STATE OF NEW YORK

Court of Appeals

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DAVID M. BONCZAR,

Plaintiff-Movant,

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 Corporation and/or Loews Theater Management Corp.),

Defendants-Respondents.

Appellate Division Docket Number: CA 19-00899.
Erie County Index No. 804799/2014.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS WITH SUPPORTING PAPERS ON BEHALF OF PLAINTIFF-MOVANT DAVID M. BONCZAR

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STATE OF NEW YORK
COURT OF APPEALS

DAVID M. BONCZAR,

Plaintiff-Movant,

NOTICE OF MOTION FOR LEAVE TO APPEAL

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 Corporation and/or Loews Theater Management Corp.),

Defendant-Respondent.

PLEASE TAKE NOTICE, that upon (1) the annexed statement setting forth the procedural history of the case, (2) the annexed statement showing the Court of Appeals' jurisdiction over this motion and the prospective appeal, (3) the annexed statement of the question presented for review, (4) the annexed statement of facts; (5) the annexed argument showing why the question presented merits review by the Court of Appeals, (6) the Appellate Division record on appeal, and (7) the Appellate Division briefs, plaintiff-movant David M. Bonczar shall move this Court at a term thereof to be held at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 31st day of August, 2020, for leave to appeal from the Order of the Appellate Division, Fourth Department, entered July 17, 2020, affirming the Judgment of the Supreme

Court, County of Erie entered April 25, 2019, dismissing plaintiff's complaint upon a jury verdict of no cause of action.

Pursuant to 22 NYCRR 500.21 (a), oral argument on the return date is not permitted, and no appearance is necessary or allowed.

DATED: Buffalo, New York
August 14, 2020

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THE PROCEDURAL HISTORY 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 in Webster, New York (Summons and Complaint, R. 14-20).[1] Plaintiff named as defendant American Multi-Cinema, Inc. (hereafter, "AMC"), the theater's owner (R. 17, ¶ 4). As amplified in his Bill of Particulars, and insofar as relevant to the issues to be raised on the proposed appeal, plaintiff alleged that AMC is liable under Labor Law § 240 (1) (R. 38, ¶ 23).

By order entered March 1, 2017, Supreme Court granted plaintiff's motion for partial summary judgment as to liability under section 240 (1) (Exhibit A hereto). The court did not render a written decision.

By Memorandum and Order entered February 2, 2018, the Fourth Department reversed Supreme Court's order and denied plaintiff's motion (Exhibit B hereto). *See Bonczar v. American Multi-Cinema, Inc.*, 158 A.D.3d 1114 (4th Dep't 2018) (3-2). The three-justice majority held that, because plaintiff "acknowledged that he might not have checked the positioning of the ladder or the locking mechanism . . .

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[1] "R. ___" references are to the Appellate Division Record on Appeal, a copy of which has been filed with this Court, along with the parties' briefs, pursuant to 22 NYCRR 500.22 (c).

[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." 158 A.D.3d at 1115 (citation and internal quotation marks omitted). 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." 158 A.D.3d at 1117 (Whalen, P.J. and Lindley, J., dissenting).

The action was subsequently tried before a jury from April 17 through 25, 2018. At the close of the evidence, plaintiff moved for a directed verdict on the issue of defendant's liability under Labor Law § 240 (1) (R. 812-825). The court reserved decision (R. 825).

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. 960-961; Verdict Sheet, R. 1048-1051, ¶¶ 1, 3-6).

Plaintiff thereafter made a post-trial motion, seeking a directed verdict under

CPLR 4401 based on his trial motion (on which the court had reserved decision) or, alternatively, an order setting aside the verdict and granting a new trial pursuant to CPLR 4404 (a) (R. 1323-1350). Plaintiff argued that the verdict should be set aside (1) as contrary to the weight of the evidence, and (2) in the interest of justice, based on defense counsel's improper and prejudicial conduct, statements, and arguments throughout the course of the trial (R. 1333-1350). AMC opposed the motion (R. 1696-1718).

