To be Argued by:
JOHN A. COLLINS, ESQ.
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(15 Minutes)

STATE OF NEW YORK

# Supreme Court

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

**Appellate Division Docket Number: CA 17-00732.**

DAVID M. BONCZAR,

*Plaintiff-Respondent,*

vs.

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-Appellant.*

Erie County Index No.: 2014-804799.

# BRIEF FOR PLAINTIFF-RESPONDENT DAVID M. BONCZAR

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## PRELIMINARY STATEMENT

As demonstrated below, plaintiff-respondent David M. Bonczar established his entitlement to partial summary judgment as to liability under Labor Law § 240(1), and defendant-appellant American Multi-Cinema, Inc. failed to demonstrate the existence of any triable issues of fact. Supreme Court's order entered March 1, 2017, granting plaintiff's motion for partial summary judgment, should therefore be affirmed.

## STATEMENT OF THE NATURE OF THE CASE AND FACTS

### A. THE NATURE OF THE CASE.

David M. Bonczar commenced this action to recover damages compensating him for personal injuries arising out of an accident that occurred on May 22, 2013, when he fell from an unstable ladder while engaged in the renovation of a movie theater located in Webster, New York (Summons and Complaint, R. 19-25). Plaintiff named as defendant American Multi-Cinema, Inc. (hereafter, "AMC"), the theater's owner (R. 22, ¶ 4; R. 404, ¶ 6). As amplified in his Bill of Particulars, plaintiff alleges that AMC is liable under the common law and Labor Law §§ 200, 240(1), and 241(6) (R. 43-44, ¶ 23).

Plaintiff moved for partial summary as to liability under section 240(1) (R. 7-18). AMC opposed the motion (R. 403-418). Supreme Court granted the

motion by order entered March 1, 2017 (R. 4-5). This appeal by AMC ensued (R. 2-3).

B. THE FACTS.

In February 2013, AMC contracted to have its twelve-screen cinema in Webster, New York renovated (Testimony of AMC construction manager Kerry Stanley, R. 55-57; Construction Agreement, R. 107-132). The theater's fire alarm and sprinkler systems were upgraded as part of the project (R. 93-94). All State Fire Equipment of WNY (hereafter, "All State") performed the fire alarm work (Subcontract, R. 133-164).

Plaintiff David Bonczar, a senior fire protection and security technician with All State, worked on the alarm system upgrade (R. 171-172; R. 333). Mr. Bonczar testified that the work entailed retrofitting the existing fire alarm system by, among other things, running new wiring above the drop ceiling and installing new smoke detectors (R. 309-312; R. 317; R. 348). Other trades were working in the theater at the same time, he said, and there were a number of ladders present and available throughout the jobsite (R. 300; R. 315-323; R. 334). Mr. Bonczar used several of those ladders during the course of his work at the theater, but did not know who had supplied each particular one (R. 321-323).

On the morning of May 22, 2013, Mr. Bonczar and Bob Lutz, a fellow All State technician, installed new fire protection devices behind the

concession stand (R. 305-308). At the direction of their supervisor, Jon Smith, they then proceeded to the theater's cash room to install an additional smoke detector (R. 307-308). To do so, they had to run new wiring above the drop ceiling (R. 310-313; R. 334-335; R. 343). The ceiling was less than ten feet high, and they used six-foot ladders to reach it (R. 334-337; R. 345; R. 391).

Mr. Bonczar testified that it was possible he brought a ladder into the cash room, but he did not know for sure (R. 338). He further testified that other workers were going in and out of the room, and that it was "hard . . . to say how many ladders there were" (R. 336). Nor did he know where the different ladders that were present came from (R. 337-338).

Mr. Bonczar and Mr. Lutz spent several hours working together in the cash room (R. 310; R. 337). During that time, they each used the ladders that were present in the room in order to access the space above the drop ceiling (R. 335-337). Mr. Bonczar stated that it was "very possible" he used more than one ladder while in the cash room (R. 338).

