

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D33630  
C/prt

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Argued - December 2, 2011

DANIEL D. ANGIOLILLO, J.P.  
THOMAS A. DICKERSON  
JOHN M. LEVENTHAL  
L. PRISCILLA HALL, JJ.

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2010-09870

DECISION & ORDER

Thomas Fernandez, etc., et al., appellants-respondents,  
v Abalene Oil Co., Inc., et al., defendants third-party  
plaintiffs-respondents-appellants, et al., defendants,  
Island Mobile Communications, Inc., defendant  
third-party defendant; I.M.C. Antenna & Tower, Inc.,  
third-party defendant/second third-party plaintiff-  
respondent, et al., second third-party defendants.

(Index No. 16397/04)

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Gary B. Pillersdorf & Associates, P.C., New York, N.Y. (Sullivan Papain Block  
McGrath & Cannavo, P.C. [Brian J. Shoot and Paul A. Hayt], of counsel), for  
appellants-respondents.

Cartafalsa, Slattery, Turpin & Lenoff, New York, N.Y. (Raymond F. Slattery of  
counsel), for defendants third-party plaintiffs-respondents-appellants.

Nicoletti, Gonson, Spinner & Owen LLP, New York, N.Y. (Jamie T. Packer of  
counsel), for third-party defendant/second third-party plaintiff-respondent.

In an action to recover damages for personal injuries, the plaintiffs appeal, as limited  
by their brief, from so much of an order of the Supreme Court, Kings County (Solomon, J.), dated  
August 23, 2010, as denied that branch of their motion which was for summary judgment on the  
issue of liability pursuant to Labor Law § 240(1) insofar as asserted by the plaintiff Mark Fernandez  
against the defendants third-party plaintiffs, Abalene Oil Co., Inc., AT&T Wireless Services, Inc.,  
and Nextel of New York, Inc., and the defendants third-party plaintiffs, Abalene Oil Co., Inc., AT&T

January 31, 2012

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FERNANDEZ v ABALENE OIL CO., INC.

Wireless Services, Inc., and Nextel of New York, Inc., cross-appeal, as limited by their brief, from so much of the same order as denied those branches of their cross motion which were for summary judgment dismissing the complaint insofar as asserted by the plaintiff Mark Fernandez against them and on the issue of liability on their third-party cause of action for contractual indemnification insofar as asserted by the defendant third-party plaintiff Nextel of New York, Inc., against the third-party defendant/second third-party plaintiff, I.M.C. Antenna & Tower, Inc.

ORDERED that the order is affirmed insofar as appealed from; and it is further,

ORDERED that the order is reversed insofar as cross-appealed from, on the law, and those branches of the cross motion of the defendants third-party plaintiffs Abalene Oil Co., Inc., AT&T Wireless Services, Inc., and Nextel of New York, Inc., which were for summary judgment dismissing the complaint insofar as asserted by the plaintiff Mark Fernandez against them and on the issue of liability on their third-party cause of action for contractual indemnification insofar as asserted by the defendant third-party plaintiff Nextel of New York, Inc., against the third-party defendant/second third-party plaintiff, I.M.C. Antenna & Tower, Inc., are granted; and it is further,

ORDERED that one bill of costs is awarded to the defendants third-party plaintiffs, Abalene Oil Co., Inc., AT&T Wireless Services, Inc., and Nextel of New York, Inc., payable by the plaintiffs and the third-party defendant/second third-party plaintiff, I.M.C. Antenna & Tower, Inc., appearing separately and filing separate briefs.

The plaintiff Thomas Fernandez's decedent, Dwayne Fernandez (hereinafter the decedent), and the plaintiff Mark Fernandez (hereinafter Fernandez) were brothers hired by the third-party defendant/second third-party plaintiff, I.M.C. Antenna & Tower, Inc. (hereinafter IMC), to install an antenna for the defendant third-party plaintiff Nextel of New York, Inc. (hereinafter Nextel), on a cellular tower owned by the defendant third-party plaintiff AT&T Wireless Services, Inc. (hereinafter AT&T), located on property owned by the defendant third-party plaintiff Abalene Oil Co., Inc. (hereinafter Abalene). On the date of the accident, the decedent climbed up the tower approximately 82 feet to tighten a bolt. As Fernandez spoke with his supervisor just outside the fence that surrounded the tower, he noticed that one of the decedent's ropes was moving "in a strange way." The decedent fell off the tower and landed on his back on an "ice bridge" that was 8 to 9 feet above ground level. The decedent's fall dislodged a number of steel step bolts that rained down on the work site. Some of the bolts hit the ice bridge and the adjacent building, and some came towards Fernandez. As the bolts fell from the tower, Fernandez ducked to avoid being struck. Afterwards, Fernandez ran towards the decedent and allegedly sustained an injury when he slipped in the snow. The decedent died at the scene. The accident allegedly was caused by the failure of a wire rope grab meant to secure the decedent to a safety wire that was permanently attached to the cellular tower.