By Decision and Order entered December 7, 2018, the trial court denied plaintiff's post-trial motion in its entirety (Exhibit C hereto). A final Judgment in defendant's favor was entered on April 25, 2019 (Exhibit D hereto). Plaintiff timely appealed the Judgment (R. 1-5), thereby bringing up for review all issues resolved in the Decision and Order, which was subsumed in the Judgment (CPLR 5501 [a] [1] and [2]).

The Appellate Division affirmed the Judgment by Order entered July 17, 2020 (Exhibit E hereto). The court did not write a decision. Defendant served the Order, with notice of entry, via the NYSCEF system on July 21, 2020 (Exhibit F hereto). By Consent to Change Attorney filed July 13, 2020, defendant substituted new counsel of record in place of its former attorneys (Exhibit G hereto).

Pursuant to CPLR 5601 (d), plaintiff has appealed to this Court as of right from the Appellate Division's Order entered July 17, 2020, thereby bringing up for review

the Appellate Division's prior nonfinal Memorandum and Order entered February 2, 2018, in which the court, by a vote of three to two, reversed the trial court's order on the law and denied plaintiff's motion for partial summary judgment as to liability under section 240(1) of the Labor Law (Notice of Appeal, Exhibit H hereto).

Plaintiff's appeal as of right does not bring up for review the Appellate Division's Order entered July 17, 2020, which unanimously affirmed Supreme Court's final Judgment and the post-trial Decision and Order that was subsumed therein. *See Killon v. Parrotta*, 25 N.Y.3d 1183 (2015) (defendant's appeal from the Appellate Division's unanimous order resolving the action "brings up for review only the prior nonfinal Appellate Division order," which by a vote of three to two had remitted the action for a new trial). Pursuant to CPLR 5602 (a) (1) (i), plaintiff now moves for leave to appeal from the Appellate Division's Order entered July 17, 2020, thus allowing him to obtain review of the Order insofar as it affirmed the trial court's order denying plaintiff's motion for a directed verdict.

Plaintiff did not previously move the Appellate Division for leave to appeal from the Order entered July 17, 2020. He is moving before this Court within 30 days of the date on which defendant served the Order with notice of entry.

STATEMENT OF JURISDICTION

I. The Court Has Jurisdiction Over the Motion.

The Court of Appeals has jurisdiction over this motion for the reasons stated in

the foregoing Procedural History (wherein the timeliness of the motion, pursuant to CPLR 5513[b], was demonstrated), and in Point II of this Statement of Jurisdiction (wherein the present appealability of the Appellate Division's Order is demonstrated).

II. The Court Has Jurisdiction Over the Proposed Appeal.

The Court of Appeals has jurisdiction over the proposed 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 proposed appeal raises 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 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).

QUESTION PRESENTED FOR REVIEW

Plaintiff asks that the Court of Appeals grant leave to appeal from the Appellate Division's Order entered July 17, 2020 to resolve the following question of law:

> 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 rationally find 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 identified and preserved the question presented for review before the Supreme Court (R. 812-825; R. 1323-1333), in his Appellate Division principal brief (pages 12-27), and in his Appellate Division reply brief (pages 1-8).

STATEMENT OF FACTS

1. *The Trial Proof.*

In 2013, David Bonczar's employer, All State Fire Equipment of WNY, was installing and upgrading fire alarm and sprinkler systems in conjunction with the renovation of a movie theater owned by defendant AMC (R. 473-474; R. 964-989). 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. 96-98). 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. 97-99; R. 102-103; R. 155). They subsequently left the cash room and surveyed several other areas in the theater, after which they split up (R. 100; R. 140).

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. 100-101; R. 140).

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. 101; R. 155). Mr. Bonczar said the ladder looked like one belonging to his employer, but that he could not be certain it was (R. 166). He used the ladder to perform the installation work (R. 101). Before doing so, he visually inspected it and observed that it was free of any defects (R. 102; R. 115-116; R. 124). 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. 102). The ladder, he stated, contained two hinged arms or spreader bars that connected the front section to the rear section (R. 104). 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. 104). 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. 206). 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. 104-105; R. 115-116; R. 124-125; R. 161; R. 163; R. 205-206).