After the two worked together for some time, Mr. Lutz left the cash room and plaintiff remained behind, working alone (R. 300; R. 307; R. 311-313). During the course of that work, plaintiff climbed to the third or fourth step of one of the ladders in order to reach the area above the ceiling (R. 344-348). The ladder, plaintiff said, was a six-foot fiberglass step ladder (R. 300; R. 338-339; R. 346). He testified that he did not know whether he had used

the same ladder during his earlier work in the cash room (R. 340). He testified also that he did not know who owned the ladder, or how it got into the room (R. 340; R. 383).

Plaintiff further testified that, prior to the time he used it, the ladder was standing upright in the center of the room (R. 340-342). Although he could not recall checking to see that the ladder was "locked into place," he did observe that it was "fully open" (R. 342-344).

After working in the area above the ceiling, plaintiff began to descend the ladder (R. 300; R. 346-349). As he was doing so, he testified, "[t]he ladder shifted, wobbled," causing him to lose his balance and fall backward onto the floor (R. 300; R. 348-349; R. 358). As stated in his Bill of Particulars and described at length in his deposition, plaintiff sustained significant, disabling injuries as proximate result of the fall (R. 38-41, ¶¶ 11-15; R. 186-294).

## ARGUMENT

## POINT I

### PLAINTIFF ESTABLISHED THAT HIS FALL AND INJURIES WERE PROXIMATELY CAUSED BY DEFENDANT'S VIOLATION OF ITS NONDELEGABLE DUTY UNDER LABOR LAW § 240(1)

A. PROPERTY OWNERS' STATUTORY OBLIGATIONS UNDER SECTION 240(1).

Labor Law § 240(1) provides:

> 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 altering, painting, cleaning or pointing 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.

An owner's statutory duty to ensure that scaffolds and other safety devices are "constructed, placed and operated as to give proper protection" is "nondelegable." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991). Owners are therefore absolutely liable for injuries proximately caused by a statutory breach even if they exercised no supervision or control over the operation and did not supply any of the equipment used by the injured worker. *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 559 (1993).

Furthermore, an owner's liability is not diminished by the injured worker's comparative negligence. *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, 1 N.Y.3d 280, 286-287 (2003); *Ferris v. Benbow Chem. Pkg., Inc.*, 74 A.D.3d 1831, 1832 (4th Dep't 2010).

Accordingly, under Labor Law § 240(1), "it is the duty of the owner, not the worker, to ensure the proper placement and use of safety devices . . . ." *Turner v. Eastman Kodak Co.*, 210 A.D.2d 883, 883 (4th Dep't 1994) (citation omitted). *See also Willard v. Thomas Simone & Son Builders, Inc.*, 45 A.D.3d 1276, 1277 (4th Dep't 2007) ("Labor Law § 240[1] imposes a duty upon a contractor or owner to provide proper protection to workers employed in elevation-related work [citation omitted].").

B. PARTIAL SUMMARY JUDGMENT AS TO LIABILITY UNDER SECTION 240(1).

A plaintiff may establish his prima facie entitlement to partial summary judgment as to liability under section 240(1) by demonstrating that, while engaged in covered employment, he fell due to the absence or failure of a protective device required by the statute, and thereby sustained injuries. *See Owczarek v. Austin Co.*, 19 A.D.3d 1003, 1003 (4th Dep't 2005) (plaintiff established entitlement to partial summary judgment by demonstrating that [1] he was engaged in a protected activity, [2] his accident involved an elevation-related hazard within the ambit of section

240[1], and [3] his injuries were proximately caused by the violation of defendants' nondelegable duty to ensure that protective devices were so constructed, placed and operated as to give proper protection to plaintiff); *see also Luna v. Zoological Soc. of Buffalo, Inc.*, 101 A.D.3d 1745, 1745-1746 (4th Dep't 2012) ("Plaintiff sustained his initial burden of establishing that he was injured as the result of a fall from an elevated work surface and that defendant failed to provide a sufficient safety device" [citations omitted]).

