At an IAS Term, Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of August, 2010.

P R E S E N T:

HON. MARTIN M. SOLOMON,
Justice.

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THOMAS FERNANDEZ, as Administrator of the Estate of DWAYNE FERNANDEZ, AND MARK FERNANDEZ,

Plaintiffs,

- against -

Index No. 16397/04

ABALENE OIL CO., INC., et al.,

Defendants.

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ABALENE OIL CO., INC., et al.,

Third-Party Plaintiffs,

Index No. 75811/05

- against -

ISLAND MOBILE COMMUNICATIONS INC., et ano.,

Third-Party Defendants

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IMC ANTENNA & TOWER, INC.,

Second Third-Party Plaintiffs,

Index No. 75832/09

- against -

ELKS RIVER, INC., AND TRYLON TSF, INC.,

Second Third Party Defendants

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| The following papers numbered 1 to 25 read on these motions and cross motions: | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2, 8-9, 10-11, 14-15, 16-20, 24-25 |
| Opposing Affidavits (Affirmations) | 3-6, 13, 21, 23 |
| Reply Affidavits (Affirmations) | 7, 22 |
| Affidavit (Affirmation) in support of severance | 12 |
| Other Papers | |

Upon the foregoing papers, defendant/third-party defendant Island Mobile Communications Inc., (Island) moves for an order: (1) pursuant to CPLR 3211 (a) (2) dismissing the complaint against it; (2) pursuant to CPLR 3124 and 3126 dismissing the complaint against it; and (3) pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross claims asserted against them in their entirety. Second Third-party defendant Elk River Inc., (Elk River) moves for an order pursuant to CPLR 603 and 1010 dismissing the second third-party complaint or, in the alternative ordering a severance of that action or, alternatively, striking the entire action from the court's trial calendar and directing that Elk River be permitted all necessary discovery and that plaintiffs be precluded from any further discovery. Second third-party defendant and Trylon TSF, Inc., (Trylon) separately moves for moves for an order pursuant to CPLR 603 and Rule 1010 dismissing the second third-party complaint or, in the alternative ordering a severance of that

action. Trylon also seeks an order vacating plaintiff's Note of Issue and Certificate of Readiness pursuant to 22 NYCRR 202.21 (e) upon the ground that the matter is not yet ready for trial.

Plaintiffs Thomas Fernandez, as administrator of the Estate of Dwayne Fernandez, and Mark Fernandez, move for an order, pursuant to CPLR 3212, granting partial summary judgment in their favor as against defendants Abalene Oil Co., Inc. (Abalene), AT&T Wireless Services Inc., (AT&T), and Nextel of New York, Inc., (Nextel) based upon their violation of Labor Law §240 (1). I.M.C. Antenna and Tower, Inc., (IMC) cross-moves pursuant to the same statute seeking summary judgment dismissing all claims asserted against it by Mark Fernandez.

Abalene, AT & T and Nextel also cross-move, pursuant to the same statute, seeking summary judgment dismissing plaintiffs' causes of action for negligence and violation of Labor Law §200. In addition, Nextel seeks summary judgment on its contractual indemnification cause of action against IMC and denying plaintiff's motion for summary judgment on their Labor Law §240 (1) cause of action.

Background

On January 27, 2003, Dwayne Fernandez was working on a telephone tower (a monopole) located at 15 Railroad Avenue in Syosset, New York. He was positioned approximately 80 to 120 feet above the ground installing a collar on the tower so that another antenna could be added to the tower. His brother, Mark Fernandez, was also working at the

site. Mark testified that it was his understanding that they were finished working for the day when they returned from lunch, as it was too cold and windy. However, after lunch, Dwayne was instructed to go back up to the top of the tower to tighten a bolt. A short time later, Mark, who was approximately 12 feet away from the monopole, observed the safety rope begin to move strangely and he then heard a zinging noise followed by a popping sound. He testified that he looked up and saw metal step bolts raining down as a result of Dwayne attempting to stop his fall from the monopole with his feet. Dwayne fell to the ground, and a short time thereafter died from the injuries he sustained in the fall. It is alleged that Mark Fernandez was physically injured as he attempted to rescue his brother and that he sustained severe emotional and psychological injury from witnessing his brother's death.

Abalene owns the property at 15 Railroad Avenue where the cell phone tower was located. AT & T owns the cell phone tower and leases ground space from Abalene . Nextel leases space on the cell phone tower from AT &T. I.M.C. Antenna and Tower, Inc., (IMC) is an entity which performs installation, maintenance and repair work on cell phone towers. Pursuant to a Maintenance Services Agreement entered into with Nextel, IMC performed installation work on the cell phone tower on the Abalene's property. IMC is owned by Nicholas Capriotti (Capriotti).