After visually inspecting and physically testing the ladder in that manner, Mr. Bonczar proceeded to use it while performing his installation work (R. 104-105). In doing so, he positioned himself in the middle of the ladder, between the two side rails (R. 189). With the ladder remaining in the same position, he ascended and descended it four to six times without incident (R. 105-106; R. 138; R. 161; R. 163; R. 191). Mr. Bonczar visually observed that the ladder remained fully open throughout that time (R. 105-106). He did not physically test it before each ascent, however, because he never moved or repositioned it (R. 105-106).

Toward the end of the installation process, Mr. Bonczar again ascended and descended the ladder (R. 106; R. 136; R. 189). 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 fourth step (R. 106; R. 164; R. 167). Upon doing so, plaintiff fell backward, "lost grip on [his] right hand," and eventually released his left hand as well (R. 166-168). Plaintiff landed on his back on the floor, and the ladder remained standing (R. 106; R. 143; R. 168).

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. 161-162 [emphasis supplied]). Mr. Bonczar responded at the deposition that he did not know if he did so "that specific time" (R.

161-162).

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. 162.]

Defendant called Daniel Paine, a construction site safety consultant, as an expert witness (R. 622-625; R. 635; R. 651). Mr. Paine did not 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 the spreader bars were in place by visually examining it and physically pulling the front and rear sections as far apart as they could go. Rather, Mr. Paine opined 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. 662 [emphasis supplied]). Mr. Paine also 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" (R. 659). 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. 659.]

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. 662). 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. 719). 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. 721).

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. 934-935). 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. 932-937). 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. 936).

In accordance with the Appellate Division's decision denying plaintiff's motion for partial summary judgment under Labor Law § 240 (1), *see Bonczar*, 158 A.D.3d at 1115, 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. 936-937.]

The factual questions identified by the court were set forth in a Jury Verdict Sheet (R. 1043-1047).

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. 1057). 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. 959). The foreperson responded, "Yes" (R. 959).

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. 960-961; Verdict Sheet, R. 1048-1051, ¶¶ 1, 3-6).

ARGUMENT

POINT I

THE PROPOSED APPEAL PRESENTS SIGNIFICANT ISSUES RELATING TO PROPER APPLICATION OF CPLR 4401, LABOR LAW § 240 (1), AND THIS COURT'S PRECEDENTS CONSTRUING THOSE PROVISIONS

Plaintiff has appealed to this Court as of right from the Appellate Division's order entered July 17, 2020, thus bringing up for review the Appellate Division's prior nonfinal order entered February 2, 2018, in which the court – by a vote of three to two – reversed the trial court's order granting plaintiff's motion for partial

summary judgment as to liability under Labor Law § 240 (1) (Notice of Appeal, Exhibit H hereto). On his appeal as of right, plaintiff intends to establish that – as the Appellate Division dissent concluded – "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." *Bonczar v. American Multi-Cinema, Inc.*, 158 A.D.3d at 1117 (Whalen, P.J. and Lindley, J., dissenting).

Plaintiff submits that, in conjunction with his appeal as of right, the Court of Appeals should grant leave to appeal from the Appellate Division's order entered July 17, 2020, thus allowing plaintiff to obtain review of the order insofar as it upheld the denial of his motion for a directed verdict under CPLR 4401. If the Court of Appeals reverses the Appellate Division's prior nonfinal order and reinstates the Supreme Court order granting plaintiff's motion for partial summary judgment, both the final judgment entered upon the jury's verdict and the Appellate Division's order affirming that judgment will necessarily have to be reversed. Plaintiff's permissive appeal would thereby be rendered moot, obviating the need for the Court to consider it. On the other hand, if the Appellate Division's order denying plaintiff's motion for partial summary judgment is affirmed, plaintiff should be permitted to establish before this Court his entitlement to a directed verdict based upon the proof adduced at trial.