Once a plaintiff satisfies his threshold evidentiary burden by establishing the existence of a statutory violation and proximate cause, his or her motion for partial summary judgment will be denied only if defendant interposes competent, admissible proof "that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, 1 N.Y.3d at 289 n.8; *accord Morin v. Machnick Bldrs., Ltd.*, 4 A.D.3d 668, 670 (3d Dep't 2004).

Contrary to AMC's argument, partial summary judgment on the issue of liability is not precluded merely because no one other than the plaintiff witnessed the injury-producing incident. As this Court held in *Abramo v. Pepsi-Cola Buffalo Bottling Co.*, 224 A.D.2d 980 (4th Dep't 1996):

> The mere fact that a fall is unwitnessed does not require denial of a motion for partial summary judgment under Labor Law § 240(1). Summary judgment is appropriate if plaintiff's account of the accident is uncontroverted or if defendant is unable

> to show, other than by speculation without factual support, that a bona fide issue exists.

224 A.D.2d at 981 (citations omitted). *Accord Boivin v. Marrano/Mark Equity Corp.*, 79 A.D.3d 1750, 1750 (4th Dep't 2010). *See also Kirbis v. LPCiminelli, Inc.*, 90 A.D.3d 1581, 1582-1583 (4th Dep't 2011) ("mere speculation that the accident may have occurred in a different manner is not sufficient to raise an issue of fact" [citation, internal quotation marks, ellipses and brackets omitted]); *Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d 1135, 1136 (4th Dep't 2008) ("defendant failed to raise an issue of fact to the extent it merely criticizes plaintiff's account as unwitnessed and unsubstantiated by independent sources" [citation, internal quotation marks, and brackets omitted]); *Niles v. Shue Roofing Co., Inc.*, 219 A.D.2d 785, 785 (3d Dep't 1995) (plaintiff entitled to partial summary judgment where, although "unsubstantiated by independent sources," "his account of the accident was never challenged").

*Carlos v. Rochester General Hosp.*, 163 A.D.2d 894 (4th Dep't 1990), upon which AMC relies, is not to the contrary. As this Court explained in *Walsh v. Baker*, 172 A.D.2d 1038 (4th Dep't 1991), plaintiff's motion for partial summary judgment was denied in *Carlos* because "the record established that defendant's submissions opposition to the motion contested plaintiff's account of how the accident occurred," leading the Court to

"conclude[] that '[p]laintiff's testimonial version should be subjected to cross-examination and his credibility assessed by the fact-finder after a trial.' " *Walsh v. Baker*, 172 A.D.2d at 1039 (quoting *Carlos v. Rochester General Hosp.*, 163 A.D.2d at 895). *See also Woodworth v. American Ref-Fuel*, 295 A.D.2d 942, 943 (4th Dep't 2002) (plaintiff's motion for partial summary judgment denied because "the accident was unwitnessed and there are conflicting versions of how the accident occurred, including plaintiff's own conflicting statements").

In the present case, David Bonczar consistently testified that he lost his balance and fell backward because the ladder shifted and wobbled as he was descending it (R. 300; R. 348-349; R. 358). Mr. Bonczar never gave a contrary account of his accident, and AMC has not established otherwise. Nor did AMC interpose any admissible proof that a third party contested Mr. Bonczar's testimony as to the circumstances of his accident. In the absence of such evidence, " 'there are no bona fide issues of fact with respect to how it occurred.' " *Kirbis v. LPCiminelli, Inc.*, 90 A.D.3d at 1583 (quoting *Ewing v. ADF Constr. Corp.*, 16 A.D.3d 1085, 1086 [4th Dep't 2005]).

Thus, notwithstanding that his fall was unwitnessed, David Bonczar may obtain partial summary judgment as to liability under section 240(1) by demonstrating that he fell due to the failure of a protective device required by the statute, and thereby sustained injuries. AMC does not dispute that Mr.

Bonczar was injured as a result of his fall. Rather, it contends that (1) he failed to sustain his prima facie burden of establishing that his fall was caused by a violation of Labor Law § 240(1), and (2) there are triable issues of fact as to whether his conduct constituted the sole proximate cause of the accident. As demonstrated below, neither argument has merit.

