Russo & Gould LLP

ATTORNEYS AT LAW
12 Fountain Plaza, Ste 600
Buffalo, NY 14202
Phone (716) 800-6389; Fax (716) 381-8155
www.russogould.com

January 28, 2021

John P. Asiello
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Bonczar v. American Multi-Cinema
APL-2020-00121

Dear Mr. Asiello,

The undersigned represents Defendant-Respondent, American Multi-Cinema, Inc, d/b/a, AMC Theatres Webster 12, as Successor in Interest to Loews Boulevard Cinemas, Inc., f/k/a Loew's Boulevard Corp and/or Loews Theater Management Corp. ("Defendant" or "AMC") in the above-referenced matter. I respectfully submit this letter pursuant to 22 NYCRR 500.11(d) in response to Plaintiff-Appellant, David M. Bonczar's ("Plaintiff") letter brief. As Plaintiff noted, this appeal addresses two separate Orders of the Appellate Division, Fourth Department.

In the first appeal, the Fourth Department reversed the Order of the trial judge that granted Plaintiff's motion for summary judgment, concluding that there were triable questions of fact as to whether Defendant had violated Labor Law § 240(1), and whether Plaintiff was the sole proximate cause of the alleged accident ("Appeal No. 1"). The facts and arguments in Appeal No. 1, therefore, refer to Plaintiff's deposition testimony and the summary judgment papers. In the second appeal, the Fourth Department affirmed the Order of the trial court that denied Plaintiff's motion for a judgment notwithstanding the verdict and for a directed verdict ("Appeal No. 2"). The facts and arguments in

Appeal No. 2, therefore, refer to the trial record. For ease of review, these two fact patterns and arguments are addressed separately. As discussed more fully below, Defendants maintain that this Court should affirm both Orders.

BACKGROUND FACTS

Plaintiff claims that he fell from a ladder and was injured on May 22, 2013 while employed as a Senior Fire and Safety Technician for non-party subcontractor, All State Fire Equipment of WNY. At the time, Plaintiff was installing a fire alarm and sprinkler in the "cash room" at Defendant's property, the AMC Theatre Webster 12 located at 2190 Empire Boulevard, Webster, New York ("the subject premises"). In order to do so, Plaintiff used a 6-foot, A-frame ladder that he either brought into the room or that was already located in the room before he started.

COUNTER-STATEMENT OF FACTS RELEVANT TO APPEAL NO. 1

According to his deposition testimony, plaintiff had used a ladder to perform his job "hundreds, possibly thousands of times" prior to the alleged occurrence. R1. 394-395.[1] Plaintiff had also performed the very same tasks "more than a hundred" times (R1. 311, 333), and on the day of the accident, he successfully ascended and descended the ladder at issue "for a fair portion of the day" before the incident. R1. 346, 347. Plaintiff testified that he may have brought the subject ladder (of which there were a number), into the room in which he was working (R1. 337, 338), and that it may even have been his own device. R1. 379, 382, 383. Regardless of whose ladder it was, Plaintiff testified that he "may have" moved and set-up the ladder up himself (R1. 341), and that while he should have done so, he does not recall locking the ladder into place. R1. 343, 344.

[1] Cites to "R1" are to the record for Appeal No. 1.

Plaintiff had been on the subject premises between five and twenty times prior to the accident date. R1. 333. During that time, he never worked for AMC or with any AMC employee, and no AMC employees ever supervised his work or provided him with tools or materials. R1. 393.

Plaintiff - who is 5 feet, 11 inches tall (R1. 344, 345) - testified at deposition that in order to perform his work, he climbed the six-foot fiberglass A-frame ladder's first three or four steps (R1. 299, 300, 388, 339, 343-346), to reach the less than ten-foot high ceiling. R1. 345. After completing his task, and as he was starting to descend the ladder, the 43-year old, nearly 300-pound Plaintiff (R1. 248) "chang[ed] positions with the right side of his body" (R1. 349), released his hands from the ladder (R1. 349), "lost [his] balance[,] and fell onto [his] back." R1. 348. While Plaintiff testified that the ladder "shifted" and "wobbled" as he descended (R1. 299-300, 348), he did not know what, if anything other than his own actions, caused it to do so. R1. 351. Plaintiff did not claim that there was anything on the floor beneath him which could have caused his accident (R1. 352, 353), and he does not allege that the ladder fell when he did. R1. 349.