Island is also owned by Capriotti but maintains that it, and IMC, are two separate and distinct companies and it had no involvement with the work being performed on the pole on the date of plaintiffs' accident. Island admits that it had entered into a Master Construction

Agreement with Nextel, which was merely a contract that allowed Island to bid on Nextel jobs. Elk River and Trylon are manufacturers and distributors of the safety equipment utilized by the decedent.

Island's Motion

Island moves for an order: (1) pursuant to CPLR 3211 (a) (2) dismissing the complaint as asserted against it; (2) pursuant to CPLR 3124 and 3126 dismissing the complaint against it; and (3) pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross claims against them in their entirety. Island argues that the court should dismiss Mark Fernandez' complaint as against Island pursuant to CPLR 3211 (a) (2) inasmuch as no summons and complaint was ever served upon Island Mobile, thus there is no jurisdiction.[1]

Island further argues that Mark Fernandez' complaint should be dismissed due to his failure to exchange medical authorizations related to his treatment for his claimed injuries, despite five court orders requiring him to do so. Finally, Island moves for summary judgment dismissing the complaint insofar as asserted against it on the ground that it is not a proper defendant in this action. Island argues that liability cannot be imposed upon it inasmuch as it had no involvement whatsoever with the work being performed on the date of plaintiff's accident. Island points out that in order for it to have been a contractor at that site, Nextel would have had to award it the job and enter into an Individual Construction

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[1]The Honorable Howard Ruditsky, in an October 19, 2006 decision, permitted plaintiff Mark Fernandez to serve an amended complaint asserting personal injury causes of action against Island and Cellular Telephone Company (Cellular).

Agreement with Island and that no such documents exists because Island never performed any work for Nextel at the cell phone tower at issue.

In support of that branch of its motion seeking summary judgment dismissing plaintiff Mark Fernandez' complaint as asserted against it, Island argues that it was IMC and not Island that was performing the work on the date of the accident and that the decedent and plaintiff were both employed by IMC and not Island. In support of this argument, Island points to the deposition testimony of Walter Dahlem, a construction manger for IMC who testified that IMC was the entity which employed the decedent and plaintiff Mark Fernandez and, that it was IMC that was performing the installation work on the cell phone tower on the date of the accident. Further, Island submits a copy of the maintenance services agreement that was entered into between Nextel and IMC which it is admitted by Nextel, governed the work performed on the date of the accident. In addition Island submits a copy of decedent's 2002 W-2 which indicates that he was employed by IMC.

Plaintiff and IMC oppose Island's motion arguing that plaintiff, as well as decedent's mother, Gloria Engstrom, and Thomas Fernandez, plaintiff decedent's father, and administrator of his estate, all testified that plaintiff and the decedent were employed by Island. Additionally they point to the testimony of Nextel's witness George Liddy , who testified that he was the manager of risk management for Nextel and that part of his duties included reviewing contracts. Liddy testified that, to the best of his knowledge, the work being performed by the decedent and plaintiff on the date of the accident was being done

pursuant to the Master Agreement between Nextel and Island. Accordingly, plaintiff and IMC contend that Island has failed to prima facie establish that it was not an entity working on this project on the date of the accident.

In reply, Island points to the affidavit of Liddy, submitted in support of Abalene, Nextel and At & T's cross motion for summary judgment, in which he affirms that he testified erroneously at his deposition regarding which entity Nextel had contracted with to perform the work that was being done on the day of the accident and who employed the Fernandez brothers. Specifically, Liddy's affidavit states that:

> at the request of my attorney, I searched Nextel's records to determine if there was a written agreement between Nextel and IMC for the work being performed by IMC. . . . on January 27, 2003 at 15 Railroad Avenue. I was able to locate a copy of the contract between Nextel and IMC pursuant to which IMC was performing their work on the date of the accident. . . . It is clear that the work performed by the Fernandez brothers at 15 Railroad Avenue on January 23, 2003 was work done by IMC pursuant to its contract with Nextel.

In addition, both Island and the Abalene, Nextel & AT & T defendants submit a copy of the Master Services Agreement entered into between Nextel and IMC, which they all agree was the contract governing the work that was being performed on the date of the accident.

As Island has shown that it was not an owner, contractor or agent involved in the work being performed at the time of the accident, it has demonstrated its prima facie entitlement to summary judgment dismissing all claims and cross claims asserted against it. Plaintiff and co-defendants have failed to establish the existence of a triable issue of fact. Accordingly,

Island's motion is granted in its entirety and all claims and cross claims as asserted against it are dismissed.

