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STATE OF NEW YORK

Court of Appeals

APL-2020-00121

DAVID M. BONCZAR,

Plaintiff-Appellant,

vs.

AMERICAN MULTI-CINEMA, INC. d/b/a AMC THEATERS WEBSTER 12 (as Successor in Interest to Loews Boulevard Cinemas, Inc. f/k/a Loew's Boulevard Corporation and/or Loews Theater Management Corp.),

Defendants-Respondents.

Appellate Division Docket Numbers: CA 17-00732 and CA 19-00899.
Erie County Index No. 804799/2014.

BRIEF FOR PLAINTIFF-APPELLANT DAVID M. BONCZAR

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PRELIMINARY STATEMENT

David Bonczar, the plaintiff in this personal injury action, is appealing from an Order of the Appellate Division, Fourth Department entered July 17, 2020, which affirmed the Supreme Court, County of Erie's final judgment in favor of 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 Corporation and/or Loews Theater Management Corp.

Plaintiff is appealing both as of right, pursuant to CPLR 5601 (d), and by permission of this Court, pursuant to CPLR 5602 (a) (1) (i). Plaintiff's appeal as of right brings up for review the Fourth Department's Memorandum and Order entered February 2, 2018, in which the court, by a vote of 3 to 2, reversed the trial court and denied plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1).

Plaintiff's permissive appeal presents the question whether the Fourth Department erred in affirming the trial court's final Judgment entered April 25, 2019, which dismissed plaintiff's complaint based upon a jury verdict of no cause of action. Pursuant to CPLR 5501 (a) (1), plaintiff's appeal from the final Judgment had brought up for Appellate Division review the trial court's post-trial order entered December 7, 2018, which denied plaintiff's motion for a directed verdict as to liability under section 240 (1). The correctness of that post-trial order,

which the Appellate Division upheld, is at issue before this Court.

Although the appeal taken as of right and the appeal taken by permission involve the same fundamental issue – whether plaintiff established defendant's liability under Labor Law § 240 (1) as a matter of law – the appellate records are distinct. This brief will therefore address each appeal separately. The record material relating to the Appellate Division's Memorandum and Order entered February 2, 2018, denying plaintiff's motion for partial summary judgment (Appeal No. 1), is contained in Volume I of the Record on Appeal. The record material relating to the Appellate Division's Order affirming the final Judgment entered after trial (Appeal No. 2) is contained in Volumes II - IV of the Record on Appeal.

STATEMENT OF JURISDICTION

APPEAL NO. 1

Under CPLR 5601 (a) and (d), the Court of Appeals has jurisdiction to entertain plaintiff's appeal from the Appellate Division's Order entered July 17, 2020 (R. 7-8) insofar as it brings up for review the Appellate Division's prior nonfinal Memorandum and Order entered February 2, 2018 (R. 13a-13c), and to review the question raised on the appeal. The earlier order necessarily affects the later one (CPLR 5601 [d]), and plaintiff has duly appealed as of right based on the existence of a dissent by two justices on a question of law (CPLR 5601 [a]).

APPEAL NO. 2

The Court of Appeals has jurisdiction over plaintiff's permissive appeal pursuant to CPLR 5602 (a) (1) (i), which provides that, in an action originating in Supreme Court, the Court of Appeals may grant leave to appeal from an order of the Appellate Division that finally determines the action and is not appealable as of right. The Court of Appeals granted leave by order entered November 24, 2020 (R. 14). The appeal presents a question of law reviewable by this Court, i.e., whether the trial court erred in denying plaintiff's motion for a directed verdict pursuant to CPLR 4401. *See Killon v. Parrotta*, 28 N.Y.3d 101, 108 (2016) (holding that, "[b]ecause determining whether a jury verdict was utterly irrational involves a pure question of law, this Court may look at the trial evidence and make that determination"); *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997) (recognizing that a motion under CPLR 4401 presents a question of law, i.e., whether, "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party," and is thus reviewable on appeal to the Court of Appeals).

QUESTIONS PRESENTED

APPEAL NO. 1

Did plaintiff, who lost his balance and fell when the ladder upon which he was working shifted and wobbled, establish his entitlement to partial summary judgment as to liability under Labor Law § 240 (1) against the defendant property owner?

Plaintiff duly identified and preserved the question for review by this Court (R. 25-34).

APPEAL NO. 2

When the trial proof is viewed in the light most favorable to defendant, with all permissible inferences drawn in its favor, could the trier of fact have rationally found that: (1) plaintiff failed to check the positioning of the ladder from which he fell; (2) the ladder was improperly positioned to perform the work; (3) plaintiff fell because the ladder was improperly positioned to perform the work; (4) the improper position of the ladder was the only substantial factor in causing plaintiff's fall; and (5) Labor Law § 240 (1) was not violated by a failure to provide proper protection?

Plaintiff duly identified and preserved the question for review by this Court (R. 1292-1305; R. 1803-1813).

THE NATURE AND PROCEDURAL HISTORY OF THE CASE

David M. Bonczar commenced this action to recover damages 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 in Webster, New York (Summons and Complaint, R. 35-41). Plaintiff named as defendant the theater's owner, 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 Corporation and/or Loews Theater Management Corp. (hereafter, "AMC") (R. 38, ¶ 4; R. 420, ¶ 6).