The plaintiffs commenced this action against, among others, Abalene, AT&T, and Nextel (hereinafter collectively the Abalene defendants), asserting, inter alia, causes of action alleging a violation of Labor Law § 200 and common-law negligence on behalf of Fernandez. The Supreme Court, among other things, denied that branch of the plaintiffs' motion which was for summary judgment on the issue of liability pursuant to Labor Law § 240(1) insofar as asserted by

Fernandez against the Abalene defendants, granted that branch of the plaintiffs' motion which was for summary judgment on the issue of liability on that cause of action insofar as asserted by the plaintiff Thomas Fernandez, as administrator of the decedent's estate, against the Abalene defendants, and denied those branches of the Abalene defendants' cross motion which were for summary judgment dismissing the complaint insofar as asserted by Fernandez asserted against them and on the issue of liability on their third-party cause of action for contractual indemnification insofar as asserted by Nextel against IMC.

The Supreme Court properly denied that branch of the plaintiffs' motion which was for summary judgment on the issue of liability pursuant to Labor Law § 240(1) insofar as asserted by Fernandez against the Abalene defendants. The complaint did not plead such a cause of action and the plaintiffs failed to seek leave to amend the complaint to assert such a cause of action. Contrary to the plaintiffs' contention, Fernandez does not have a cause of action under Labor Law § 240(1) based on the "zone-of-injury" rule (*Bovsun v Sanperi*, 61 NY2d 219, 228; *cf. Del Vecchio v State of New York*, 246 AD2d 498). The alleged psychological injuries sustained by Fernandez were not a direct consequence of a failure to provide adequate protection to him against a risk arising from a physically significant elevation differential (*see Wilinski v 334 E. 92d Hous. Dev. Fund Corp.*, 18 NY3d 1, \*6; *Runner v New York Stock Exch. Inc.*, 13 NY3d 599, 603; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 1127). To apply the "zone-of-injury" rule to a cause of action alleging a violation of Labor Law § 240(1) "would, in effect, extend the owner's nondelegable duty to a person who was not injured by the particular hazard the statute was designed to guard against" (*Del Vecchio v State of New York*, 246 AD2d at 500; *see Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491).

The Supreme Court should have granted that branch of the Abalene defendants' cross motion which was for summary judgment dismissing the complaint insofar as asserted by Fernandez against them. Contrary to the conclusion of the Supreme Court, the accident "did not arise from a defective condition inherent on the . . . property, but rather, arose as a result of the allegedly defective 'means' utilized by [the decedent] to perform his work" (*Duarte v State of New York*, 57 AD3d 715, 716; *see McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872; *Jenkins v Walter Realty, Inc.*, 71 AD3d 954; *Radonic v Independence Garden Owners Corp.*, 67 AD3d 981, 982; *Gomez v City of New York*, 56 AD3d 522, 523-524).

Where, as here, "a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery . . . cannot be had under Labor Law § 200 [and for common-law negligence] unless it is shown that the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia*, 57 AD3d 54, 61; *see Radonic v Independence Garden Owners Corp.*, 67 AD3d at 982). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d at 62). In response to the Abalene defendants' prima facie showing that they did not have the authority to supervise or control the decedent's work, the plaintiffs failed to raise a triable issue of fact.

The Supreme Court also should have granted that branch of the Abalene defendants' cross motion which was for summary judgment on the issue of liability on their third-party cause of action for contractual indemnification insofar as asserted by Nextel against IMC. "[A] party seeking

contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662, citing General Obligations Law § 5-322.1; *see Reynolds v County of Westchester*, 270 AD2d 473). The Abalene defendants made a prima facie showing that Nextel was free from negligence by proffering evidence that it did not have the authority to supervise or control the decedent’s work. In opposition, IMC failed to raise a triable issue of fact.

ANGIOLILLO, J.P., DICKERSON, LEVENTHAL and HALL, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court