olecki v BP 399 Park Ave., LLC
2026 NY Slip Op 30484(U)
February 9, 2026
Supreme Court, New York County
Docket Number: Index No. 159112/2021
Judge: Phaedra Perry-Bond
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHAEDRA F. PERRY-BOND PART 35

Justice

-----X

INDEX NO. 159112/2021

ROBERT OLECKI and GIOVANNA OLECKI,

Plaintiffs,

03/15/2024,

04/26/2024,

MOTION DATE 04/26/2024

- v -

MOTION SEQ. NO. 001 002 003

BP 399 PARK AVENUE, LLC, BOARD OF MANAGERS OF
THE 399 PARK AVENUE CONDOMINIUM, 399 PARK
AVENUE ADVISORS, LLC,

Defendant.

DECISION + ORDER ON
MOTION

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BP 399 PARK AVENUE, LLC, BOARD OF MANAGERS OF
THE 399 PARK AVENUE CONDOMINIUM

Plaintiff,

Third-Party
Index No. 595062/2022

-against-

ATLANTIC COOLING TECHNOLOGIES AND SERVICES,
LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 71, 72, 73, 74, 75,
76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102,
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201, 202, 203, 204, 241, 242, 243, 244, 247, 248, 249, 250, 251, 252, 253, 254, 255

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 149, 150, 151, 152,
153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 208,
209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 238, 239, 240, 245, 256

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 173, 174, 175, 176,
177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 205, 206, 207,
223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 246, 257, 258

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, motion sequences 001 through 003 are consolidated for disposition and decided as follows:

- A. Plaintiffs Robert Olecki (“Plaintiff”) and Giovanna Olecki (collectively “Plaintiffs”) motion for summary judgment on Plaintiff’s Labor Law §§ 240(1) and 241(6) claims against Defendants BP 399 Park Avenue, LLC (“399 Park Ave”) and 399 Park Avenue Condominium (“Board of Managers”) (collectively “Defendants”), and to sever the main action from the third-party action (“Mot. Seq. 001”), is granted in part and denied in part.
- B. Third-Party Defendant Atlantic Cooling Technologies and Services, LLC’s (“Atlantic”) motion for summary judgment dismissing the Third-Party Complaint and dismissing Plaintiff’s Labor Law § 240(1) and 241(6) claims (“Mot. Seq. 002”) is granted in part and denied in part.
- C. Defendants’ motion for summary judgment dismissing Plaintiffs’ Complaint or alternately seeking summary judgment on the third-party claims asserted against Atlantic (“Mot. Seq. 003”) is denied.

I. Background

399 Park Avenue, New York, New York (the “Premises”) is a condominium owned by Defendant 399 Park Ave (NYSCEF Doc. 90) with the Premises’ common elements being managed by the Board of Managers pursuant the condominium’s declaration (NYSCEF Doc. 72 at § 9.4). One of the Premises’ four cooling towers was experiencing an oil leak, and Atlantic was asked to replace a pinion oil seal cap to stop the leak (NYSCEF Doc. 95). On April 20, 2021, Atlantic’s field manager, Peter Leviness, conducted a walkthrough of the Premises and the leaking cooling tower to prepare an estimate (NYSCEF Doc. 86 at 46-47). Subsequently, on June 7, 2021, Atlantic

directed three of its employees, including Plaintiff, to repair the oil leak in the cooling tower (NYSCEF Doc. 80 at 55).