The proposed appeal presents significant issues as to the proper application of CPLR 4401, Labor Law § 240 (1), and this Court's precedents construing those provisions. Under CPLR 4401, a litigant is entitled to a directed verdict – i.e., judgment as a matter of law – 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.

Under Labor Law § 240 (1), 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." *Blake v. Neighborhood Hous. Servs. of New York City*, 1 N.Y.3d 280, 289 n.8 (2003). Furthermore, "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 a worker's "comparative negligence is not a defense to absolute liability under the statute" *Id.* at 289-290.

In the present case, those settled legal principles compel a directed verdict on plaintiff's behalf because, upon considering the trial evidence in light of the court's charge, the jury could not have rationally found that plaintiff failed to position the ladder properly, thus rendering his own culpable conduct the sole proximate cause of his injuries. Instead, the evidence establishes that plaintiff lost his balance and let go of the ladder *after* it wobbled for some indeterminate reason unrelated to the

manner in which plaintiff positioned and set it up. Plaintiff's loss of balance constitutes, at most, comparative negligence, which is insufficient to defeat his entitlement to judgment as a matter of law.

Under New York jurisprudence, a jury charge serves to "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." 1A N.Y. PJI3d, General Principles - Introduction (2020 [online]). In the present case, 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, on the day of the incident, plaintiff (a) never checked the positioning of the ladder, which wobbled or shifted because it was improperly positioned, or (b) 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 (4) 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. 935-937).

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. 102-105; R. 115-116; R. 124-125; R. 161; R. 163; R. 205-206). Plaintiff explained that, by doing so, "the [hinged spreader] arms drop down to the bottom" and the legs are "fully extended" (R. 104). 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. 206).

Mr. Bonczar further testified that, during the course of his ensuing work, he climbed up and down the ladder four to six time without incident (R. 105-106; R. 138). Throughout that time he visually observed that the ladder remained fully opened, but did not physically test it before each assent because he did not move or reposition it between each descent and ascent (R. 105-106).

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 (Charge, R. 936-937), 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. 161-162; see Bonczar Deposition, R. 1249-1250). Mr. Bonczar explained that his deposition answer was responsive to defense counsel's question – which was 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. 161-162).

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 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 asserted on direct examination that the ladder plaintiff used had been "*properly set up*" (R. 662 [emphasis supplied]).

Nor does Mr. Paine's testimony support an inference that plaintiff's fall was proximately caused by the ladder's improper positioning. Mr. Paine asserted that the question of whether Mr. Bonczar "had set [the ladder] up properly and performed his work *isn't the issue*" (R. 659 [emphasis supplied]). Rather, he opined, Mr. Bonczar proximately caused his fall by failing to maintain three-point contact while descending (R. 657-659; R. 662). Mr. Paine asserted that, when the ladder shook and

wobbled, plaintiff should not have missed a step or let go of the ladder with his hands (R. 718-722).

Defendant argued below 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, p. 19. Defendant's argument is fundamentally flawed because – in accordance with the trial court's charge (R. 935-937) – 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. 935-937).

In any event, plaintiff's failure to maintain three-point contact after the ladder shifted or 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 v. Neighborhood Hous. Servs. of New York City*, 1 N.Y.3d at 289 ("comparative negligence is not a defense to absolute liability under the statute"). Thus, the jury could not have permissibly found that David Bonczar's

failure to maintain three-point contact after the ladder 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 because plaintiff failed 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. 936).

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. 936-937). Given defendant's failure to sustain its burden, the jury's finding that no statutory violation occurred is irrational.

Contrary to defendant's further argument below, the jury could not have found that plaintiff "simply lost his balance and fell." Appellate Division Brief for

---

[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").

Defendant-Respondent, 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. 935-938).

The trial court therefore erred in denying David Bonczar's motion for judgment as a matter of law under CPLR 4401 because, when the evidence is viewed in the light most favorable to defendant, and defendant is afforded the benefit of every 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.