Elk River and Trylon's Motions

Both Elk River and Trylon move for an order pursuant to CPLR 603 and 1010 dismissing the second third-party complaint or, in the alternative ordering a severance of that action. Elk River alternatively seeks an order striking the entire action from the court's trial calendar and directing that Elk River be permitted all necessary discovery and plaintiff be precluded from any further discovery. Trylon also seeks an order vacating plaintiffs' Note of Issue and Certificate of Readiness pursuant to 22 NYCRR 202.21 (e) upon the grounds that it is incorrect and the matter is not yet ready for trial.

In support of those branches of their respective motions seeking an order either dismissing the second third-party action, or severing it, Elk River and Trylon point to the procedural history of the case. Specifically, they note that the action was commenced on or about May 21, 2004, while the second third-party action was not commenced until September 25, 2009, over five years later. They argue that they have not had an adequate opportunity to conduct discovery and have not received responses from various parties regarding outstanding discovery requests. They contend that, due to plaintiffs' filing of a Note of Issue and Certificate of Readiness, they would be severely prejudiced if they were forced to go to trial at this time.

CPLR § 603 provides that:

> In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

CPLR §1010 provides that :

> The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Plaintiff submits an affirmation in support of the second third-party defendants motions to sever, arguing that severance is warranted inasmuch as discovery is complete in both the main action and the first third-party action; that the third-party defendant unreasonably delayed more than five years before instituting the second third-party action. Plaintiffs contend that they will be prejudiced by the delay in completing discovery in the second third-party action, pointing out that the decedent's mother and legal beneficiary, is dying of AIDS, and had received financial assistance from her deceased son, while plaintiff Mark Fernandez, has remained unemployed as a result of the psychological damages sustained in the underlying action. Additionally, plaintiffs contend that the second third-party action does not involve a legal issue that is inextricably intertwined with the main action. Plaintiffs' action is premised on violation of the Labor Law, while the second third-

party action seeks contribution on a products liability claim against the manufacturer and distributor of a safety device which is alleged to have failed.

It is well settled that the court has considerable discretion in deciding whether severance is appropriate (see *Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]; *Quiroz v Beitia*, 68 AD3d 957 [2009]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2006]; *see also* CPLR 603; CPLR 1010). Severance of the second third-party action is warranted in this case, given: (1) the delay that would be created in the absence of severance; (2) the completion of discovery in the main and third-party action; and (3) the prejudice to plaintiffs, who are ready for trial (*see Meczkowski v E.W. Howell Co., Inc.*, 63 AD3d 803 [2009]; *Abreo v Baez*, 29 AD3d 833 [2006]; *Wassel v Niagara Mohawk Power Corp.*, 307 AD2d 752 [2003]; *Singh v City of New York*, 294 AD2d 422 [2002]; *Ambriano v Bowman*, 245 AD2d 404 [1997]). Accordingly, those branches of Elk River and Trylon's motions seeking an order directing severance of the second third-party action is granted and said action is hereby severed.

Plaintiffs' Motion

Plaintiffs Thomas Fernandez, as administrator of the Estate of Dwayne Fernandez, and Mark Fernandez, move for an order, pursuant to CPLR 3212, granting partial summary judgment in their favor as against defendants Abalene, AT&T, and Nextel, as owners and lessees of the area at which the accident occurred, based upon their violation of Labor Law

§240 (1). Labor Law § 240(1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

Labor Law § 240(1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240(1) is nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross,* 81 NY2d at 500). However, given the exceptional protection offered by Labor Law § 240(1), the statute does not cover accidents merely tangentially related to the effects of gravity. Rather, gravity must be a direct factor in the accident as when a worker falls from a height or is struck by a falling

object (*Ross*, 81 NY2d at 501; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

It is well-settled that the failure to provide adequate safety devices to a worker who falls from a height while engaged in a work-related activity involving an elevation-related risk constitutes prima facie evidence of a Labor Law § 240 (1) violation (*Collado v City of New York*, 72 AD3d 458,459 [2010]; *Balzer v City of New York*, 61 AD3d 796, 797 [2009]; *Guaman v Ginestri*, 28 AD3d 517, 518 [2006]).

The court will first address that branch of plaintiff's motion which seeks partial summary judgment as it relates to decedent's Labor Law §240 (1) claim. It is undisputed that decedent fell approximately 80 feet while altering a cellular tower when a safety device, namely a "wire rope grab" that connected his harness to a life wire failed, causing him to plunge to his death. The testimony of plaintiff Mark Fernandez, as well as that of IMC's witness Dahlem, indicates that pieces from the broken wire grab were retrieved from the accident scene. Accordingly, plaintiffs have established a prima facie Labor Law §240 (1) violation as relates to decedent.