Following pretrial disclosure, plaintiff moved for partial summary judgment as to liability under section 240 (1) (R. 23-34). Supreme Court, which did not render a written decision, granted the motion by order entered March 1, 2017 (R. 20-21). AMC appealed to the Fourth Department (R. 18-19).

By Memorandum and Order entered February 2, 2018, the Appellate Division reversed Supreme Court's order and denied plaintiff's motion (R. 13a-13c). *Bonczar v. American Multi-Cinema, Inc.*, 158 A.D.3d 1114 (4th Dep't 2018). The three-justice majority held that, because plaintiff "acknowledged that he might not have checked the positioning of the ladder or the locking mechanism . . . '[t]here is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were

the sole cause of the accident.' " (R. 13a [quoting *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 289 n.8 (2003)]). The dissent disagreed, "conclud[ing] that plaintiff's deposition testimony does not support a nonspeculative inference that the sole proximate cause of his injuries was his alleged failure to check the positioning of the ladder or whether it was locked into place" (R. 13c [Whalen, P.J. and Lindley, J., dissenting]).

The issue of AMC's liability under Labor Law § 240 (1) was subsequently tried before a jury from April 17 through 25, 2018. At the close of the evidence, plaintiff moved for a directed verdict (R. 1292-1305). The court reserved decision (R. 1305). The jury then returned a verdict in which it found that: (1) Labor Law § 240 (1) was not violated by a failure 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 (Trial Transcript, R. 1440-1441; Verdict Sheet, R. 1528-1531, ¶¶ 1, 3-6).

Plaintiff thereafter made a post-trial motion, seeking, inter alia, a directed verdict under CPLR 4401 based on his trial motion (on which the court had reserved decision) (R. 1803-1830). By Decision and Order entered December 7, 2018, the trial court denied plaintiff's post-trial motion in its entirety (R. 488-493).

A final Judgment in defendant's favor was entered on April 25, 2019 (R. 486-487). Plaintiff timely appealed the Judgment to the Appellate Division, Fourth Department (R. 481-483), thereby bringing up for review all issues resolved in the Decision and Order entered December 7, 2018 (CPLR 5501 [a] [1]). The Appellate Division, which did not write a decision, unanimously affirmed the Judgment by Order entered July 17, 2020 (R. 7-8). *Bonczar v. American Multi-Cinema, Inc.*, 185 A.D.3d 1423 (4th Dep't 2020), *lv. granted*, 36 N.Y.3d 901 (2020).

Plaintiff has appealed the Appellate Division's Order to this Court as of right pursuant to CPLR 5601 (d), thereby bringing up for review the Appellate Division's prior nonfinal Memorandum and Order entered February 2, 2018, denying plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1) (R. 4-6).

Plaintiff has also appealed the Appellate Division's Order by leave of this Court granted on November 24, 2020 (CPLR 5602 [a] [1] [i]) (R. 14). *Bonczar v. American Multi-Cinema, Inc.*, 36 N.Y.3d at 901. The permissive appeal brings up for review the correctness of the trial court's post-trial order entered December 7, 2018, denying plaintiff's motion for a directed verdict, which was subsumed in the final Judgment and upheld by the Appellate Division on plaintiff's appeal from that Judgment.

APPEAL NO. 1

STATEMENT OF FACTS

In moving for partial summary judgment as to liability under Labor Law § 240 (1), David Bonczar established that, in February 2013, AMC contracted to have its movie theater in Webster, New York renovated (R. 70-73; R. 123-148). The theater's fire alarm and sprinkler system were upgraded as part of the project (R. 109-110). All State Fire Equipment of WNY (hereafter, "All State") performed the fire alarm work pursuant to a subcontract agreement (R. 149-180).

David Bonczar, a senior fire protection and security technician employed by All State, worked on the upgrade (R. 187-188; R. 315; R. 321-322; R. 349). 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. 325-328; R. 333; R. 364). 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. 316; R. 331-338; R. 350). Mr. Bonczar used several of those ladders during the course of his work at the theater (R. 337-339).

On the morning of May 22, 2013, Mr. Bonczar and Bob Lutz, a fellow All State technician, were directed to install an additional smoke detector in the theater's cash room (R. 323-324). To do so, they had to run new wiring above the

drop ceiling (R. 326-329; R. 351; R. 359). There were a number of ladders in the room, and they used them in order to reach the space above the ceiling (R. 350-354; R. 360-361).

Mr. Lutz subsequently left the cash room and plaintiff remained behind, working alone (R. 316; R. 323; R. 327-330). During the course of his work, plaintiff climbed to the third or fourth step of one of the ladders in order to reach the area above the ceiling (R. 360-364). The ladder, plaintiff testified, was a six-foot fiberglass step ladder (R. 316; R. 354-355; R. 362). Plaintiff further stated that, prior to the time he used it, the ladder was "fully open" and "standing up" in the center of the room (R. 356-358). He ascended and descended the ladder several times during the course of his installation work (R. 362).