POINT II

PLAINTIFF'S APPEAL WILL ADDRESS ALL ISSUES OF WHICH THIS COURT MAY TAKE COGNIZANCE

Under *Quain v. Buzzetta Constr. Corp.*, 69 N.Y.2d 376 (1987), a party who limits his or her leave application to specific issues "is bound by such limitation and may not raise additional issues on the appeal." *Id.* at 379. Plaintiff hereby states that he is not so limiting his motion. Should leave to appeal be granted, plaintiff reserves the right to address all issues of which the Court may take cognizance, in accordance with the Court's general practice. *Id.* at 380.

CONCLUSION

For the reasons set forth above, the Court of Appeals should grant plaintiff's motion for leave to appeal from the Appellate Division's order entered July 17, 2020 insofar as it upheld the denial of plaintiff's motion for a directed verdict pursuant to CPLR 4401.

DATED: Buffalo, New York
August 14, 2020

Respectfully submitted,

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
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FILED: ERIE COUNTY CLERK 03/01/2017 03:21 PM INDEX NO. 804799/2014
NYSCEF DOC. NO. 19 RECEIVED NYSCEF: 03/01/2017

At a Motion Term of this Court in and for the County of Erie at the Erie County Courthouse, Part 6, 92 Franklin Street, Buffalo, New York on 10th day of February, 2017.

PRESENT: Hon. Joseph R. Glownia, J.S.C.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DAVID M. BONCZAR,

Plaintiff,

v.

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.

ORDER

Index No. 804799/2014

Plaintiff, DAVID M. BONCZAR, having duly moved this Court for an Order granting partial summary judgment on the issue of liability under Labor Law §240(1),

NOW, upon reading the Notice of Motion dated November 1, 2016, the Affidavit of Richard P. Weisbeck, Esq., sworn to on November 1, 2016, together with the exhibits annexed thereto, the Affirmation of Florina Altshiler, Esq. affirmed January 20, 2017, together with the exhibits annexed thereto, the Reply Affidavit of Richard P. Weisbeck, Jr., Esq. sworn to on January 27, 2017, and after hearing Katherine A. Gillette, Esq., of counsel to Lipsitz Green Scime Cambria, LLP, attorneys for Plaintiff, DAVID M.

FILED: ERIE COUNTY CLERK 03/01/2017 03:21 PM INDEX NO. 804799/2014
NYSCEF DOC. NO. 19 RECEIVED NYSCEF: 03/01/2017

BONCZAR, in support of Plaintiff's motion and Florina Altshiler, Esq., of counsel to Russo & Toner, LLP, attorneys for Defendant, AMERICAN MULTI-CINEMA, INC. d/b/a AMC THEATERS WEBSTER 12, in opposition to Plaintiff's motion, and due deliberation having been had herein, it is hereby,

ORDERED, that the motion by Plaintiff, DAVID M. BONCZAR, for partial summary judgment on the issue of liability under Labor Law §240(1) be and the same is hereby granted.

Hon. Joseph R. Glownia, J.S.C.

DATED:

GRANTED

MAR 1 2017

BY Wendy Haseley
WENDY HASELEY
COURT CLERK

Exhibit B - Appellate Division, Fourth Department Memorandum and Order, Entered February 2, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1170

CA 17-00732

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

DAVID M. BONCZAR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN MULTI-CINEMA, INC., DOING BUSINESS AS AMC THEATRES WEBSTER 12, AS SUCCESSOR IN INTEREST TO LOEWS BOULEVARD CINEMAS, INC., FORMERLY KNOWN AS LOEW'S BOULEVARD CORP. AND/OR LOEWS THEATER MANAGEMENT CORP., DEFENDANT-APPELLANT.