In opposition, Abalene, AT & T and Nextel contend that summary judgment should be denied on decedent's Labor Law §240 (1) claim. These defendants argue that a question of fact exist regarding whether decedent was the sole proximate cause of his own accident contending that there is evidence that decedent was using an improper karabiner, the length of which, caused him to drop a longer distance before the rope grab engaged. In support of

this contention, they point to the fact that the testimony reveled that decedent was using a brand new rope grab which engaged the safety line as designed, which was evidenced by the zipping sound heard by Mark Fernandez, and then failed. These defendants argue that this gives rise to the possibility that the rope grab failed as a result of coming in contact with the climbing pegs because of the excessively long karabiner decedent chose to use.

The sole proximate cause defense generally applies where a plaintiff misused a safety device, removed a safety device, failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device (*see e.g. Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006] [plaintiff's choice to use inadequate ladder, despite proper ladders readily available at site, was sole proximate cause of accident]; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.,* 1 NY3d 280, 291 [plaintiff's negligent use of a ladder with the extension clips unlocked was sole proximate cause of accident]; *Letterese v State of New York*, 33 AD3d 593, 593-594 [2006] [plaintiff's decision to use inadequate ladder despite availability of adequate ladders on site was sole proximate cause of accident]; *Negron v City of New York*, 22 AD3d 546, 547 [2005] [plaintiff's failure to have himself re-tied off was sole proximate cause of accident]; *Plass v Solotoff*, 5 AD3d 365, 367 [2004], *lv denied* 2 NY3d 705 [2004] [plaintiff's unilateral determination to use only one plank instead of the three available was sole proximate cause of accident]).

In the instant case, there has been no testimony, or other evidence presented to this court, indicating that decedent was using an improper karabiner other than the conclusory assertion by these defendants in opposition to plaintiffs' motion (*see Morales v Westchester Stone Co., Inc.*, 63 AD3d 805, 806 [2009] [holding that statements which are unsupported with evidence or specific factual references are conclusory, lack probative value and arm insufficient to raise a triable issue of fact]; *Carlos v New Rochelle Mun. Hous. Auth.*, 262 AD2d 515, 516 [1999]; *Young v Fleary*, 226 AD2d 454, 455 [1996]).

As it is undisputed that decedent was engaged in an activity covered under Labor Law §240 (1), and fell 80 feet to his death when a safety device he was given failed to protect him, plaintiffs have demonstrated their prima facie entitlement to partial summary judgment on decedent's Labor Law §240 (1) claim as against defendants Abalene, AT & T and Nextel based upon their status as owners and lessees of the subject area at which the accident occurred (*see McCaffery v Wright & Co. Constr., Inc.*, 71 AD3d 842 [2010];*Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 880 [2006]; *Curte v City of New York*, 21 AD3d 1050 [2005]; *Gui Zhu v Great River Holding, LLC*, 16 AD3d 185 [2005] [holding that defendant's failure to provide a safety device sufficient to protect him from the elevation-related risk was a breach of the duty imposed by Labor Law § 240(1), and a proximate cause of the fall and resulting injury]). Accordingly, that branch of plaintiffs' motion seeking partial summary judgment on decedent's Labor Law §240 (1) claim is granted.

The court now turns to that branch of plaintiffs' motion seeking summary judgment in its favor on Mark Fernandez' Labor Law §240 (1) claim. Plaintiffs argue that Mark Fernandez is also entitled to summary judgment on his Labor Law §240 (1) claim for the emotional damages he sustained as result of witnessing his brother's death, while at the same time, trying to avoid being struck by the sheared off step bolts. Plaintiffs admit that this assertion of a zone of danger theory to a Labor Law §240 (1) claim is one of first impression but argue that legal precedent and public policy dictate that zone of danger be applied to a Labor Law 240 §(1) violation.

In *Bovsun v Sanperi*, (61 NY2d 219, 228-229 [1984]), the Court of Appeals held as follows:

> The zone-of-danger rule, which allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family, is said to have become the majority rule in this country. It is premised on the traditional negligence concept that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover all damages sustained including those occasioned by witnessing the suffering of an immediate family member who is also injured by the defendant's conduct.

Defendants Abalene,. AT & T, and Nextel oppose this branch of plaintiffs' motion arguing that Mark Fernandez has not asserted any Labor Law causes of action in the complaint as against these defendants and that Justice Ruditsky's October 19, 2006 order

merely allowed Mark Fernandez to assert Labor Law claims against Island. Moreover, they contend that Mark Fernandez' zone of danger claim only relates to his claims based upon these defendants' negligence in maintaining the premises. In reply, plaintiffs contend that Mark's assertion of a claim under the zone of danger theory not only relates to his asserted negligence claim but also to a claimed Labor Law §240 (1) violation, inasmuch as that section of the complaint related to Mark Fernandez' claims incorporated all of the previous paragraphs of the complaint including allegations that defendants violated Labor Law §240 (1). Additionally, plaintiffs contend that Mark Fernandez submitted a verified bill of particulars which asserts that defendants violated Labor Law §240 (1) by not providing adequate safety devices. The court is satisfied that these defendants were on notice that Mark intended to assert a Labor Law §240 claim as against them and will thus consider the merits of said claim. These defendants further argue that should the court consider this branch of plaintiffs' motion, partial summary judgment in Mark Fernandez' favor should be denied.