Plaintiff was wearing a safety helmet and safety glasses at the time of the alleged accident. R1. 327, 348. He had no reason to believe that a rope, net, guardrails, or barricades should have been provided so that he could perform his functions safely, or that any such equipment could have prevented the alleged accident. R1. 393-394. Most significantly, Plaintiff stated under oath that: "[g]enerally speaking, this [i.e., the subject] situation, wouldn't—would not have a ladder affixed to anything . . . [and] it was not common practice to have any additional mechanical means to hold this type of ladder in place. R1. 395-96 (emphasis added). Finally, Plaintiff testified that the only "precaution" that was not present at the time of his accident was someone holding the ladder or "spotting" him, but that he decided to utilize the ladder without anyone present, he did not request any such assistance, and he was the only worker in the room at the time. R1. 299-300, 396-397.

Immediately after he allegedly fell, Plaintiff returned to work in another area of the building. R1. 140, 359-360. When he completed his day, Plaintiff drove one to one and a half hours to his residence in Cheektowaga. R1. 364-366. He did not seek medical attention until Saturday, May 25, 2013, more than two days after the alleged accident. R1. 261, 384. Plaintiff claims that he suffered an injury to his lower back and left knee as a result of the accident. R1. 38-41.

ARGUMENT APPEAL NO. 1

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED

A. Plaintiff Did Not Make a Prima Facie Showing that Defendant Violated Labor Law § 240(1)

Labor Law § 240 (1) requires, in relevant part, that:

> owners, contractors and their and their agents...in the repairing, altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor . . . ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

This Court has specifically stated that "not every worker who falls at a construction site gives rise to the extraordinary protections of Labor Law §240(1)." *Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 (2001). Indeed, the "mere fact that plaintiff fell from a ladder does not establish, in and of itself, that proper protection was not provided" (*Kanvowski v Grolier Club of City of N. Y.*, 144 AD3d 865, 867-866 (2d Dept 2016)) much less, a "statutory violation." *Harris v City of New York*, 83 AD3d 104, 108 (1st Dept 2011). Rather, "liability is contingent upon the existence of a hazard contemplated in Section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *Narducci*, 96 NY2d at 267.

In order to prevail under Labor Law § 240(1), an injured party must demonstrate that the owner and/or contractor breached a statutory duty to provide workers with adequate safety devices and that this breach proximately caused his injuries. *See Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401 (4th Dept 2015), quoting, *Blake v Neighborhhod Hous. Servs. of N.Y.* 1 NY3d 280, 287

(2003); *see Kerrigan v TDX Constr. Corp.*, 108 AD3d 468 (1st Dept 2013). "The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one." *Jones v 414 Equities LLC*, 57 AD3d 65, 69 (1st Dept 2008); *Felker v Corning Inc.*, 90 NY2d 219, 224 (1997); *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 490-491 (1995); *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 268-269 (1st Dept 2007).

To succeed via dispositive motion, the plaintiff must establish *prima facie* that there is a safety device of the kind enumerated in Section 240(1) that could have prevented his accident because "liability is contingent upon . . . the failure to use, or the inadequacy of such a device." *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 (2011); *see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). To "defeat [such a] motion . . ., the defendants must raise an issue of fact as to whether the plaintiff had adequate safety devices available, that he knew both that they were available and that he was expected to use them, that he chose for no good reason not to do so, and that had he not made that choice he would not have been injured." *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 (1st Dept 2011) (internal citations omitted); *see Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 63 (1st Dept 1999).

Whether a subject safety device constitutes proper protection is normally an issue of fact for the jury. *See Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 (lst Dept 2013). Indeed, if a reasonable factfinder could conclude that the defendant provided proper safety devices, the worker's summary judgment motion should be denied. *See Georgia v Urbanski*, 84 AD3d 1569 (3d Dept 2011); *Ramsey v Leon DeMatteis Construction Corp.*, 79 AD3d 720 (2d Dept 2010). In *Blake*, this Court recognized that: "the terms strict and absolute [as used in the statute] may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results

in an award of damages to the injured party . . . that is not the law, and we have never held or suggested otherwise. *Blake*, 1 NY3d at 287-288; *see Abbatiello v Lancaster Studio Assocs.*, 3 NY3d 46, 50 (2004)("an accident alone does not establish a Labor Law § 240 (1) violation" and "absolute liability requires a violation of the statute.").