## C. THE UNDISPUTED FACT THAT PLAINTIFF'S LADDER SHIFTED AND WOBBLED ESTABLISHES THAT IT WAS NOT CONSTRUCTED, PLACED, AND OPERATED SO AS TO GIVE PROPER PROTECTION.

In *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, the Court of Appeals held that "[i]n cases involving ladders . . . that collapse *or malfunction* for no apparent reason, we have . . . continued to aid plaintiffs with a presumption that the ladder . . . was not good enough to afford proper protection." 1 N.Y.3d at 289 n.8 (citations omitted) (emphasis supplied). In accordance with that settled application of Labor Law § 240(1), New York's courts have held that summary judgment as to liability is appropriate not only where the ladder on which the plaintiff was positioned fell over (i.e., "collapsed"), but also where it tipped, wobbled, skidded, or shifted (i.e., "malfunctioned"), thereby causing the plaintiff to fall and sustain injuries.

Thus, in *Gordon v. Eastern Ry. Supply*, the Court of Appeals affirmed this Court's order granting partial summary judgment as to liability based on proof the plaintiff fell when the ladder he was working on "tipped." 82 N.Y.2d

at 560. "The ladder did not prevent plaintiff from falling; thus, the 'core' objective of section 240(1) was not met," the Court of Appeals held. *Gordon*, 82 N.Y.2d at 561.

The Fourth Department, too, has imposed absolute liability in numerous cases involving falls caused by unstable ladders, recognizing that such incidents necessarily establish a failure to construct, place or operate the requisite safety devices so as to provide proper protection. In *Woods v. Design Center, Inc.*, 42 A.D.3d 876 (4th Dep't 2007), for example, this Court affirmed the grant of partial summary judgment under section 240(1) based upon proof that plaintiff fell when her stepladder tipped as she was descending it. 42 A.D.3d at 877. " 'The fact that the ladder tipped establishes that it was not so placed . . . as to give proper protection to plaintiff,' " the Court held. *Id.* (quoting *Petit v. Board of Educ. of W. Genesee School Dist.*, 307 A.D.2d 749, 750 [4th Dep't 2003]).

In *Nephew v. Klewin Building Co., Inc.*, 21 A.D.3d 1419 (4th Dep't 2005), similarly, the Court – in affirming the grant of partial summary judgment as to liability under Labor Law § 240(1) – held that the fact the ladder "buckled" or "walked" when plaintiff leaned to one side "established that the ladder did not provide the requisite protection" under section 240(1). 21 A.D.3d at 1420. *See also Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d at 1136 (4th Dep't 2008) (plaintiff demonstrated his entitlement to

partial summary judgment by establishing that he fell from an aluminum pick when the ladder supporting it "shifted"); *Newman v. C. Destro Dev. Co., Inc.*, 46 A.D.3d 1452, 1452 (4th Dep't 2007) (plaintiff's showing that "he fell from an unstable ladder . . . establish[ed] as a matter of law that the ladder failed to provide him with adequate protection"); *Dahl v. Armor Building Supply*, 280 A.D.2d 970, 971 (4th Dep't 2001) ("the fact that the ladder 'tipped' establishes that it was not so placed as to give proper protection to plaintiff" [citation, internal quotation marks, and ellipses omitted]); *Evans v. Anheuser-Busch, Inc.*, 277 A.D.2d 874, 874 (4th Dep't 2000) (summary judgment as to liability granted based on evidence that, "[a]s plaintiff began to descend the ladder, the ladder skidded, and plaintiff lost his balance and fell").

The other Departments have likewise held that a ladder that shakes, wobbles, or is otherwise unstable, violates section 240(1)'s mandate that such devices be "so constructed, placed and operated as to give proper protection to" the persons using them. Thus, in *Messina v. City of New York*, 148 A.D.3d 493 (1st Dep't 2017), the court held that "[p]laintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony that he was injured when the A-frame ladder on which he was standing moved underneath him as he applied pressure to it while

trying to remove part of the drop ceiling he was demolishing." 148 A.D.3d at 494.