As discussed at length above, Labor Law §240 (1) is a strict liability statute which imposes liability upon, owners, lessees and their agents related to their failure to provide an adequate safety device to prevent injury to a worker caused to work at a height or at an area at which they are exposed to gravity related risks. In support of their motion, plaintiffs argue that the Court of Appeals in *Runner v New York Stock Exchange (*13 NY3d 599 [2009]) did away with the requirement that a falling object must actually make contact with a worker in

order for Labor Law§ 240 (1) to apply and held that relevant inquiry is "whether the harm flows directly from the application of the force of gravity on the object." Thus, plaintiffs contend that Mark Fernandez is entitled to summary judgment on his Labor Law §240 (1) zone of danger claim because all of the necessary elements of a zone of danger claim are present in this case. These elements are that Mark and Dwayne are natural brothers and Mark was approximately twelve feet from the base of the monopole at the time of the accident ,which he witnesses while at the same time avoiding being hit by the step bolts that were being sheared off as Dwayne hit them during his fall, resulting in Mark becoming clinically depressed and suicidal. The court disagrees.

Although the *Runner* court may have broadened the scope of a Labor Law §240 (1) claim to include physical injury to a worker that did not fall or actually get struck by an object, it still requires that, in order for a Labor Law § 240 (1) claim to be sustained, a worker must suffer an injury as result of the physical effects of gravity upon himself. In the instant case, Mark Fernandez has failed to demonstrate that defendants' failure to provide an adequate safety device caused him to sustain his injuries as a result of the physical effects of gravity upon him. Moreover, the court agrees with defendants that the theory under which Mark Fernandez seeks summary judgment is an unauthorized combination of two separate theories (a negligence theory -"zone of danger" and, a strict liability theory under Labor Law 240 (1)) and that there is just no authority for imposing liability upon these defendants under said combination theory. In fact the *Bovsun* court specifically held that "there is no

recognition of a new cause of action or of a cause of action in favor of a party not previously recognized as entitled thereto. In conformity with traditional tort principles, the touchstone of liability in these cases is the breach by the defendant of a duty of due care owed the plaintiff"(*Bovsun*, 61 NY2d at 233). Accordingly, that branch of plaintiffs' motion seeking partial summary judgment in their favor on Mark Fernandez' Labor Law §240 (1) claim is denied.

IMC's Cross Motion

IMC cross moves for summary judgment in its favor dismissing all claims asserted by Mark Fernandez against IMC. Specifically, Mark Fernandez asserted causes of actions against IMC based upon violations of Labor Law §§240 (1), 241 (6), 202[2] and 200 and common law negligence. As discussed above, the court does not find that Mark Fernandez has sustained injuries as a result of a violation of Labor Law §240 (1). Accordingly, that branch of IMC's cross motion seeking dismissal of Mark Fernandez' Labor Law §240 (1) claim is granted.

The court now turns to that branch of IMC's cross motion which seeks to dismiss Mark Fernandez's Labor Law §241 (6) claim. Labor Law §241(6) imposes absolute liability on owners and contractors for violation of its provisions, but only when such violation is the proximate cause of a worker's injury (*Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343; *Allen v Cloutier Constr. Corp.*, 44NY2d 290, 300, *rearg denied* 45 NY2d 776). Section

[2]Labor Law §202 only applies to window washers and, thus, is inapplicable to the facts of the instant case.

241(6) places a non-delegable duty upon owners and contractors to "provide reasonable and adequate protection and safety" for their workers in accordance with established rules and regulations (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross*, 81 NY2d at 503). In order to support a claim pursuant to this section, a plaintiff must allege that a concrete and "specific" provision of the Industrial Code has been violated; an allegation that a "general safety" standard has been violated will not support a Labor Law §241(6) claim" (*Rizzuto*, 91 NY2d at 349-350; *Ross*, 81 NY2d at 505; *Borowicz v International Paper Co.*, 245 AD2d 682, 684 [ ]). Here, plaintiff alleges the violation of various provisions of the Industrial Code in his bill of particulars including sections 23-1.5, 23-1.7, 23-1.8, 23-1.16, 23-1.21, 23-5.6; 21.3 (a), 21.3 (b), 21.3 (e), 21.3 (f), 21.4 and 21.6.