"The point of Labor Law § 240 (1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so." *Blake*, 1 NY3d at 286. Thus, "a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240(1) and those caused by general hazards specific to a workplace. The former give rise to liability under Labor Law § 240(1), the latter do not." *Makarius v Port Auth. of New York and New Jersey*, 76 AD3d 805, 807 (1st Dept 2010). This Court has also stated that "if liability were to attach even though the proper safety devices were entirely sound and in place, the Legislature would have simply said so, or made owners and contractors into insurers." *Blake*, 1 NY3d at 292. Indeed, "although Labor Law § 240(1) is to be construed as liberally as necessary to accomplish the purpose of protecting workers . . . the language must not be strained to accomplish what the Legislature. did not intend." *Bish v Odell Farms Partnership*, 119 AD3d 1337, 1337-1338 (4th Dept 2014).

In *Blake*, the trial court denied the plaintiff summary judgment on his Labor Law § 240 claim, stating that movant had failed to identify either a defect in, or the absence of, any mandated safety equipment from the ladder from which he fell. *Blake*, 1 NY3d at 284. At trial, plaintiff still could not identify a single defect or instability, and the jury found that the device was "so constructed [and] operated as to give proper protection to plaintiff." *Id.* The trial court refused to set the defense verdict aside, stating that the "conclusion" was "inescapable" that "the accident happened not because the ladder malfunctioned, was defective or was improperly placed, but solely because of plaintiff's own negligence in the way he used it." *Id.* The First Department affirmed, stating that "a factual issue was posed as to whether plaintiff's injury was caused by some inadequacy of the ladder or was

solely attributable to the manner in which plaintiff used the ladder," and that there were no grounds to disturb the jury's factual determinations. This Court affirmed the First Department. *Id.* at 292.

Of course, courts have routinely denied plaintiffs summary judgment on Labor Law § 240(1) claims when there are questions of fact regarding the adequacy of the safety equipment that defendants provided. *See Lopez v FAHS Const. Grp., Inc.*, 129 AD3d 1478, 1479 (4th Dept 2015); *Sponholz v Benderson Prop. Dev., Inc.*, 273 AD2d 791, 792 (4th Dept 2000); *see also Beesimer v. Albany Avenue/Route 9 Reality*, 216 AD2d 853, 854 (3rd Dept 1995). Notably, it has been held that when no one witnessed a subject ladder tipping and the "manner in which the accident occurred is within the exclusive knowledge of the plaintiff . . .,plaintiff's testimonial version should be subjected to cross-examination and his credibility assessed by the fact-finder after a trial." *Carlos v Rochester General Hosp.*, 163 AD2d 894 (4th Dept 1990); *see Doan v Aiken & McGlauklin, Inc.*, 217 AD2d 908 (4th Dept 1995); *Marasco v Kaplan*, 177 AD2d 933 (4th Dept 1991).

In the cases which Plaintiff cites, it is clear that the defendants had not provided an adequate safety device, and that said failure proximately caused the alleged injuries. *See, e.g. Gordon v Eastern Rwy. Supply*, 82 NY2d 560, 561 (1993) (in which an unsafe ladder *tipped* when plaintiff activated a sandblaster); *Garcia v Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 AD3d 524, 525 (lst Dept 2017) (defendant liable where a wooden ladder that was *permanently affixed to the wall in a "jerry-rigged fashion" shifted*); *Hill v City of New York*, 140 AD3d 568, 568-69 (1st Dept 2016) (ladder wobbled where it was *missing two of its four rubber foot pads*); *Melchor v Singh*, 90 A.D.3d 866, 867 (2d Dept 2011) (defendant liable where ladder *had old and worn out feet*); *Burke v APV Crepaco, Inc.*, 2 AD3d 1279 (4th Dept 2003) (defendant was liable where ladder *shook when it was not held* and *tipped over*).

While "it is the duty of the owner, not the worker, to ensure proper placement and use of safety devices" the plaintiff must proffer evidence that the owner improperly placed the ladder or

failed to provide legally-mandated safeguards or "proper protection." Plaintiff herein proffered no evidence that his ladder was unsecured, unstable, improperly placed, or in any way unsafe. Indeed, the device did not even collapse or malfunction in any fashion before, during or after the accident.