RUSSO & TONER LLP, NEW YORK CITY (JOSH H. KARDISCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 1, 2017. The order granted the motion of plaintiff for partial summary judgment on the issue of liability under Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the motion is denied.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from a ladder in the lobby of a movie theater owned by defendant. At the time of the accident, plaintiff was updating a fire alarm system on behalf of his employer, which was subcontracted by the company hired by defendant to renovate the theater. We agree with defendant that Supreme Court erred in granting plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1). "In order to establish his entitlement to judgment on liability as a matter of law, plaintiff was required to 'show that the statute was violated and the violation proximately caused his injury' " (*Miller v Spall Dev. Corp.*, 45 AD3d 1297, 1297 [4th Dept 2007], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). Plaintiff did not know why the ladder wobbled or shifted, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so. We thus conclude that plaintiff failed to meet his initial burden on the motion. "[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" (*Blake v*

Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 n 8 [2003]; *see generally Cullen v AT&T, Inc.*, 140 AD3d 1588, 1591 [4th Dept 2016]).

All concur except WHALEN, P.J., and LINDLEY, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. We conclude that plaintiff met his initial burden of establishing his entitlement to partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) by presenting evidence that the A-frame ladder from which he fell wobbled or shifted and therefore failed to provide him with proper protection, and that this violation of section 240 (1) was a proximate cause of his injuries (*see Arnold v Baldwin Real Estate Corp.*, 63 AD3d 1621, 1621 [4th Dept 2009]; *see also Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582 [4th Dept 2011]). We further conclude that, in opposition to plaintiff's motion, defendant submitted no evidence that had not already been submitted by plaintiff and thus, contrary to defendant's contention in opposition to the motion, failed to raise a triable issue of fact with respect to whether plaintiff's own actions were the sole proximate cause of his injuries (*see Siedlecki v City of Buffalo*, 61 AD3d 1414, 1415 [4th Dept 2009]; *Burke v APV Crepaco*, 2 AD3d 1279, 1279 [4th Dept 2003]). The 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" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]; *see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). Although plaintiff testified at his deposition that he did not recall whether he checked the positioning of the ladder or checked that it was "locked into place," he also testified that the ladder was upright and "fully open" near the middle of a small room, and we conclude that 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 (*see Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [1st Dept 2008]; *Handley v White Assoc.*, 288 AD2d 855, 856 [4th Dept 2001]). A party moving for summary judgment "need not specifically disprove every remotely possible state of facts on which its opponent might win the case[, and plaintiff's] showing here was adequate to shift the burden to [defendant] 'to produce evidentiary proof . . . sufficient to establish the existence of material issues of fact,' " which defendant failed to do (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]).

The majority's reliance on *Blake* is misplaced. The injured worker in that case sustained his injuries when the upper portion of his extension ladder retracted, and he testified at trial that he was not sure whether he had locked the extension clips, i.e., equipment meant to hold the upper portion of the ladder in place (*id.* at 283-284). Based 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 (*see id.* at 291; *see generally Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]). Here, 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 (*see Alvarez v Vingsan L.P.*, 150 AD3d 1177, 1179 [2d Dept 2017]), we conclude 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 (*see generally Bombard v Christian Missionary Alliance of Syracuse*, 292 AD2d 830, 831 [4th Dept 2002]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID M. BONCZAR,

Plaintiff,

DECISION AND ORDER
Index No. 804799/2014

v.

AMERICAN MULTI-CINEMA, INC., d/b/a AMC THEATRES WEBSTER 12 (as Successor in Interest to Loews Boulevard Cinemas, Inc., f/k/a Loews Boulevard Corp. And/or Loews Theater Management Corp.)

Defendant.

Glownia, J.

Plaintiff sued Defendant for damages sustained as the result of Plaintiff's fall from a ladder while performing renovations at a property owned by Defendant. This Court granted Summary Judgment to Plaintiff on his claim that Defendant had violated Labor Law §240(1) by failing to provide an adequate safety device for Plaintiff to perform the work. That decision was reversed on appeal, and the case was remanded to this Court for a trial on the issue of liability under Labor Law §240(1). At the close of proof in the ensuing "liability only" trial, Plaintiff moved for a directed verdict pursuant to CPLR §4401. This Court reserved decision on Plaintiff's motion, and submitted the case to the jury. The jury determined that Defendant had not violated Labor Law §240(1), and rendered a "No Cause of Action" verdict. Plaintiff has

now renewed his motion for a directed a verdict pursuant to CPLR §4401, or in the alternative for an order setting aside the jury verdict and ordering a new trial pursuant to CPLR §4404(a).