At the outset the court notes that Industrial Code §23-1.5 relates to the general responsibilities of employers and thus cannot be a basis for liability under § 241(6) of the Labor Law (*Ross*; *see also*, *Maday v Gabe's Contracting, LLC.*, 20 AD3d 513 [2005]; *Sparkes v Berger*, 11 AD3d 601, 602 [ 2004]). Plaintiffs do not specify which of the seven subsections of 23-1.7 was violated, however the subsections pertaining to overhead hazards, falling hazards, drowning hazards, vertical passages, air contaminated or oxygen deficient work areas and corrosive substances are clearly inapplicable to Mark Fernandez' claim.

Industrial Code § 23-1. 7(d) provides that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign

substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Section 23-1.7 (e) provides in pertinent part that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping."

IMC argues that Mark Fernandez does not claim that he slipped, tripped or fell and, thus, this provision is inapplicable. However, a careful review of his deposition testimony reveals that Mark Fernandez testified that as he attempted to reach his brother after he fell from the monopole, he had to run through an area in which he slipped on snow and further that he had to run through an area with all kinds of debris, such as boxes that he had to jump over and that he was slipping and bumping as he was caused to jump over this debris. However, Mark Fernandez himself testified that the area at which he claims to have slipped was not a passageway that was associated with the work area, and that a decision had been made to not utilize that area as an access point "because of all the junk in there." Moreover, the affidavit of Abalene's President Walter Jadezuk, submitted in support of their cross motion, states that Abalene did not "grant permission to anyone working on the cell tower to access the tower by entering the fenced off area immediately adjacent to the side and rear of the building." Based upon the foregoing, the court finds that the passageway at which Mark Fernandez claims to have slipped was not a part of the work area subject to the protections afforded under Labor Law §241 (6).

Fernandez also asserts a violation of Industrial Code §§23-1.8, 23-1.16, 23-1.21, 23-5.6 and 21.3 all of which the court finds inapplicable to the facts of the instant case as they relate to the claims asserted by Mark Fernandez. Based upon the foregoing, that branch of IMC's motion seeking summary judgment dismissing Mark Fernandez' Labor Law §241 (6) claim as asserted against IMC is granted.

Finally, IMC seeks dismissal of Mark Fernandez' claims as based upon Labor Law §200 and common law negligence. Labor Law § 200 (1) is a codification of the common-law duty imposed on owners and contractors to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]). Labor Law § 200 (1) applies to owners, contractors, and their agents (*see Romang v Welsbach Elec. Corp.*, 47 AD3d 789, 789 [2008]). Plaintiffs complaint asserts that defendants failed to failed to inspect the work areas on the date of the accident and prior to, failed to ensure that the work area contained proper and approved safety devices, and failed to perform proper inspections to remedy the dangerous and defective conditions existing upon the work site.

"To establish liability under a theory of common-law negligence and for a violation of Labor Law § 200, an injured worker must establish that the party charged with the duty to maintain a reasonably safe construction site had the authority to control the activity bringing about the injury, to enable it to avoid or correct an unsafe condition" (*O'Leary v Clean Cut Carpentry, Inc.*, 31 AD3d 514, 514 [2006]; *see also Russin v Louis Picciano &*

*Son*, 54 NY2d 311, 317 [1981]; *Locicero v Princeton Restoration, Inc.*, 25 AD3d 664, 666 [2006]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that the plaintiff employs in his or her work, or to those who have actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (*see LaGuidice v Sleepy's Inc.*, 67 AD3d 969, 972 [2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008]; *Ortega v Puccia*, 57 AD3d 54, 61 [2008]; *Singh v Black Diamond LLC*, 24 AD3d 138, 140 [2005]; *Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 162 [2004]; *Aranda v Park E. Constr.*, 4 AD3d 315, 316-317 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

Here, as it has now been demonstrated that IMC was the employer of decedent and Mark Fernandez, and the entity which had contracted with Nextel for the work performed, it is clear that it owed a duty to Mark Fernandez to maintain the work site in a reasonably safe manner. In opposition to this branch of the cross motion, plaintiffs point to Mark Fernandez' deposition testimony that the aircraft cable which was permanently affixed to the monopole could have been a little tighter and that he had mentioned this to his foreman. He further testified that the only way to tighten it would have been to get permission from the owner of the pole. Where as here, an issue of fact has been raised regarding whether IMC had actual or constructive knowledge of a dangerous condition on the work site that ultimately may have caused, or contributed to the accident, summary judgment dismissing

Mark Fernandez' Labor Law §200 and common law negligence claims would be inappropriate and that branch of the cross motion seeking such relief is denied.