Moreover, Plaintiff was provided with ample safety devices, including a ladder that could be locked into place, a helmet and safety glasses. He admitted that there was no device, piece of equipment or "safety" mechanism that, if provided, would have protected him from his own decisions and actions. Plaintiff certainly did not offer an expert's opinion to identify the safety device or devices that AMC should have provided, and his attorney's arguments in this regard are, therefore, speculative, conclusory and specious and fatal to the motion. *See, e.g. Borress v 200 Park, L.P.*, 2015 NY Slip Op 32092(U) (Sup. Ct., NY Cty., Apr. 30, 2015) ("failure to submit an expert affidavit stating which [devices] should have been provided to prevent the alleged incident is a glaring omission from [a movant's] papers"); *See generally Diaz v Vasques*, 17 AD3d 134, 136 (lst Dept 2005).

Plaintiff failed to demonstrate that he was not provided with enumerated safety equipment or that the provided equipment was defective or inadequate and proximately caused his accident. For all of these reasons, AMC submits that the Fourth Department properly reversed the decision of the trial court which granted Plaintiff summary judgement on his Labor Law § 240(1) claim and that this Court should affirm the Fourth Department's decision.

B. Defendant Made a Prima Facie Showing that Plaintiff was the Sole Proximate Cause of his Injuries

Insofar as Plaintiff failed to demonstrate that any safety equipment was inadequate or defective, any contention that the "sole proximate cause defense" is unavailable is wholly incorrect. Indeed, where a plaintiff s actions are the sole proximate cause of his injuries, liability under Labor Law § 240 (1) does not attach to the owner. *See Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554,

(2006); *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 (1998); *Cioffi v Target Corp.*, 114 AD3d 897, 898 (2d Dept 2014); *Corchado v 5030 Broadway Props., LLC*, 103 AD3d 768, 768-769 (2d Dept 2013); *Piotrowski v McGuire Manor, Inc.*, 118 AD3d 1368 (4th Dept 2014*); Bascombe v West 44th St. Hotel, LLC*, 124 AD3d 812, 813 (2d Dept 2015).

As this Court stated, “it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff’s injury) to occupy the same ground as a plaintiff’s sole proximate cause for the injury,” and “if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation.” *Blake*, 1 NY3d at 290-91. "Extending the statute to impose liability in such a case would be inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed.” *Blake*, 1 NY3d 290, citing, *Weininger v Hagedorn & Co.*, 91 N.Y.2d 958, 960 (1998) (in which this Court held that the “Supreme Court erred . . in directing a verdict in favor of plaintiff...on the issue of proximate cause” where “a reasonable jury could have concluded that plaintiff’s actions were the sole proximate cause of his injures, and consequently that liability under Section 240 (1) did not attach").

Indeed, this Court has stated that a defendant has not violated the statute when plaintiff cannot identify a defect in the ladder or a reason why the device shifted before he fell. *See Blake*, *supra*. This Court has emphasized that “[e]ven when a worker is not `recalcitrant'... there can be no liability under Section 240(1) when there is no violation and the worker's actions are the `sole proximate cause' of the accident.” *Id.*

In this case, Plaintiff failed to identify any defects or deficiencies in the equipment he was using and while he may not have been “recalcitrant,” he testified that prior to using the ladder, “it's feasible” that he moved or re-positioned it, and that he did not recall checking the positioning, or whether he ensured that the ladder was locked into place before the accident. Plaintiff was sure, however, that he had climbed and descended the device many times without incident on the day of

the subject occurrence. Clearly, there were questions of fact whether Plaintiff was the sole proximate cause of this event. Therefore, it is respectfully submitted that the Fourth Department properly reversed the decision of the trial court, and denied Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim.

COUNTER-STATEMENT OF FACTS IN APPEAL NO. 2

A. Plaintiff could not recall many salient facts concerning his accident, which created credibility issues for the jury to resolve

Plaintiff was the only individual with first-hand knowledge of the occurrence who testified at trial and he told the jury that he was working alone at the time of the alleged occurrence (R2. 100, 135-136)[2]. Although Plaintiff testified that his co-worker, Justin Dommegala, witnessed his fall (R2. 106-107, 141), opposing counsel never called this individual to the stand and, therefore, no one corroborated Plaintiff's version of the events.