Defense counsel inquired as to plaintiff's actions immediately prior to the ascent that preceded his fall in the following colloquy:

> Q. Before you went up the ladder – I'm talking about specifically the time immediately prior to falling. So before you went up that ladder, did you check to make sure that the ladder was properly positioned?
>
> A. I don't recall. I'd like to say that, you know, that's something I try to do. I just can't be sure I did it that specific time.
>
> . . . .
>
> Q. Do you remember whether or not you looked to check whether the ladder was locked into place?
>
> A. I don't recall. [R. 359-360.]

After working in the area above the ceiling, plaintiff began to descend the ladder (R. 316; R. 362-364). As he was doing so, "[t]he ladder shifted, wobbled," causing him to lose his balance and fall backward onto the floor (R. 316; R. 364-365; R. 374). Plaintiff sustained significant, disabling injuries as a proximate result of the fall (R. 54-57, ¶¶ 11-15; R. 202-310).

Defendant, in opposing plaintiff's motion for partial summary judgment, interposed no evidence disputing his account of his accident (R. 419-468).

ARGUMENT

PLAINTIFF ESTABLISHED THAT HIS FALL AND INJURIES WERE PROXIMATELY CAUSED BY DEFENDANT'S VIOLATION OF ITS NONDELEGABLE DUTY UNDER LABOR LAW § 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 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 work. *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 559 (1993). Furthermore, an owner's liability is not diminished by the worker's comparative negligence. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 286-287 (2003).

In *Blake*, this Court 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." *Id.* at 289 n.8 (citations omitted). In accordance with that principle, 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*, this Court affirmed the Appellate Division's order granting partial summary judgment as to liability based on proof the plaintiff fell from a ladder when it "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 held. *Id.* at 561. *See also Garcia v. Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 A.D.3d 524, 525 (1st Dep't 2017) (holding 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]" [citations omitted]); *Hill v. City of New York*, 140 A.D.3d 568, 570 (1st Dep't 2016) (partial summary judgment granted in favor of plaintiff who fell when the ladder he was 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 provide to prevent the ladder from slipping or plaintiff from falling if it did").

Once a plaintiff satisfies his or her threshold evidentiary burden by establishing the existence of a statutory violation and proximate cause, plaintiff's 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*, 1 N.Y.3d at 289 n.8. *See also Batista v. Manhattanville College*, 28 N.Y.3d 1093, 1094 (2016) (reversing the Appellate Division, the Court granted plaintiff's motion for partial summary judgment under Labor Law § 240 [1] because "[d]efendants failed to raise a triable issue of fact whether the plaintiff was the sole proximate cause of his accident").

Partial summary judgment on the issue of liability is not precluded merely because no one other than the plaintiff witnessed the injury-producing incident.

Thus, in *Klein v. City of New York*, 89 N.Y.2d 833 (1996), the Court of Appeals upheld the grant of partial summary judgment to a plaintiff who was the sole witness to his accident, in which he fell after the ladder upon which he was working slipped out from under him. The Court held that, "[s]ince neither the defendant nor third-party defendant has presented any evidence of a triable issue of fact relating to the prima facie case or to plaintiff's credibility, summary judgment was properly awarded to the plaintiff." *Id.* at 835. *See also Melchor v. Singh*, 90 A.D.3d 866, 868-869 (2d Dep't 2011) (plaintiff, who fell when the ladder he was using "moved," was entitled to partial summary judgment even though he was the sole witness to his accident because "respondents offered no evidence, other than mere speculation, to undermine the plaintiff's showing of entitlement to judgment as a matter of law, or present a bona fide issue regarding the plaintiff's credibility as to a material fact").

In the present case, David Bonczar testified that he lost his balance and fell backward because his ladder shifted and wobbled as he was descending it (R. 316; R. 364-365; R. 374). AMC introduced no evidence contradicting that testimony or otherwise calling plaintiff's credibility into question. Thus, notwithstanding that his accident was unwitnessed, plaintiff is entitled to partial summary judgment as to liability under section 240 (1) based on the undisputed evidence establishing that

he fell because the ladder shifted and wobbled as he was descending it, causing him to lose his balance.

Contrary to the Appellate Division majority's opinion, plaintiff's testimony that he did not know why the ladder wobbled and shifted, and that he may not have checked the positioning of the ladder or the locking mechanism, does not raise a triable issue of fact as to whether " 'there was no statutory violation and that plaintiff's own acts or omissions were the sole proximate cause of the accident.' " (R. 13a [quoting *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d at 289 n.8].) As stated by the dissent, "[t]he fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that 'malfunction[s] for no apparent reason' is entitled to 'a presumption that the ladder . . . was not good enough to afford proper protection' " (R. 13b [quoting *Blake*, 1 N.Y.3d at 289 n.8]).

As further stated by the dissent, the majority also erred in concluding that plaintiff himself raised a triable issue of fact by testifying that he could not recall whether, immediately before ascending the ladder, he had "checked the positioning of the ladder or checked that it was 'locked in place' " (R. 13b). The dissent correctly concluded that, in light of plaintiff's testimony "that the ladder was upright and 'fully open' " before he ascended it, "it would be unduly speculative

for a jury to infer from plaintiff's testimony that the sole proximate cause of the accident was his alleged failure to check its positioning or its locking mechanism" (R. 13b [citation omitted]).