To complete this task, Plaintiff was required to climb down from the top of the cooling tower and replace a pinion oil seal cap (NYSCEF Doc. 80 at 67; 82). Plaintiff lowered himself from the top of the cooling tower onto a narrow 14- to 18-inch-wide platform called a catwalk and then lowered himself further to stand on top of a drift eliminator in the cooling tower. When his feet touched the drift eliminator, the drift eliminator broke and he fell at least 12 feet, first hitting a pipe and then hitting the floor of the cooling tower (NYSCEF Doc. 80 at 83; 109; 115; 134).¹ Plaintiff was not provided any wooden planks to put on surfaces like the drift eliminator to ensure there were stable surfaces to work from (*id.* at 141 and 148). Plaintiff believed the drift eliminator had decomposed due to the presence of moss or algae on the drift eliminator. Plaintiff's co-worker, Christopher Anthony, corroborated that no planks were provided (NYSCEF Doc. 87 at 101-102).

Anthony Fasulo, the Premises' chief engineer employed by 399 Park Ave, testified it was his responsibility to maintain and to clean the cooling towers (NYSCEF Doc. 83 at 33). Mr. Fasulo could not recall the last time the drift eliminators were cleaned, and he testified neither he nor any of his engineers ever inspected the drift eliminators (*id.* at 87; 91). Mr. Fasulo knew that when working in the cooling tower it was a requirement to have a safety harness and lifeline anchored, or to have planks installed to ensure safe walkways, but he did not check with Plaintiff or Plaintiff's coworkers to ensure they brought the required planking, lifelines, or harnesses (*id.* at 174-176). Nor did Mr. Fasulo ever instruct Atlantic to bring the required safety equipment to complete work in the cooling tower (*id.* at 174-175). According to Kenneth Wood, Atlantic's Vice President of Operations, planking should be put on top of drift eliminators prior to walking on top of drift

¹ Plaintiff testified the fall was 15 to 20 feet while another witness testified the distance was 12 feet.

eliminators, and planking is often utilized when changing an oil seal cap (NYSCEF Doc. 85 at 158 and 161). Now, each of the parties moves for summary judgment. The motions are consolidated for disposition and decided in accordance with the reasons that follows.

II. Discussion

A. Plaintiffs' Motion ("Mot. Seq. 001")

Plaintiffs' motion for summary judgment is granted in part and denied in part. Plaintiff's motion for summary judgment is granted as to his Labor Law § 240(1) claim.

At the outset, the Court is mindful of the Court of Appeals' long-standing instruction to give effect to the legislative intent of Labor Law § 240, which is "to be construed as liberally as may be for the accomplishment" of "protection of workmen from injury" (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520-521 [1985]).

Plaintiffs established a *prima facie* Labor Law § 240(1) violation through Plaintiff's uncontroverted testimony that while replacing an oil seal cap inside a water cooling tank, he fell multiple feet when his foot broke through an unsecured drift eliminator which he had to traverse to complete his assigned task (*see, e.g. Telesford v Port Auth. of N.Y. & N.J.*, --- N.Y.S.3d ---, 2026 N.Y. Slip Op. 00035 at *1 [1st Dept 2026] [worker's fall when foot caused material to collapse constituted Labor Law § 240(1) violation]; *Palumbo v Citigroup Tech., Inc.*, 240 AD3d 455, 456 [1st Dept 2025] [worker's fall 10 ½ to 20 inches after foot broke through stack of two pallets he was standing on established Labor Law § 240(1) violation]; *see also Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016] [worker's fall through opening in latticework rebar deck 12 to 18 inches below constituted Labor Law § 240(1) violation]). The evidence is further undisputed that although wooden planks should have provided to allow Plaintiff and his coworkers to have a more secure surface to work on, no wooden planks were provided on the date of

Plaintiff's accident (*see Rodriguez v CB Developers*, --- N.Y.S.3d ----, 2026 N.Y. Slip Op. 00326 at *1 [1st Dept 2026] [worker who fell through ceiling while traversing narrow metal beams normally covered by plywood that had been removed constituted Labor Law § 240(1) violation]).