Indeed, Plaintiff—the claimant and only purported eyewitness—testified that he does not remember many of the circumstances which are germane to the Labor Law § 240(1) analysis, without evidence of which the triers of fact could not have reasonably found in his favor. Specifically, Plaintiff testified at trial that inasmuch as his alleged fall occurred five years prior, he could not recall:

a. how the subject ladder came to be present, set up, or positioned in the "cash" room in the first place (R2. 159, 166) (but the jury also heard his deposition averment that it would have been "feasible" for him to have brought the ladder into the room and set it up himself) (R2. 158);

b. whether the ladder had been moved when he temporarily left the cash room at one point (the ladder "could have been [moved] between when I was there and when I came back.") (R2. 138-139);

c. whether he checked the ladder's positioning or whether the legs were fully-extended, fully opened, or locked, *i.e.* the ladder's stability, immediately before his last ascent. R2. 105-106, 161-162. Plaintiff explicitly testified that he did not recall pushing the ladder's bars down or checking to make sure they were locked into place (R2. 205-206), or inspecting the ladder's stability in any manner, relying

[2] Cites to "R2" are to the Record on Appeal in Appeal No. 2.

instead on having visualized the arms in the down position and believing that they were "locked";

d. where the ladder was positioned in the cash room – alternating his testimony between the "center," "middle," "a few feet from the door," and "inside of the doorway to the right a little bit." R2. 137-142;

e. where the smoke detector that he was servicing was located in the ceiling, and whether its placement required him to reach directly above or above and to one side of the ladder. R2. 187-190; and

f. whether he used the ladder earlier that day. R2. 164-165.

B. <u>Plaintiff's testimony contained various inconsistencies which also created credibility issues best left to the jury</u>

Plaintiff's testimony contained a number of significant inconsistencies. Plaintiff testified initially that there were "one or two ladders" in the cash room (R2. 97-99; 102-103, 155), but that when he left and returned, there was one "six-foot A-frame ladder that was fully extended, standing freely in the middle of the room." R2. 101, 155. On cross-examination, the jury heard Plaintiff's pre-trial deposition testimony that he could not recall how many ladders were available for his use (R2. 156-157), and that he did not know whether he used one that was already there or one that he brought into the room (and set up and positioned himself). R2. 1246-1248. Plaintiff also testified at trial that while he was not certain, the ladder he used looked like one belonging to his employer. R2. 163, 166.

Additionally, although he testified that the ladder was "fully extended" when he returned to the cash room, Plaintiff also testified that he was still able to "pull the legs apart." R2. 104-105, 115-116, 124 - 125, 161, 163, 205-206. If the ladder was indeed properly set up in the room before Plaintiff arrived, the spreader arms would have been in place (*i.e.*, in the down position), and Plaintiff would not have been able to separate the two sides any further.

Among a host of other issues, the jury was left to decide, therefore, whether the ladder was set up and positioned with the legs fully extended and the hinged spreader bars locked in place when

Plaintiff came back to the room or whether he did so himself. Indeed, the jury note that asked about the word "positioning" (R2. 1057) evinces that at least at one juncture, the jurors were confused as to Plaintiff's testimony on this point, and that after getting clarification and deliberating further, they resolved the issue against Plaintiff.

C. <u>Defendant's safety expert opined that Plaintiff's accident was caused by Plaintiff's failure to properly inspect the ladder, as well as his failure to properly use the ladder</u>

Contrary to Plaintiff's contention, Defendant's safety expert, Daniel Paine, did take issue with the manner in which Plaintiff inspected and tested the ladder if not initially, then immediately before he climbed it for the last time. As the trial court indicated in denying Plaintiff's motion, Mr. Paine told the jury that:

> the person who is using the [ladder] needs to use it properly and safely…should set it up properly and inspect and check to make sure the device is locked and stable *every time [he] use]s] it*.

R2. 742. As indicated above, Plaintiff did not remember much about the set-up, positioning, securing, movement or location of the subject ladder. He testified repeatedly, however, that he "visually looked" at it and concluded that the device had no "apparent defects" before he first climbed it. R2. 102, 115-116. The critical point is that Plaintiff "could not say for sure" that he checked the device "that final time" (R2. 161-162) which, according to Mr. Paine (R2.742), he should have done.

Plaintiff also testified at trial that he was "transitioning down the ladder through the drop ceiling" and "shifting his hands" when the ladder "shifted" and "wobbled," causing him to fall. R2. 106, 164, 166. He swore that he could not "say for sure" whether he released his right hand causing him to miss a step, testifying as follows:

> Q: As you were coming down off the ladder, first you released your right hand as you're transitioning down, right?
>
> A: First I would have probably released -- I can't say for sure but it was -- my left hand was solidly on the ladder and I was transitioning through the drop ceiling. As I was doing that and stepping down, when I lost balance, that's when I lost grip on my

right hand and I fell to my back.