As the dissent also stated, the majority erred in holding that this action was analogous to *Blake* (R. 13b-13c). In *Blake*, the plaintiff admitted that he was not sure if he had checked the locking clips on an extension ladder that retracted while he was on it. 1 N.Y.3d at 283-284. Thus, as the dissent in this case noted, "[b]ased on the injured worker's uncertainty and the fact that the accident occurred in the very manner that the extension clips were meant to prevent, it was logical for the jury to infer both that he had failed to lock the clips and that his negligence in that regard was the sole proximate cause of his injuries" (R. 13b-13c [citations omitted]).

In the present case, by contrast, the dissent correctly concluded that, "given that an A-frame ladder can wobble or shift for various reasons unrelated to its positioning or locking mechanism, and even for no apparent reason . . . plaintiff's deposition testimony does not support a nonspeculative inference that the sole proximate cause of his injuries was his alleged failure to check the positioning of the ladder or whether it was locked into place" (R. 13c [citation omitted]).

Therefore, the Appellate Division majority erred in reversing the trial court and denying plaintiff's motion for partial summary judgment as to liability under

Labor Law § 240 (1). This Court should therefore reverse the Appellate Division's Memorandum and Order entered February 2, 2018 and reinstate the trial court's order granting the motion. The Memorandum and Order's reversal will in turn require the vacatur of the Appellate Division's Order entered July 17, 2020 and the trial court's final Judgment, as the Memorandum and Order "necessarily affects the judgment" within the meaning of CPLR 5601 (d) and its reversal renders the jury's verdict in favor of defendant and the Judgment entered thereon legal nullities.

Alternatively, if the Court affirms the Memorandum and Order denying plaintiff's motion for partial summary judgment, it should, for the reasons stated below, reverse the Appellate Division's Order entered July 17, 2020 and grant plaintiff's motion for a directed verdict on the issue of defendant's liability.

APPEAL NO. 2

STATEMENT OF FACTS

1. The Trial Proof.

In 2013, All State, David Bonczar's employer, was installing and upgrading fire alarm systems in conjunction with the renovation of a movie theater owned by defendant AMC (R. 951-954; R. 1444-1469). Mr. Bonczar testified that on the morning of May 22, 2013, he and a coworker by the name of Robert Lutz went to the theater's cash room to determine where a new smoke detector should be installed (R. 575-578). There were one or two ladders present in the room, which

Mr. Bonczar and Mr. Lutz used to survey the area above the drop ceiling (R. 577-583; R. 635). They subsequently left the cash room and surveyed several other areas in the theater, after which they split up (R. 580; R. 620). Mr. Bonczar obtained the tools and materials he needed to install the smoke detector in the cash room, and returned there on his own to perform the installation work (R. 580-581; R. 620).

Upon reentering the cash room, Mr. Bonczar observed a single ladder there, i.e., "a 6-foot A-frame ladder that was fully extended, standing freely in the middle of the room" (R. 581; R. 635). Mr. Bonczar said the ladder looked like one belonging to his employer, but that he could not be certain it was (R. 646). He used the ladder to perform the installation work (R. 581). Before doing so, he visually inspected it and observed that it was free of any defects (R. 582; R. 595-596; R. 604-605). Mr. Bonczar also "grabbed the – one of the rungs on the steps and the back support on the back of the ladder and made sure, tugged on it, that the ladder was fully opened to its furthest position" (R. 582). The ladder, he stated, contained two hinged arms or spreader bars that connected the front section to the rear section (R. 584). When you pull hard on the front and back sections, he explained, "the arms drop down to the bottom" and the legs are "fully extended" (R. 584). Thus, he further stated, when the legs are full extended and the spreader bars drop down, the bars are "forced downward" and necessarily "locked into place" (R.

685-686). Mr. Bonczar pulled the legs apart before using the ladder, ensuring that they were as far apart as possible and that the spreader arms were all the way down (R. 584-585; R. 595-596; R. 604-605; R. 641; R. 643; R. 685-686).

After visually inspecting and physically testing the ladder in that manner, Mr. Bonczar proceeded to use it while performing his installation work (R. 584-585). In doing so, he positioned himself in the middle of the ladder, between the two side rails (R. 669). With the ladder remaining in the same position, he ascended and descended it four to six times without incident (R. 585-586; R. 618; R. 641; R. 643; R. 671). Mr. Bonczar visually observed that the ladder remained fully open throughout that time (R. 585-586). He did not physically test it before each ascent, however, because he never moved or repositioned it (R. 585-586).

Toward the end of the installation process, Mr. Bonczar again ascended and descended the ladder (R. 586; R. 616; R. 669). As he was coming down, "the ladder shifted and wobbled," causing him to lose his balance and miss a step while moving from the fourth to the third step (R. 586; R. 644; R. 646-647). Upon doing so, plaintiff fell backward, "lost grip on [his] right hand," and eventually released his left hand as well (R. 646-648). Plaintiff landed on his back on the floor, and the ladder remained standing (R. 586; R. 623; R. 648).