Abalene, AT & T and Nextel's Cross Motion

Abalene, AT & T and Nextel cross-move for summary judgment dismissing decedent and Mark Fernandez' causes of actions for negligence and violation of Labor Law §200. Having granted that branch of plaintiffs' cross motion for partial summary judgment in decedent's favor on the Labor Law §240 (1) claim as against these defendants, the court sees no need to consider defendants' argument that they are entitled to summary judgment dismissing the claims based upon the violation of Labor Law §200 and common law negligence. It is clear from the record that the decedent plaintiff's damages are the same regardless of the theory of liability, and such damages can only be recovered once. As such, defendants' argument concerning the lack of merit of the other theories of liability contained in the complaint are moot as relates to the decedent plaintiff (*see Yost v Quartararo*, 64 AD3d 1073 [2009]; *Torino v KLM Constr., Inc.*, 257 AD2d 541 [1999]; *Covey v Iroquois Gas Transmission Sys*, 218 AD2d 197 [1996]).

The court now turns to that branch of defendants motion seeking summary judgment in their favor dismissing Mark Fernandez' Labor Law §200 and common law negligence claims. Mark Fernandez alleged two causes of action against these defendants. His seventh cause of action alleges that he sustained psychological/emotional injuries from being placed in a "zone of danger" as a result of these defendants' negligence in causing his brother's

accident. His sixth cause of action alleges that these defendants negligently caused injury to decedent inviting rescue by Mark Fernandez (a "danger invites rescue" theory) which resulted in Mark Fernandez' being physically injured.

"The two doctrines are not mutually inconsistent and can be contemporaneously applicable in situations, such as this one, where an immediate relative attempts to rescue a loved one and is thereby placed in the "zone of danger"" (*Hass v Manhattan & Bronx Surface Transit Operating Auth.*, 204 AD2d 208, 209 [1994]; *see, e.g.*, *DiMarco v Supermarkets Gen. Corp.*, 137 AD2d 651, 652 [1988]).

In opposition to this cross motion, plaintiffs point out that during their respective depositions ,each of these defendants acknowledged that the tower was constructed with a safety cable affixed to it. In fact, Anthony Sareniro, who testified on behalf of AT&T, was shown a picture of the tower during his examination before trial and testified that the safety cable was present on the tower when he first visited the site in the 1990s. He further testified that the cable had been inspected in 2000, some three years prior to the accident. Plaintiffs point out that this inspection report has never been exchanged during the discovery process. Finally, Mr. Sareniro testified that he did not know if the wire had ever been changed between the 1990s, and when the accident occurred in 2003, and that he had never seen any maintenance records related to the safety wire. Mr. Liddy, Nextel's witness, testified that the safety cable is typically affixed to the pole by the owner at the time the pole is installed and that it is typically the owner's responsibility to maintain it. However, Abalene's

President, Mr. Jadezuk, testified that Abalene had no responsibility for maintaining the tower and had never serviced it. Moreover, he testified that Abalene did not know if the tower had been equipped with a safety cable, never saw any maintenance records for the cable and never made any inspections of it. As discussed above, Mark Fernandez testified regarding the fact that the safety cable was too loose and that he informed his foreman of the situation but it was his understanding that permission was required from the owners of the tower before it could be changed or made tighter.

Thus, plaintiffs argue that questions of fact exist regarding whether these defendants had actual or constructive notice of any problems with the safety cable, and that these defendants cannot establish their prima facie entitlement to summary judgment dismissing Mark Fernandez' Labor Law §200 claim. The court agrees.

The danger invites rescue doctrine has been most frequently applied when a defendant through his negligence either injured or imperilled another and a third person was injured in attempting to rescue the person in jeopardy (*Guarino v Mine Safety Appliance Co.*, 25 NY2d 460, 464 [1969]; *see Flederbach v Lennett*, 65 AD3d 1011,1012-1013 [2009]; *Khalil v Guardino*, 300 AD2d 360, 362 [2002]; *Ha-Sidi v South Country Cent. School Dist.*, 148 AD2d 580, 582 [1989]). In fact, the doctrine of "danger invites rescue" was eloquently defined by Judge Cardozo many years ago in *Wagner v International Ry. Co.*, 232 NY 176, 180 [1921]):

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in

> tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid (*Gibney v State of N. Y.*, 37 NY 1 [1893]). The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path"

Here, the record reveals that there are questions of fact regarding whether the negligence of defendants Abalene, AT &T and Nextel may have caused, or contributed to, decedent's fall from the monopole which triggered Mark Fernandez' attempt to rescue his fallen brother and, as a result, caused him to sustain his own injuries. Thus, the court finds that questions of fact exist making it inappropriate to grant these defendants' summary judgment on Mark Fernandez' negligence claim as it relates to the danger invites rescue theory.

