

Piotr Podbielski et al., Respondents,

v.

KMO-361 Realty Associates et al., Defendants and
Third-Party Plaintiffs-
Appellants, et al., Defendant. Yates Group, Ltd., et
al., Third-Party
Defendants-Appellants.

Second Department,

(May 28, 2002)

Newman Fitch Altheim Meyers, P.C., New York,
N.Y., (Harry Steinberg of counsel), for defendants
third-party plaintiffs-appellants.

Quirk & Bakalor (Mauro Goldberg & Lilling, LLP,
Great Neck, N.Y., [Kenneth Mauro, Timothy R.
Capowski, and Christopher Simone] of counsel), for
third-party defendants-appellants.

Perceman & Dersovitz (Mintz & Gold, LLP, New
York, N.Y., [Steven G. Mintz] of counsel), for
respondents.

NANCY E. SMITH, J.P., CORNELIUS J. O'BRIEN,
WILLIAM D. FRIEDMANN and BARRY A.
COZIER, JJ.

In an action, inter alia, to recover damages for
personal injuries, etc., the defendants third-party
plaintiffs appeal and the third-party defendants
separately appeal from a judgment of the Supreme
Court, Kings County (Vaughan, J.), entered June 30,
2000, which, upon that portion of an order of the
same court (Rappaport, J.), dated May 27, 1999, as
granted the plaintiffs' motion for summary judgment
on the issue of liability pursuant to Labor Law § 240
(1) against the defendants third-party plaintiffs, and
upon a jury verdict on the issue of damages, is in
favor of the plaintiffs and against the defendants
third-party plaintiffs.

Ordered that the judgment is affirmed, with costs.

On December 1, 1993, the plaintiffs' decedent, a
construction worker, fell to his death from a scaffold
that was missing guardrails on three of its sides. The
decedent was wearing a safety belt at the time of the
accident, but the belt had not been tied to a safety
line. "Rope grabs," parts of the safety system used to
connect a worker's personal safety belt to the safety
lines, were not in evidence at the job site immediately
after the accident occurred.

The coadministrators of the decedent's estate
(hereinafter *553 the plaintiffs) sued the defendants
KMO-361 Realty Associates, the owner of the
property, and Lehrer McGovern Bovis, the
construction manager of the project (hereinafter
collectively the KMO defendants). The KMO
defendants brought claims, inter alia, for contractual
indemnification against the decedent's employer,
Yates Group Ltd., Skyline Windows, and Yates
Group Ltd.-Skyline Windows (hereinafter the third-
party defendants), which had been retained to do the
masonry work in which the decedent was engaged at
the time of his accident.

The plaintiffs moved for summary judgment on the
issue of liability, establishing that the scaffolding
from which the decedent fell violated Labor Law §
240, and that such violations were a proximate cause
of his fall. In opposition to the plaintiffs' motion, the
KMO defendants and the third-party defendants
submitted evidence that the decedent was intoxicated
when he fell from the scaffolding, asserting that the
decedent's intoxication was the sole proximate cause
of his fall. By order dated May 27, 1999, the
Supreme Court granted the plaintiffs' motion for
summary judgment on the issue of liability. The
Supreme Court also granted that branch of the KMO
defendants' cross motion which was for summary
judgment against the third-party defendants on the
issue of contractual indemnification. Although both
the KMO defendants and the third-party defendants
appealed that order, the third-party defendants
withdrew their appeal and this court dismissed the
KMO defendants' appeal for failure to prosecute.
Subsequently, a jury verdict on the issue of damages
was rendered in favor of the plaintiffs, and judgment
was entered on the order dated May 27, 1999, and the
verdict. Both the KMO defendants and the third-party
defendants appeal from the judgment.

In the exercise of discretion in our interests of justice
jurisdiction, this Court shall determine the appeal of
the KMO defendants (*see Faricelli v TSS Seedman's*,
94 NY2d 772, 774; *Rubeo v National Grange Mut.*
Ins. Co., 93 NY2d 750; *Aridas v Caserta*, 41 NY2d
1059, 1061; *Bray v Cox*, 38 NY2d 350). The third-
party defendants, having withdrawn their first appeal,
are properly before this Court, and the issues raised
by the KMO defendants and the third-party
defendants are identical. Moreover, public policy
favors the resolution of claims on their merits (*see*
Stolpiec v Wiener, 100 AD2d 931; *Stark v Marine*

Power & Light Co., 99 AD2d 753).

The Supreme Court properly granted the plaintiffs' motion for summary judgment on the issue of liability pursuant to Labor Law § 240 (1). Because the lack of safety devices was *554 demonstrated to have been a proximate cause of the decedent's accident, the decedent's intoxication was not the sole proximate cause of his death (*see Sergeant v Murphy Family Trust*, 284 AD2d 991; *Hodge v Crouse Hinds Div. of Cooper Indus.*, 207 AD2d 1007; *Keane v Sin Hang Lee*, 188 AD2d 636; *Tate v Clancy-Cullen Stor. Co.*, 171 AD2d 292, 296). Further, the decedent's failure to attach his safety harness to a safety line, by the use of a rope grab, does not avail the defendants of the so-called "recalcitrant worker defense," since the evidence established that the defendants did not provide the decedent with such rope grabs (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920; *Hagins v State of New York*, 81 NY2d 921; *Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361).

Smith, J.P., O'Brien, Friedmann and Cozier, JJ.,
concur.

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Briefs and Other Related Documents (Back to top)

- 2001 WL 34692359 (Appellate Brief) Reply Brief for Defendants-Appellants and Third-Party Plaintiffs-Appellants KMO-361 Realty Associates and Lehrer McGovern Bovis (Apr. 06, 2001)
- 2000 WL 34451894 (Appellate Brief) Brief for Third-Party Defendants-Appellants (2000)

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