Similarly, in *Garcia v. Church of St. Joseph of the Holy Family of the City of New York*, 146 A.D.3d 524 (1st Dep't 2017), the court held that "[p]laintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240(1)." 146 A.D.3d at 525 (citations omitted). *See also Hill v. City of New York*, 140 A.D.3d 568, 568-570 (1st Dep't 2016) (partial summary judgment granted in favor of plaintiff who lost his balance and fell when the ladder he was on "wobbled"); *Ausby v. 365 West End LLC*, 135 A.D.3d 481, 481 (1st Dep't 2016) (partial summary judgment granted in favor of plaintiff who fell when the ladder he was working on shook); *Grant v. City of New York*, 109 A.D.3d 961, 962 (2d Dep't 2013) (plaintiff entitled to partial summary judgment where "he fell from an unsecured ladder when it shifted to the side"); *Tuccillo v. Bovis Lend Lease, Inc.*, 101 A.D.3d 625, 626-627 (1st Dep't 2012) (plaintiff entitled to partial summary judgment where he fell because the ladder he was working on "wobbled"); *Picano v. Rockefeller Center North, Inc.*, 68 A.D.3d 425, 425 (1st Dep't 2009) (partial summary judgment in plaintiff's favor warranted based on proof that the ladder upon which he was working "suddenly shifted or wobbled, and that no safety devices were provided to prevent the ladder from slipping or plaintiff from falling if it did"); *Montalvo*

*v. J. Petrocelli Const., Inc.*, 8 A.D.3d 173, 174 (1st Dep't 2004) ("It is well settled that the failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240[1]" [citation, internal quotation marks, and brackets omitted]).

Thus, plaintiff's unrefuted showing that he fell and sustained injuries because the ladder upon which he was working shifted and wobbled establishes AMC's liability under Labor Law § 240(1).

## D. PLAINTIFF HAD NO OBLIGATION TO ESTABLISH THAT THE LADDER WAS DEFECTIVE.

AMC contends that, in *Blake v. Neighborhood Hous. Servs. of New York City, Inc.,* the Court of Appeals "stated that defendant has not violated the statute when plaintiff cannot identify a defect in the ladder or a reason why the latter [*sic*] shifted before he fell." (Brief for Defendant-Appellant, pp. 14-15.) AMC does not provide a page citation supporting that ostensible holding; the omission is not surprising because the Court's opinion is directly to the contrary. As noted above, the Court actually held that, where a ladder malfunctions "for no apparent reason," there is a "presumption that the ladder . . . was not good enough to afford proper protection." 1 N.Y.3d at 289 n.8.

Thus, contrary to AMC's argument, a plaintiff seeking summary judgment as to liability is under no obligation to establish that the ladder

from which he or she fell wobbled, shifted, or otherwise malfunctioned due to the existence of a specific, identifiable defect. The Appellate Division has reiterated and applied that principle in a host of cases. In *Dahl v. Armor Building Supply*, for example, the Fourth Department held: "Defendant's contention that the ladder provided to plaintiff was an adequate safety device lacks merit; the fact that the ladder 'tipped' establishes that it was not so placed as to give proper protection to plaintiff." 280 A.D.2d at 971 (citations, internal quotation marks, and ellipses omitted).

In *Woods v. Design Ctr. LLC*, 42 A.D.3d 876, 877 (4th Dep't 2007), similarly, the Court held that "[e]vidence that the ladder was structurally sound and not defective is not relevant on the issue of whether it was properly placed." 42 A.D.3d at 877 (citation and internal quotation marks omitted). *Accord Kirbis v. LPCiminelli, Inc.*, 90 A.D.3d at 1582. *See also Messina v. City of New York*, 148 A.D.3d at 494 (plaintiff who was injured when ladder "moved underneath him . . . was not required to show that the ladder was defective or that he actually fell off the ladder to satisfy his prima facie burden"); *Ocana v. Quasar Realty Partners L.P.*, 137 A.D.3d 566, 567 (1st Dep't 2016) (where ladder wobbled, "[p]laintiff was not required to offer proof that the ladder was defective"); *Picano v. Rockefeller Center North, Inc.* 68 A.D.3d at 425 (where ladder shifted and wobbled, "it does not avail defendants to assert that the ladder itself was not defective").