In opposition, Defendants and Atlantic Cooling fail to raise a triable issue of fact. The argument that Plaintiff was engaged in routine maintenance not covered by Labor Law § 240(1) is unavailing. Whether an activity can be considered “routine” involves an analysis of multiple factors, including (1) if it “is the type of job that occurs on a daily, weekly, or other relatively-frequent and recurring basis as part of the ordinary maintenance and care” of premises; (2) requires specialized equipment or expertise or a team of workers; (3) involves significant elevation risks; and (4) is “unrelated to any ongoing construction, renovation, painting, alteration or repair project” (*see Soto v J. Crew Inc.*, 21 NY3d 562, 568-569 [2013]). All four factors weigh against a finding that the replacement of the oil seal cap was routine maintenance. The undisputed testimony shows that in the twenty years Atlantic serviced the Premises, the pinion oil seal cap never required maintenance – which is completely contrary to the argument that Plaintiff was engaged in routine maintenance. Moreover, replacement of the cap required specialized equipment and expertise – namely requesting a contractor – Atlantic – who first deployed an employee to inspect the Premises and then on a second day deployed multiple employees who with specialized knowledge to complete the work. The task also involved a significant elevation risk in that it requires Plaintiff to work at a height of over 10 feet from the ground to replace the oil seal cap.

Finally, the task can be considered renovation, alteration, or repair under Labor Law § 240(1) as the replacement altered the structure and functioning of the Premises. Without the work done on the cooling tank, the Premises' entire cooling system could become significantly impacted (*see e.g. Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003] [altering “requires making

a significant physical change to the configuration or composition of the building or structure”]; *Mananghaya v Bronx-Lebanon Hospital Center*, 165 AD3d 117, 124 [1st Dept 2018] [work being performed that affects a crucial building system constitutes alteration under Labor Law § 240(1)]; *see also Parente v 277 Park Ave. LLC*, 63 AD3d 613 [1st Dept 2009] [repair of malfunctioning fan was not routine maintenance]).

The argument that Plaintiff was the sole proximate cause of his accident is similarly unavailing. It is conceptually impossible for a plaintiff to be considered the sole proximate cause of his accident where a Labor Law § 240(1) violation, which serves as a proximate cause for a plaintiff’s injury, is established (*see Suazo v 501 Madison-Sutton LLC*, 235 AD3d 513, 513 [1st Dept 2025]). Plaintiff’s failure to request planks which he was not instructed to use and were not readily available does not make him the sole proximate cause of his accident (*see DeRose v Bloomingdale’s Inc.*, 120 AD3d 41, 47 [1st Dept 2014] [placing burden on employees to demand adequate safety devices would eviscerate protections Legislature put in place to protect workers]).

Plaintiff’s failure to observe a warning sign outside the cooling tank to use planks amounts to at most comparative negligence, especially since Plaintiff’s coworkers testified, they did not recall the warning sign and regardless of the warning sign, the undisputed evidence establishes planks were not made readily available to Plaintiff [*see, e.g. Medas for Sena v 147 Amsterdam LLC*, 237 AD3d 410 [1st Dept 2025] [worker’s intoxication at time of accident amounts to comparative negligence which is not a defense to Labor Law § 240(1)]; *see also Pirozzo v Laight Street Fee Owner LLC*, 209 AD3d 596, 597 [1st Dept 2022] [worker’s failure to lock pins in lace before ascending scaffold amounted to only comparative negligence]). The same holds true for Plaintiff’s decision to walk on the draft eliminators, as he testified on prior occasions he had

walked on draft eliminators without issue, and he was forced to walk on the draft eliminator without any available planks to complete his assigned task.

The Court has considered the remainder of the arguments in opposition to granting Plaintiff summary judgment on his Labor Law § 240(1) claim and finds them to be unavailing. Therefore, the motion is granted to the extent that Plaintiff is entitled to a finding of liability under Labor Law § 240(1) against Defendants. Because Plaintiff is awarded summary judgment under Labor Law § 240(1), the branch of the motion seeking summary judgment under Labor Law § 241(6) is denied as academic (*see DaSilva v Super P57, LLC*, 243 AD3d 469, 471 [1st Dept 2025]). The motion to sever the third-party claims is denied as the Court dismisses the Third-Party claims for the reasons that follow in the Court's analysis of motion sequence 002. The motion for summary judgment on Giovanna Olecki's loss of consortium claim is granted to the extent the jury will consider Mrs. Olecki's loss of consortium damages alongside Plaintiff's damages arising from the violation of Labor Law § 240(1).