As to Mark Fernandez' negligence claim based upon the zone of danger theory, the court notes that, pursuant to the rule explicated in *Bovsun*, a defendant is subject to liability for a plaintiff's immediate emotional distress from viewing bodily harm to an immediate family member where the defendant's negligent conduct also threatens bodily harm to the plaintiff (see *Hass v Manhattan & Bronx Surface Transit Operating Auth.*, 204 AD2d 208, 208-209 [1994]). However, court's have refused to impose liability for a zone of danger claim where the party asserting this theory was not actually threatened with bodily harm (*see Zea v Kolb*, 204 AD2d 1019, 1019-1020 [1994][court refused to find that mother in the zone

of danger when she witnessed, from approximately 12 to 15 feet away, her daughter get killed when the bicycle she was riding was struck by a vehicle]; *DeAguiar v County of Suffolk*, 289 AD2d 280 [2001] [court held that sister was not within the zone of danger at the time of a fatal motorcycle accident involving her brother merely because she was following the decedent on the same road and around the same curve because she herself was never under risk of unreasonable bodily harm]). Here, in contrast, the court finds that Mark Fernandez' testimony that he was ducking for cover because he was concerned that he was going to be hit by the falling step bolts which he knew could be fatal, and his subsequent emotional injuries resulting from watching his brother fall to his death, is sufficient to raise a zone of danger claim related to defendants' negligence, thus precluding summary judgment dismissing Mark Fernandez' negligence claim as asserted against these defendants. Based upon the foregoing, that branch of defendants motion seeking summary judgment in their favor dismissing Mark Fernandez' Labor Law §200 and common law negligence claims is denied.

Finally, Nextel cross moves for summary judgment on its contractual indemnification cause of action against IMC arguing that at the time of the accident, plaintiffs were employed by IMC, and were performing work pursuant to IMC's August 5, 2002 contract with Nextel. Nextel points to the indemnification clause contained in paragraph 8(A) "Indemnification" of "Attachment A, the Standard Terms and Conditions" which pertinently states as follows:

> Contractor (IMC) shall indemnify, defend by counsel, (acceptable to Nextel)and hold harmless Nextel and its affiliates,

> partners, parents and the directors, officers,. . . Agents and employees of any of them (collectively "Indemnitees"). From and against any . . . Injury, claim . . . or liability (collectively "Liabilities" which results from (I) injury to or death of any person . . . . or, when such liabilities arise out of or result from the acts or omissions of Contractor (IMC) or its personnel or agents, under the agreement or (ii) the breach of any covenant, representation or warranty of Contractor (IMC) hereunder or (iv) Contractor's (IMC's) negligence in performing the services to be rendered under this agreement.

Nextel contends that IMC is obligated to indemnify, defend and hold Nextel harmless from any injury which results from the death of any person arising out of IMC's acts or omissions. Nextel further maintains that the injuries suffered by both plaintiffs resulted from IMC's means and methods in the performance of the contract and the failure of safety equipment issued by IMC, and, thus, the indemnity provision has been triggered..

IMC opposes this cross motion arguing that questions of fact exist regarding whether or not plaintiffs were in fact IMC employees. However, the court notes that it is satisfied that the evidence submitted in this case demonstrates that plaintiffs were employees of IMC and not Island and were performing work pursuant to the August 5, 2002 IMC-Nextel contract at the time of the accident.

However, it is well settled that " 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, 661 [2009]; *see* General Obligations Law § 5-322.1; *Bellefleur v*

*Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2009]; *Reynolds v County of Westchester*, 270 AD2d 473 [2000]). As there are questions of fact as to whether the Nextel defendants were free from negligence with regard to the underlying accident, summary judgment on the cause of action for contractual indemnification is not warranted (see *Cava Constr. Co., Inc.*, 58 AD3d at 662; *Castrogiovanni v Corporate Prop. Invs.*, 276 AD2d 660,661 [2000]). Accordingly, that branch of Nextel's cross motion seeking summary judgment in Nextel's favor on its indemnification claim as against IMC is denied.

Conclusion

Island's motion is granted in its entirety and all claims and cross claims as asserted against it are dismissed. Those branches of Elk River and Trylon's motions seeking an order directing severance of the second third-party action is granted and said action is hereby severed. That branch of plaintiffs' motion seeking partial summary judgment on decedent's Labor Law §240 (1) claim is granted, while that branch of plaintiffs' motion seeking partial summary judgment in their favor on Mark Fernandez' Labor Law §240 (1) claim is denied.

Those branches of IMC's cross motion seeking dismissal of Mark Fernandez' Labor Law §§240 (1) and 241 (6) claims are granted and that branch seeking dismissal of his Labor Law §200 and common law negligence claims is denied. That branch of Abalene, AT & T and Nextel's cross motion seeking summary judgment in their favor dismissing Mark Fernandez' Labor Law §200 and common law negligence claims is denied as is that branch

of Nextel's cross motion seeking summary judgment in its favor on its contractual indemnification claims as against IMC.

The foregoing constitutes the decision and order of the court.

ENTER,

J. S. C.

Hon. Martin M. Solomon S.C.J.