## POINT II

### AMC FAILED TO RAISE A TRIABLE ISSUE OF FACT AS TO WHETHER PLAINTIFF'S OWN CONDUCT CONSTITUTED THE SOLE PROXIMATE CAUSE OF HIS ACCIDENT AND INJURIES

In Point I (B) of its brief, AMC asserts that plaintiff's motion for partial summary judgment should be denied because there are triable questions of fact as to whether his own conduct constituted the sole proximate cause of his fall and injuries. AMC raises two points in support of that argument: (1) plaintiff failed to establish that the ladder was defective, and (2) plaintiff stated that it was feasible he moved the ladder before using it, and could not recall checking to see if the spreader arms were locked in place.

The first prong of defendant's argument is grounded upon the Court of Appeals' opinion in *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, in which it held that the sole-proximate-cause defense applies only "where there is no evidence of [a statutory] violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident." 1 N.Y.3d at 290.

AMC contends that, because plaintiff ostensibly failed to establish a statutory violation, his own conduct necessarily constituted the sole proximate cause of his fall. That argument is in turn predicated on the contention that, under *Blake*, plaintiff bore the burden of "identify[ing] a

defect in the ladder or a reason why" it shifted. (Brief for Defendant-Appellant, pp. 14-15.) As demonstrated above in Point I (D), however, the Court in *Blake* actually held that where a ladder malfunctions "for no apparent reason," there is a "presumption that the ladder . . . was not good enough to afford proper protection." 1 N.Y.3d at 289 n.8. In other words, in and of itself, the fact that a ladder tips, shifts, wobbles, or otherwise proves unstable establishes that it was not constructed, placed, and operated to provide proper protection. *See, e.g., Hill v. City of New York*, 140 A.D.3d at 568-570 (ladder "wobbled"); *Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d at 1136 (ladder "shifted"); *Newman v. C. Destro Dev. Co.*, 46 A.D.3d at 1452 (ladder was "unstable"); *Woods v. Design Center, Inc.*, 42 A.D.3d at 877 (ladder "tipped"); *Evans v. Anheuser-Busch*, 277 A.D.2d at 874 (ladder "skidded").

Here, David Bonczar testified that the ladder he was using "shifted and wobbled" (R. 300; R. 348-349; R. 358), and AMC failed to introduce any evidence contradicting that testimony. Contrary to defendant's argument, therefore, Mr. Bonczar established as a matter of law a violation Labor Law § 240(1). Therefore, Mr. Bonczar's own conduct could not have been the sole proximate cause of his fall and injuries. *See Blake*, 1 N.Y.3d at 290 ("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"); *Burke v. APV Crepaco, Inc.*, 2 A.D.3d 1279, 1279 (4th Dep't 2003) ("Because plaintiff's fall was caused by the inadequacy of the equipment and not plaintiff's conduct alone, that conduct cannot be found to be the sole proximate cause of plaintiff's injuries").

Nor is there merit to AMC's contention that a triable issue of fact exists because plaintiff himself may have moved the ladder into place before using it, and/or may not have checked to see that the spreader arms were locked. As this Court held in *Abramo v. Pepsi-Cola Buffalo Bottling Co.*, a defendant cannot defend a properly supported motion by offering only "speculation without factual support." 224 A.D.2d at 981. The Third Department applied the same analysis in *Nudi v. Schmidt*, 63 A.D.3d 1474 (3d Dep't 2009), where, in upholding the grant of partial summary judgment as to liability under section 240(1), it held: "[Defendants] offer only speculation that plaintiff's own actions may have caused his fall. Speculation is insufficient to defeat summary judgment." 63 A.D.3d at 1376-1477 (citations omitted). *See also Kirbis v. LPCiminelli*, 90 A.D.3d at 1582 ("defendant's contention that plaintiff fell because he may have misused the ladder is based upon mere conjecture and thus is insufficient to defeat plaintiff's motion" [citations, internal quotation marks, and brackets omitted]).