On cross-examination, defense counsel read to Mr. Bonczar a portion of his pretrial deposition testimony in which he was asked if, "*immediately prior to*

falling," he had checked to make sure the ladder was properly positioned, with the spreader arms locked into place (R. 641-642 [emphasis supplied]). Mr. Bonczar responded at the deposition that he did not know if he did so "that specific time" (R. 641-642).

In explaining his deposition response at trial, Mr. Bonczar testified:

> You were saying immediately before I went up. I mean, before I had went up the first time, I checked it in place by pulling on it, visually seeing that it was open and extended fully. And after that, it didn't move. The immediately before, as your question was, immediately before, the last time I visually saw, nothing had changed. I hadn't moved the ladder, it was in the same position. So I can't say for sure that I checked it that final time. But that four – before I went up any of those four to six times, the ladder was firm fitted, fully extended, by pulling out on it. [R. 642.]

Plaintiff called Arthur Dube, a construction safety consultant, as an expert witness (R. 719-724). After recounting plaintiff's testimony as to the circumstances surrounding his fall – i.e., that as he was descending a six-foot step ladder, it shifted and wobbled, causing him to miss a step and fall to the floor – counsel asked Mr. Dube if he had an opinion "as to whether the construction safety law known as Labor Law Section 240 paren 1 was violated and whether he was not provided with the statutorily mandated proper protection?" (R. 733-734). Mr. Dube opined: "Yes. Obviously. He fell. So he wasn't protected properly" (R. 734).

Defendant called Daniel Paine, a construction site safety consultant, as an expert witness (R. 1101-1105; R. 1115; R. 1131). Mr. Paine did not criticize or otherwise take issue with the method by which plaintiff inspected and tested the ladder before using it. In particular, he did not opine that plaintiff had not properly positioned the ladder and ensured that the spreader bars were in place by visually examining the ladder and physically pulling the front and rear sections as far apart as they could go. Rather, Mr. Paine acknowledged that David Bonczar had been provided with proper protection under Labor Law § 240 (1) because "he was provided with a ladder that was adequate [and] *properly set up*" (R. 1142 [emphasis supplied]).

Mr. Paine opined that, in any event, the question of whether Mr. Bonczar "had set [the ladder] up properly and performed his work isn't the issue" in this case (R. 1139). Rather, he asserted:

> The issue here is he's descending the ladder. And when you descend and/or ascend a ladder, you must maintain three point contact on that ladder, that is one foot and two hands or two feet and one hand, so how you go up and down the ladder. And if you do that, you wouldn't fall. [R. 1139.]

Mr. Paine further asserted that plaintiff's "problem was when he was descending the ladder, that he did not keep the proper protocols which would have prevented him from falling, therefore making him basically the proximate cause of his own accident" (R. 1142). In explicating that opinion, Mr. Paine stated: "The

evidence is that the ladder supposedly twisted or wobbled and he let go of it. That's not something you can do" (R. 1198-1199). Asked if he meant that a person who misses a step because a ladder shook or wobbled must continue holding on to the ladder, Mr. Paine stated: "Of course they do. They're not going to fall if they hold on to it" (R. 1201).

2. The Jury Charge and Verdict.

In instructing the jury, the trial court charged that it was undisputed that: (1) AMC owned the theater in which plaintiff was working, (2) plaintiff was engaged in the erection, repairing, or altering of the theater, (3) plaintiff was not provided with any device other than the ladder, and (4) "the ladder shifted or wobbled for no apparent reason" (R. 1414-1415). The court also charged that plaintiff had the burden of proving he was not provided with proper protection under Labor Law § 240 (1), and that defendant bore the burden of proving that plaintiff's actions were the sole substantial factor in causing his fall (R. 1412-1413). The court further instructed that, although "David Bonczar could not identify the reason the ladder shifted or wobbled, there is a presumption that the ladder was not good enough to afford the statutorily mandated proper protection when it shifted or wobbled for no apparent reason" (R. 1416).

In accordance with the Appellate Division's decision denying plaintiff's motion for partial summary judgment under Labor Law § 240 (1) (R. 13a-13c), the

trial court further instructed:

> In this case, in order to overcome the presumption that the ladder failed to provide the required proper protection and a finding that the law was violated, the defendant must have proved that the plaintiff David Bonczar, on the day of the incident, never checked the positioning of the ladder, and that the ladder was improperly positioned, which caused the ladder to shift and wobble, and those two factors – facts were the only substantial factor in causing the ladder to shift or wobble or for David Bonczar to fall; or, the defendant must have proved that the plaintiff David Bonczar, on the day of the incident, never checked whether the spreader arms were fully extended, and that the spreader arms were not fully extended, which caused the ladder to shift or wobble, and those two facts were the only substantial factors in causing the ladder to shift or wobble and for David Bonczar to fall.
>
> If you find that the defendant proved the specific facts set forth above and overcame the presumption that the statute was violated, you will find for the defendant on this issue. [R. 1416-1417.]

