

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

D30115  
W/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - January 7, 2011

WILLIAM F. MASTRO, J.P.  
CHERYL E. CHAMBERS  
SHERI S. ROMAN  
JEFFREY A. COHEN, JJ.

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2010-01377

DECISION & ORDER

Bin Gu, respondent, v Palm Beach Tan, Inc., et al.,  
defendants third third-party plaintiffs/fourth third-party  
plaintiffs, et al., defendant third-party plaintiff,  
RD Management LLC, et al., defendants, New York  
Connecticut Development Corp., defendant third-  
party defendant/second third-party plaintiff/third  
third-party defendant; Smart Choice of New York,  
Inc., second third-party defendant/fourth third-  
party defendant-appellant.

(Index No. 1032/07)

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Marks, O'Neill, O'Brien & Courtney, P.C., Elmsford, N.Y. (Brian Meissner of  
counsel), for second third-party defendant/fourth third-party defendant-appellant.

Caesar & Napoli, New York, N.Y. (Robert Stein of counsel), for respondent.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel),  
for defendants RD Management, LLC, and FB Mt. Kisco Owner, LLC.

In an action to recover damages for personal injuries, the second third-party  
defendant/fourth third-party defendant, Smart Choice of New York, Inc., appeals, as limited by its  
brief, from so much of an order of the Supreme Court, Queens County (Flaherty, J.), entered  
December 3, 2009, as denied that branch of its motion which was for summary judgment dismissing  
the cause of action in the amended complaint alleging a violation of Labor Law § 240(1).

February 22, 2011

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ORDERED that the order is affirmed insofar as appealed from, with costs.

The Supreme Court correctly denied that branch of the motion of the second third-party defendant/fourth third-party defendant, Smart Choice of New York, Inc., which was for summary judgment dismissing the cause of action in the amended complaint alleging a violation of Labor Law § 240(1), because triable issues of fact exist as to whether the plaintiff's alleged conduct was the sole proximate cause of the subject accident, for the reasons stated in *Bin Gu v Palm Beach Tan, Inc.*, (\_\_\_\_\_AD3d\_\_\_\_\_ [Appellate Division Docket No. 2010-00302; decided herewith]).

MASTRO, J.P., CHAMBERS, ROMAN and COHEN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court