Thus, the mere possibility that plaintiff may have moved the ladder into position before ascending it does not raise a triable question of fact as to

whether his own actions constituted the sole cause of his fall. Nor does the possibility that plaintiff may not have inspected the spreader bars to see if they were locked raise a triable issue of fact, particularly in light of his testimony that the ladder was "fully open" (R. 342).

In any event, plaintiff's conduct in positioning the ladder would at most constitute comparative negligence, which would not negate AMC's absolute liability. In *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, the Court of Appeals reiterated the settled rule that a worker's comparative fault does not negate an owner's absolute liability for injuries arising out of a violation of Labor Law § 240(1). 1 N.Y.3d at 289-290. Prior to *Blake*, the courts – in applying that principle – had repeatedly held that owners and contractors were liable for a statutory violation as a matter of law even if the plaintiff himself caused the violation. *See, Carlos v. W.H.P. 19 L.L.C.*, 280 A.D.2d 419, 419 (1st Dep't 2001) (plaintiff who fell because ladder tipped after he himself placed it on uneven sidewalk entitled to partial summary judgment as to liability under Labor Law § 240[1], as his negligence is irrelevant and does not implicate sole-proximate-cause defense); *DiVincenzo v. Tripart Dev.*, 272 A.D.2d 904, 904-905 (4th Dep't 2000) (affirming partial summary judgment as to liability under section 240[1] in favor of a plaintiff who fell because he himself had constructed his scaffold improperly); *Vasey v. Pyramid Co. of Buffalo*, 258 A.D.2d 906, 906 (4th Dep't 1999) (plaintiff

entitled to partial summary judgment as to liability under section 240[1] where he accidentally maneuvered manlift onto a decorative tree grate, causing the lift to tip over and plaintiff to fall to the floor).

*Blake* squarely supports the rationale underlying the foregoing cases, and the courts have continued to apply their reasoning. Thus, in *Gizowski v. State of New York*, 66 A.D.3d 1348 (4th Dep't 2009), this Court held:

> Even assuming . . . that claimant was negligent in his placement of the scaffold [from which he fell] and his removal of bracing from the portion of the ceiling that collapsed [and struck the scaffold], we conclude that those actions render him merely contributorily negligent, a defense unavailable under section 240(1). Because claimant established that a statutory violation was a proximate cause of his injury, he cannot be solely to blame for it.

*Gizowski*, 66 A.D.3d at 1349 (citations, internal quotation marks, and brackets omitted).

Likewise, in *Whalen v. ExxonMobil Oil Corp.*, 50 A.D.3d 1553 (4th Dep't 2008), the Court affirmed the grant of partial summary judgment to a plaintiff who fell from a ladder when the door against which it was leaning opened. The placement of the ladder violated section 240(1), the Court held, and "[w]hile the plaintiff may have been negligent in leaning the ladder against the door, the plaintiff's conduct cannot be considered the sole proximate cause of his injuries." 50 A.D.3d at 1554 (citation and internal quotation marks omitted). *See also Calderon v. Walgreen Co.*, 72 A.D.3d 1532,

1533 (4th Dep't 2010) (even assuming that plaintiff negligently moved materials to the back of his scaffold, causing it to tip backward, his actions rendered him only "contributorily negligent, a defense unavailable under section 240[1])" [citation and internal quotation marks omitted]), *appeal dismissed*, 15 N.Y.3d 900 (2010); *Alligood v. Hospitality West, LLC*, 8 A.D.3d 1102, 1102 (4th Dep't 2004) (although plaintiff may have acted negligently in positioning the ladder that slipped out from under him on an ice-covered surface, his negligence did not constitute the sole proximate cause of his accident); *Morin v. Machnick Bldrs.*, 4 A.D.3d at 670 (same).

## CONCLUSION

Supreme Court correctly granted plaintiff's motion for partial summary judgment as to liability under Labor Law § 240(1). The Order entered March 1, 2017 should therefore be affirmed in its entirety.

Dated: Buffalo, New York
May 17, 2017

Respectfully submitted,

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