R2. 166-167. According to the above answer – in which he said nothing about the ladder moving – Plaintiff released his right hand as he started to descend, lost his balance, lost his grip, and fell to his back. Plaintiff's trial testimony about the occurrence is consistent with his examination before trial testimony that he had "changed positions with the right side of his body" (R2. 168), released his hands from the ladder, "lost [his] balance and fell onto [his] back" (R2. 169), again saying nothing about the ladder having moved in any manner. And while Plaintiff also testified at his deposition and at trial that the ladder "shifted" and "wobbled" (but did not fall) as he descended it, he did not know what, if anything other than his own actions, caused it to do so.

For the above reasons, Mr. Paine's testimony with regard to Plaintiff maintaining safe and appropriate contact with the ladder on his descent was significant. Defendant's safety expert testified that whether Plaintiff continued "three-point contact" while climbing down the ladder is an important concern because "if you do that, you wouldn't fall... *(e)specially (since) the ladder didn't fall*, so he fell off the ladder, not the other way around." R2. 659, 662-663.

Plaintiff could not identify the reason the ladder shifted or wobbled. The trial court articulated several ways in which Defendant could overcome the presumption that it had failed to provide the required proper protection, to wit, by showing: (1) that Plaintiff did not check the ladder's positioning, which positioning was improper and caused the device to shift and wobble; or (2) that Plaintiff did not check whether the spreader arms were fully extended, that said arms were not fully extended, and that that caused the device to shift and wobble. R2. 936-937.

The jury ultimately correctly reached a verdict "in accordance with the principles of law charged by the court and *the facts as (it) found them to be ..."* in Defendant's favor as follows: (1) Defendant did not violate Labor Law § 240(1) by failing to provide proper protection; (2) Plaintiff failed to check the positioning of the ladder; (3) the ladder was improperly positioned to perform the

work; (4) Plaintiff fell because the ladder was improperly positioned to perform the work; and (5) the improper position of the ladder was the only substantial factor in causing Plaintiff's fall. R2. 960-961, 1048-1051.

The trial judge should have had the jury end its inquiry after determining that Defendant had not violated Labor Law § 240(1), and not proceed to consider whether Plaintiff was the sole proximate cause of this occurrence. Instead, the court had the jury return its verdict after deciding that Plaintiff fell because he failed to check and properly position the ladder and failed to maintain a safe level of contact with the device. R2. 1048-1051.

ARGUMENT APPEAL NO. 2

PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AS TO DEFENDANT'S LIABILITY UNDER LABOR LAW § 240(1) WAS PROPERLY DENIED

CPLR 4401 provides as follows:

> Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Grounds for the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.

In considering a motion to direct a verdict,

> the court cannot properly undertake to weigh the evidence. Its duty is to take that view of the evidence most favorable to the nonmoving party, and from the evidence and the inferences reasonably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the moving party. The test is whether the trial court could find 'that by no rational process could the trier of the facts base a finding in favor of the [party moved against] upon the evidence presented'.

Wessel v Krop, 30 AD2d 764, 765 (4th Dept. 1968); *Fernandes v Allstate Ins. Co.*, 305 AD2d 1065, 1065 (4th Dept. 2003); *see also, Martin v Fitzpatrick*, 19 AD3d 954 (3d Dept. 2005); *Butler v N.Y. State Olympic Reg'l Dev. Auth.*, 292 AD2d 748 (3d Dept. 2002). It is also a basic principle of law

that "it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict". *Cohen v Hallmark Cards, Inc.,* 45 NY2d 493, 499 (1978).

All of the elements which determine whether a plaintiff was the sole proximate cause of his injury present issues of fact for a jury to decide. *Lopez* v. *FAHS Canst. Grp., Inc.,* 129 AD3d 1478, 1479 (4th Dept. 2015); *Beesimer* v. *Albany Avenue/Route 9 Realty,* 216 AD2d 853, 854 (3d Dept. 1995). Thus, in *Weininger, supra,* the Appellate Division held that the "supreme court erred ... in directing a verdict in favor of plaintiff on the issue of proximate cause" where "a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Section 240 (1) did not attach."

Here, it is clear that Plaintiff was not entitled to a directed verdict. Plaintiff testified: (1) that he visually inspected the ladder before *first* ascending it, and that he observed that it was free of any defects (R2. 102); (2) that he had climbed and descended the device "maybe four to six times" before the occasion on which he fell (R2. 105, 142, 162-163); and (3) that he released his right hand causing him to lose his balance and miss a step as he "transitioned down the ladder" for the last time. R2. 102, 115-116.