B. Atlantic's Motion ("Mot. Seq. 002")

Atlantic's motion for summary judgment dismissing Plaintiff's Labor Law §§ 240(1) and 241(6) claims and seeking dismissal of the Third-Party Complaint is granted in part and denied in part. The branch of the motion seeking dismissal of the Labor Law § 240(1) claim is denied in light of this Court awarding Plaintiff summary judgment on Labor Law § 240(1), and the branch of the motion seeking dismissal of the Labor Law § 241(6) claim is denied as academic.

The motion for summary judgment dismissing the Third-Party Complaint is granted. The very broad contractual indemnification clause is void under General Obligations Law § 5-322.1 which requires dismissal of the contractual indemnification claim. The indemnification provision at issue provides as follows:

“Vendor shall indemnify, defend and hold harmless the Buyer Entities listed on Schedule A-1 attached hereto, their agents, employees, affiliates, successors and assigns from any claims, demands, debts, suits, losses, damages, fines, penalties, liabilities, costs and expenses, including attorneys fees, expenses, court costs, or causes of action whatsoever of every name and nature, both in law and in equity, (i) arising from or claimed to have arisen from the omission, fault, willful act, negligence or other misconduct of Vendor of Vendor’s subcontractors, licensees, invitees, agents, servants or employees, (ii) resulting from the performance by Vendor of its obligations under this Purchase Order and the execution of the work or furnishing of goods hereunder or (iii) arising from or by reason of any actual or claimed violation or infringement of patent, trademark, service mark or similar laws, including costs and expenses for or on account of any invention or other item embodied in the goods or work supplied hereunder or used in the performance hereof, including the use or disposal thereof by or on behalf of Buyer, provided that violations of such laws which result from Vendor complying with specific written instructions furnished by Buyer, shall be excepted from the liability hereunder.”

The indemnification clause does not contain the requisite savings language, and the triggers for indemnification are so broadly worded that it calls for indemnifying Defendants in the event of their own negligence (*see Vasquez v Manhattan College*, 223 AD3d 601, 602-603 [1st Dept 2024]). Subsection (ii) of the clause requires Atlantic to indemnify Defendants for any liabilities, costs and expenses “arising “resulting from the performance by Vendor of its obligations under this Purchase Order and the execution of the word or furnishing of goods hereunder.” In other words, just by virtue of performing under the contract, Atlantic must indemnify Defendants for this lawsuit, even if the lawsuit was caused in part by Defendants’ own negligence. Although a negligence-free indemnitee may seek indemnity under an indemnification clause that lacks saving language, the record reflects the Defendants could be found negligent as they failed to provide any sort of site safety training as they were supposed to, failed to provide scaffolding or planks, and may have contributed to the accident by failing to adequately maintain the drift eliminator (*see also Rogers v Peter Scalamandre & Sons, Inc.*, 231 AD3d 1174, 1178-1179 [2d Dept 2024]; *11 Essex Street Corp. v Tower Ins. Co. of New York*, 153 AD3d 1190, 1197-1198 [1st Dept 2017]; *Cavanaugh v 4518 Associates*, 9 AD3d 14, 17-18 [1st Dept 2004]).