The factual questions identified by the court were set forth in a Jury Verdict Sheet (R. 1523-1527).

During the course of its deliberations, the jury sent a note asking for "clarification on the meaning of positioning of ladder[,] Ex: location or setup" (R. 1537). In response, the court stated: "Question 3, the position of the ladder is not to the physical location of the ladder in the room but to the setup of the ladder. Did that answer the question for you?" (R. 1439). The foreperson responded, "Yes" (R. 1439).

As stated above, the jury returned a verdict in which it found that: (1) Labor Law § 240 (1) was not violated by a failure 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 (Trial Transcript, R. 1440-1441; Verdict Sheet, R. 1528-1531, ¶¶ 1, 3-6).

ARGUMENT

PLAINTIFF IS ENTITLED TO A DIRECTED VERDICT AS TO DEFENDANT'S LIABILITY UNDER LABOR LAW § 240 (1)

A. Judgment as a Matter of Law Under CPLR 4401.

Pursuant to CPLR 4401, "[a]ny 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 evidence presented by an opposing party with respect to such cause of action or issue . . . ." Judgment is warranted where, "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Szczerbiak v. Pilat*, 90 N.Y.2d at 556. Although the sufficiency of the trial evidence is, initially, a matter for the trial court's consideration, it presents a question of law and is thus subject to Court of Appeals review. *Killon v. Parrotta*, 28 N.Y.3d at 108.

B. A Litigant Who Unsuccessfully Moved for Summary Judgment May Nevertheless Obtain a Directed Verdict Under CPLR 4401 Based on the Trial Proof.

The Fourth Department's prior denial of David Bonczar's motion for partial summary judgment (R. 13a-13c) does not bar a directed verdict in his favor under CPLR 4401. It is well established that "[a] denial of a motion for summary judgment is not necessarily *res judicata* or the law of the case that there is an issue of fact in the case that will be established at the trial." *Wyoming County Bank v. Ackerman*, 286 A.D.2d 884, 884 (4th Dep't 2001) (citation and internal quotation marks omitted).

That principle applies with equal force where, as in the present action, the Appellate Division rather than the trial court denied a party's motion for summary judgment. In *Smith v. Hooker Chemicals & Plastics Corp.*, 89 A.D.2d 361 (4th Dep't 1982), *appeal dismissed*, 58 N.Y.2d 824 (1983), the Fourth Department – reversing the trial court – denied the plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1). Noting that plaintiff had testified he fell because safety lines that were attached to his safety belt gave way, while a coworker testified that plaintiff was not using the safety lines or belt, the court held that there was a triable question of fact as to whether plaintiff had "declined to use the available safety devices . . . ." 89 A.D.2d at 363-363.

At the subsequent trial, Supreme Court granted plaintiff's motion for judgment as a matter of law under CPLR 4401. The Fourth Department, which affirmed the judgment and was in turn affirmed by this Court, held:

> Even though plaintiff was previously denied summary judgment by this court, the trial court was not precluded from directing a verdict in plaintiff's favor after all the evidence was presented. That evidence established, as a matter of law, that defendant had violated Labor Law § 240 (1) and that the violation was a proximate cause of plaintiff's injuries.

Smith v. Hooker Chemical & Plastics Corp., 125 A.D.2d 944, 946 (4th Dep't 1986), *aff'd*, 70 N.Y.2d 994 (1988), *rearg. denied*, 71 N.Y.2d 995 (1988).

As in *Smith*, the trial evidence in this case establishes plaintiff's entitlement to a directed verdict on the issue of defendant's liability under Labor Law § 240 (1) notwithstanding the Appellate Division's prior denial of his motion for partial summary judgment.

C. The Trial Court Erred in Denying David Bonczar's Motion for a Directed Verdict.

In denying plaintiff's motion for a directed verdict, Supreme Court concluded that, "based on Plaintiff's trial testimony, and the testimony of Defendant's expert witness, . . . a rational jury could conclude that the Plaintiff's conduct was the sole proximate cause of the accident" (R. 490). Specifically, the court stated: (1) plaintiff testified that, although he ascended and descended the ladder multiple times without a problem, he did not check the spreader

arms/locking mechanism immediately before his final ascent; and (2) "Defendant's expert testified that the Plaintiff's conduct, i.e. the Plaintiff's failure to make sure the spreader arms were locked, and failure to maintain three points of contact on the ladder, was the only cause of the accident" (R. 490).

In so holding, Supreme Court disregarded both the record evidence and the law as charged in the court's jury instructions. The trial proof established not only that plaintiff duly ensured that the ladder with properly positioned, with the spreader bars fully extended and locked, but that the defendant's own expert conceded that fact. Equally importantly, pursuant to the jury charge (and under this Court's settled Labor Law § 240 [1] jurisprudence, as well) plaintiff's failure to maintain three-point contact after the ladder shifted and wobbled constituted comparative negligence at most, and did not negate defendant's statutory liability based on the ladder's sudden and unexpected movement.