Apart from the aforementioned, Plaintiff "forgot" more about the circumstances which are relevant to his case and the Labor Law § 240(1) analysis than he "remembered." As discussed above, Plaintiff did not recall whether or not he brought the ladder into the room and set it up, which of several ladders he used, whether he did anything other than visually inspect the device to determine its stability, where the ladder was placed in proximity to the smoke detector he was wiring in the ceiling, and whether he checked to see if the ladder was properly positioned and locked *immediately before his last ascent.* R2. 161-162.

Just as Plaintiff did, defense expert Daniel Paine told the jury that there was nothing unstable

or defective about the subject ladder. Defendant's expert did not reject one manner in which Plaintiff was the sole proximate cause of this event in favor of another, as Plaintiff suggests. Rather, he linked two acts/omissions together, testifying that if Plaintiff had set up the ladder properly and maintained three-point contact, he would not have missed a step, much less fallen, as evidenced by the undisputed fact that only Plaintiff—not the ladder—fell to the ground. R2. 721-722. But whether Mr. Paine concluded that the ladder wobbled because Plaintiff failed to properly position and/or lock the spreader bars in the first place, neglected to properly check and position it before his last ascent, did not maintain three-point contact on his final descent, or all of the above, the failure(s) was (were) on Plaintiff's—not Defendant's—part, and it was (or they were) the sole reason(s) he fell.

In sum and substance, defense expert Paine, testified: (a) that there was nothing unstable or defective about the ladder in question; and (b) that plaintiff's acts and/or omissions–in one form or another–were the sole proximate cause of this event. Thus, the jury quite reasonably concluded from Plaintiff's and the defense expert's testimony that Plaintiff's acts and/or omissions, in one form or another, were the sole proximate cause of this event.

Given Plaintiff's admission that he did not find the ladder to be defective, he had (and has) no choice but to insist, as he did at every juncture and throughout the trial, that the mere fact that he fell from a height proves, *prima facie*, that Defendant violated the Labor Law. In accordance with the case law cited above, however, the mere fact that Plaintiff fell does not prove that Defendant violated the Labor Law by any measure.

Further, while Plaintiff highlights several differences between his deposition and trial testimony, he does not recognize that the jury is charged with judging Plaintiff's credibility and reconciling contradictory statements, believing one or the other, or rejecting all. The jury heard Plaintiff's live trial testimony and several contradicting excerpts from his deposition testimony, and reasonably determined that Plaintiff did not make out a *prima facie* showing that Defendant violated

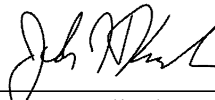
Labor Law § 240(1) by failing to provide proper protection and that Plaintiff's acts and/or omissions as described above were the sole proximate causes of his fall.

In deciding Plaintiff's motion for a directed verdict, the trial recognized that: (1) "Plaintiff testified that he went up and down the ladder several times and could not recall having checked the spreader arms/locking mechanism immediately before going up… for the last time"; and (2) "that Mr. Paine testified that Plaintiff's failure to make sure the spreader arms were locked and his failure to maintain three points of contact on the ladder, was the only cause of the accident." R2. 10. Accordingly, the court concluded, "a rational jury could conclude that the Plaintiff's conduct was the sole proximate cause of the accident." R2. 10-11. Insofar as the jury determined that Defendant did not violate the law and that Plaintiff was the sole proximate cause of the subject occurrence, the trial below properly denied Plaintiff's motion for a directed verdict pursuant to CPLR 4401, and the Appellate Division rightly affirmed that denial.

CONCLUSION

The Appellate Division Fourth Department's Orders in Appeal No. 1 and Appeal No. 2 should be affirmed in their entirety.

Respectfully submitted,
Russo & Gould, LLP



Josh H. Kardisch, Of Counsel
Trishe L.A. Hynes
Attorneys for Defendant-Respondent
American Multi-Cinema, Inc, d/b/a, AMC Theatres Webster 12, as Successor in Interest to Loews Boulevard Cinemas, Inc., f/k/a Loew's Boulevard Corp and/or Loews Theater Management Corp.
33 Whitehall Street, 16th Floor
New York, New York 10004
Tel.: 212-482-0001
Email: jkardisch@russogould.com