The common law indemnification and contribution claims are dismissed because it is barred by Workers Compensation Law § 11. Specifically, Plaintiff's injuries do not constitute a "grave injury" as defined by that statute (*see Aramburu v Midtown West B, LLC*, 126 AD3d 498, 501 [1st Dept 2015]) The breach of contract for failure to procure insurance claim is also dismissed as the policies produced by Atlantic show that Defendants were insured in the amounts required by the vendor agreement (*see* NYSCEF Doc 159). That Atlantic's insurers have allegedly not provided Defendants with coverage may give rise to a claim against those insurers and is distinct from the issue of whether Atlantic procured the requisite amount of insurance (*see Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 497-498 [1st Dept 2004]). Therefore, the branch of Atlantic's motion seeking summary judgment dismissing the Third-Party Complaint is granted.

C. Defendants' Motion ("Mot. Seq. 003")

Defendants' motion for summary judgment is denied. Defendants' motion for summary judgment on their third-party claims is denied as moot as this Court granted Atlantic's motion for summary judgment dismissing the Third-Party Complaint. Defendants' motion for summary judgment dismissing Plaintiff's Labor Law §240(1) claim is denied as moot as this Court granted Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim.² Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 241(6) claim is denied as academic in light of Plaintiff obtaining summary judgment on his Labor Law § 240(1) claim.

Defendants' motion for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claims is denied (*see, e.g. Sinai v Luna Park Hous. Corp.*, 209 AD3d 600, 601 [1st Dept 2022]). As a preliminary matter, although the parties' agreement stated that

² On this motion, Defendants argue the Board of Managers is not a proper Labor Law defendant. But this is buried in one paragraph of an affidavit attached to Defendants' motion and is also contradicted by the terms of the declaration which states the Board of Managers is an agent of the unit owners and shall maintain, repair, and replace the common elements, which include the common elements and the roof (NYSCEF Doc. 72 at § 9.4).

Defendants would provide a site safety training to Plaintiff, the undisputed evidence shows that did not take place, which in and of itself creates an issue of fact as to whether Defendants' failure to provide a site safety training at least partially caused Plaintiff's accident under Labor Law § 200 and common law negligence. A jury could find that but for Defendants' failure to exercise their contractual obligation to provide training and supervision to Plaintiff, the accident could have been avoided by alerting Plaintiff to the need for planks or harnesses in the cooling tower (*see, e.g. Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426 [2015]).

Moreover, Defendants may be liable for the creation of a dangerous condition in the cooling tank – namely a degraded drift eliminator which, due to the presence of algae and other biological matter broke easily when Plaintiff stepped on it. Defendants failed to demonstrate affirmatively the lack of notice as to this dangerous condition as Defendants' own witness could not recall the last time the draft eliminators were inspected or maintained (*see Garcia v Soho AOA Owner, LLC*, 234 AD3d 572, 572 [1st Dept 2025]). Further, the alleged degradation of the drift eliminator coupled with the growth of algae is not the kind of condition that could have formed spontaneously or overnight, so “constructive notice may be inferred from its existence” (*Genova v City of New York*, 165 AD3d 486, 487-88 [1st Dept 2018] citing *Johnson v 675 Coster St. Hous. Dev. Fund*, 161 AD3d 635 [1st Dept 2018]). Because Defendants have failed to eliminate issues of fact as to their maintenance of the cooling tank and the absence of any notice as to the condition of the drift eliminators, the motion for summary judgment dismissing Plaintiff's Labor Law § 200 and common law negligence claims is denied.

Accordingly, it is hereby,

ORDERED that Plaintiffs' motion for summary judgment as to liability on the Labor Law § 240(1) claim asserted against Defendants is granted, and at the time of trial an inquest on

Plaintiff's damages under Labor Law § 240(1) and Mrs. Olecki's damages under her claim for loss of consortium shall be held, but the remainder of the motion is denied; and it is further

ORDERED that Atlantic's motion for summary judgment dismissing the Third-Party Complaint is granted, but the remainder of the motion is denied; and it is further

ORDERED that Defendants' motion for summary judgment is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiffs shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

2/9/26
DATE


HON. PHAEDRA F. PERRY-BOND, J.S.C.

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