As stated by the drafters of New York's Pattern Jury Instructions, a jury charge serves to: (1) "define and explain the issues in the case and explain the applicable principles of law and the processes to be used in deciding those issues so that the jurors understand what they are called upon to decide and the steps they are to follow in arriving at a verdict," and (2) "set[] forth for the reviewing court the trial judge's view of the issues presented by the case and of the law governing those issues." N.Y. PJI, General Principles, Introductory Statement, Introduction.

In the present action, the trial court instructed the jury that: (1) it was undisputed that the ladder upon which plaintiff was working shifted or wobbled for no apparent reason; (2) although plaintiff could not identify the reason the ladder shifted or wobbled, there was a presumption that the ladder did not afford the statutorily mandated protection; (3) to overcome that presumption, defendant bore the burden of proving that (a) plaintiff never checked the positioning of the ladder, which wobbled or shifted because it was improperly positioned, or (b) plaintiff never checked whether the spreader bars were fully extended, as a result of which the ladder wobbled or shifted because the spreader bars were in fact not fully extended, and (c) plaintiff's failure to properly position the ladder and/or check the spreader bars constituted the sole substantial factor in causing the ladder to shift or wobble, and plaintiff to fall (R. 1415-1417).

Upon applying those instructions in light of the trial proof, the jury could not have rationally rendered the verdict that it did. At trial, David Bonczar described in detail the steps he took to ensure that, prior to using it, the ladder was properly positioned with the spreader bars fully extended in their locked position. He testified that he visually inspected the ladder, observed that it was free of any apparent defects, and "grabbed the – one of the rungs on the steps and the back support on the back of the ladder and made sure, tugged on it, that the ladder was fully opened to its furthest position" (R. 582-585; R. 595-596; R. 604-605; R. 641;

R. 643; R. 685-686). Plaintiff explained that, by doing so, "the [hinged spreader] arms drop down to the bottom" and the legs are "fully extended" (R. 584). And, he further explained, when the legs are fully extended with the spreader bars "forced downward," the spreader bars are necessarily "locked into place" (R. 685-686).

Mr. Bonczar also testified that, during the course of his ensuing work, he climbed up and down the ladder four to six time without incident (R. 585; R. 641). Throughout that time he visually observed that the ladder remained fully opened, but did not physically test it before each ascent because he did not move or reposition it between each descent and ascent (R. 585-586).

Defendant, which under the court's instructions was obligated to prove that plaintiff failed to properly position the ladder and/or ensure that the spreader bars were fully extended (R. 1416-1417), did not meet its evidentiary burden. In cross-examining Mr. Bonczar, defense counsel read a portion of his examination before trial, in which he testified that he could not recall if he had checked the position of the ladder and the spreader arms immediately before making the ascent that resulted in his fall (R. 641-642; see Bonczar Deposition, R. 1729-1730). Mr. Bonczar explained that his deposition answer was responsive to defense counsel's question – which was temporally limited "specifically [to] the time immediately prior to falling" – and reiterated that he had in fact visually and physically inspected and tested the ladder to confirm its stability at the start of his installation

work (R. 642).

Daniel Paine, defendant's construction site safety expert, did not criticize the methods that David Bonczar employed to ensure the ladder was properly positioned and set up, as described by Mr. Bonczar during the course of his trial testimony. Moreover, Mr. Paine did not opine that Mr. Bonczar had in fact improperly positioned or set up the ladder, and his testimony does not support an inference that plaintiff failed to do so. Indeed, Mr. Paine acknowledged on direct examination that the ladder plaintiff used had been "*properly set up*" (R. 1142, [emphasis supplied]).

Furthermore, Mr. Paine's testimony does not otherwise support a reasonable inference that plaintiff's fall was proximately caused by the ladder's improper positioning or set-up. Mr. Paine asserted that the question of whether Mr. Bonczar "had set [the ladder] up properly and performed his work *isn't the issue*" in this case (R. 1139 [emphasis supplied]). Rather, he opined, Mr. Bonczar proximately caused his fall by failing to maintain three-point contact while descending (R. 1137-1139; R. 1142). Mr. Paine asserted that, when the ladder shifted and wobbled, plaintiff should not have missed a step or let go of the ladder with his hands (R. 1137-1138; R. 1198-1202).

Defendant argued in the Appellate Division that, "whether Mr. Paine concluded that the ladder wobbled because Bonczar 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." Appellate Division Brief for Defendant-Respondent (Appeal No. 2), p. 19.[1] Defendant's argument is fundamentally flawed because – in accordance with the trial court's charge (R. 1415-1417) – plaintiff's purported failure to maintain three-point contact did not constitute a basis upon which the jury could make a sole proximate cause determination. Rather, the only two potential grounds for such a finding were plaintiff's purported failure to check the positioning of the ladder, or to check whether the spreader bars were fully extended (R. 1415-1417).

In any event, plaintiff's failure to maintain three-point contact after the ladder shifted and wobbled constituted nothing more than comparative negligence, and does not negate defendant's statutory liability based on the ladder's sudden and unexpected movement. *See Blake*, 1 N.Y.3d at 289 ("comparative negligence is not a defense to absolute liability under the statute"); *Bennett v. Savage*, 192 A.D.3d 1243, 1245 (3d Dep't 2021) (in affirming the trial court's order granting plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 [1], the court held that – even assuming plaintiff failed to "maintain[] the

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[1] Defendant's Appellate Division brief in Appeal No. 2 was previously filed with this Court pursuant to 22 NYCRR 500.11 (c) (1) and 500.22 (c).

three-point safety stance while on the ladder" – "this would merely present a factual question as to his potential comparative negligence, which does not relieve defendant of liability under Labor Law § 240 [1]" [citation, brackets, and internal quotation marks omitted]). Thus, the jury in this case could not have permissibly found that David Bonczar's failure to maintain three-point contact after the ladder shifted and wobbled constituted the sole proximate cause of his fall.

Furthermore, because there is no evidentiary support for the jury's finding that the ladder was improperly positioned due to plaintiff's failure to check its position, the jury's finding that Labor Law § 240 (1) was not violated by a failure to provide proper protection is equally infirm. Consistent with settled New York law,[2] the trial court instructed the jury that "[e]ven though the plaintiff David Bonczar could not identify the reason the ladder shifted or wobbled, there is a presumption that the ladder was not good enough to afford the statutorily mandated proper protection when it shifted or wobbled for no apparent reason" (R. 1416).

That legal presumption, the court further instructed, could be overcome only if the defendant met its burden of proving that plaintiff's own conduct in failing to check the ladder's position and/or check whether the spreader bars were extended constituted the only substantial factor in causing the ladder to shift or wobble (R.

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[2] *See Blake*, 1 N.Y.3d at 289 n.8 (where a ladder "malfunction[s] for no apparent reason," there is a legal "presumption that the ladder . . . was not good enough to afford proper protection").

1416-1417). Given defendant's failure to sustain its burden as to that issue, the jury's finding that no statutory violation occurred is wholly unsupported by the trial proof. Accordingly, the trial court erred in holding that a jury could rationally find that plaintiff's own conduct constituted the sole proximate cause of his accident

Finally, contrary to defendant's argument in the Appellate Division, the jury could not have found that plaintiff "simply lost his balance and fell." Appellate Division Brief for Defendant-Respondent (Appeal No. 2), pp. 17-18. Such a finding would be precluded by the court's charge that (1) it was undisputed the ladder shifted or wobbled for no apparent reason, and (2) the presumption that the ladder failed to provide adequate protection could be overcome *only* by evidence establishing that plaintiff failed to check that the ladder was properly positioned and that the spreader arms were fully extended (R. 1415-1418).

Supreme Court therefore erred in denying David Bonczar's motion for judgment as a matter of law under CPLR 4401 because, when the trial proof is viewed in the light most favorable to defendant, and defendant is afforded the benefit of every permissible inference, "there is no rational process by which the fact trier could base a finding in favor of" the defendant. *Szczerbiak v. Pilat*, 90 N.Y.2d at 556. Based upon its independent review of the trial evidence, this Court should therefore grant a directed verdict in plaintiff's favor.

CONCLUSION

In Appeal No. 1, the Court of Appeals should reverse the Appellate Division's Memorandum and Order entered February 2, 2018 and reinstate the trial court's order granting plaintiff's motion for partial summary judgment. The Memorandum and Order's reversal will in turn require the vacatur of the Appellate Division's Order entered July 17, 2020 and the trial court's final Judgment entered April 25, 2019, as the Memorandum and Order "necessarily affects the judgment" within the meaning of CPLR 5601 (d) and its reversal renders the jury's verdict in favor of defendant and the Judgment entered thereon legal nullities.

Alternatively, if the Court affirms the Appellate Division's Memorandum and Order denying plaintiff's motion for partial summary judgment, it should, in Appeal No. 2, reverse the Appellate Division's Order entered July 17, 2020 and grant plaintiff's motion for a directed verdict on the issue of defendant's liability under section 240 (1).

Dated: Buffalo, New York
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Respectfully submitted,

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WORD COUNT CERTIFICATION
PURSUANT TO 22 NYCRR 500.13 (c) (1)

I hereby certify that:

1. This brief was prepared on a computer with Microsoft Word using double-spaced Times New Roman 14-point type, a serifed, proportionally spaced type font.

2. The body of the brief contains 7,978 words of printed text, as determined by the word count of the above-identified word processing system, inclusive of point headings and footnotes and exclusive of the table of contents, table of cases and authorities, and this certification.

Dated: May 11, 2021

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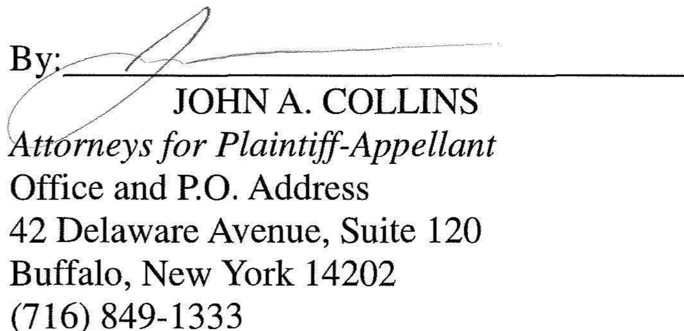

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