Now, upon Plaintiff's Notice of Motion dated May 21, 2018, the Affidavit of Richard P. Weisbeck, Jr., dated May 21, 2018, the Affirmation in Opposition to Plaintiff's Post-Trial Motion to Set Aside the Jury Verdict dated June 20, 2018, the affirmation of John H. Kardish, Esq. Dated June 20, 2018, the transcript of the relevant portions of the trial-testimony attached to the aforesaid submissions, the oral argument heard in this Court, and upon all proceedings heretofore had herein, due deliberation having been had thereon, this court finds as follows:

1) Motion for a Directed Verdict:

New York state CPLR §4401 provides in pertinent part that,

> "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 this motion shall be specified."

A court is required to direct a verdict when there is insufficient evidence to support the jury finding because, "there is simply no valid line of reasoning or permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at the trial." Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499 (1978).

The Plaintiff has argued that the proof at trial showed that the ladder wobbled inexplicably, which wobbling caused the Plaintiff to fall to the ground. The Plaintiff has further argued that the aforementioned proof creates a legal presumption that the ladder was not an adequate safety device as contemplated by Labor Law §240(1) and the progeny of case-law where §240(1) has been interpreted given similar circumstances. (See, Blake v. Neighborhood

Housing Services of New York City, Inc., 1 N.Y.3d 280). The Plaintiff has also claimed that the Defendant's proof at trial was not sufficient to overcome the presumption that the ladder was inadequate. The Plaintiff moved at the close of evidence, and is moving again now for a directed verdict on the basis of his claim that the evidence proves that Defendant has failed to overcome the legal presumption that the ladder provided by Defendant to Plaintiff was not an adequate safety device.

Defendant's theory of the case is that Plaintiff's failure to check, and then re-check the positioning of the ladder each time he climbed and descended the ladder to complete overhead renovations was the sole-proximate cause of the accident. Defendant has asked this Court specifically to consider Plaintiff's admission at trial that he could not recall checking the positioning of the spreader arms/locking mechanism immediately before his final ascent of the ladder in question. Defendant has argued that Plaintiff's failure to make sure the ladder was set-up properly was the sole proximate cause of the accident, therefore the Court should not direct a verdict pursuant to CPLR §4401.

The Plaintiff testified that he went up and down the ladder several times on the day of the accident. He testified that he had checked the positioning of the ladder several times, but that he could not recall having checked the spreader arms/locking mechanism immediately before going up the ladder the time that it wobbled and caused him to fall. The Defendant's expert testified that the Plaintiff's conduct, ie. 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.

This Court finds based on Plaintiff's trial testimony, and the testimony of Defendant's expert witness, that a rational jury could conclude that the Plaintiff's conduct was the sole proximate cause of the accident. Therefore, Plaintiff is not entitled to judgment as a matter of

law pursuant to CPLR 4401. Accordingly, the Plaintiff's motion for a directed verdict is hereby DENIED.

2) Motion to Set Aside the Verdict:

CPLR §4404(a) provides in pertinent part that,

> "After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law, or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, or in the interest of justice..."

The Court of Appeals has held that a trial court may set aside a jury verdict and order a new trial if it finds that, "the evidence so preponderated in favor of the [moving party] that the verdict could not have been reached on any fair interpretation of the evidence." Lolik v. Big Supermarkets, Inc., 86 NY2d 744. Moreover, "the question of whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors." Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493 (1978). Additionally, when, as in this case, there is conflicting testimony between witnesses for the Plaintiff and witnesses for the Defendant, "it is soley within the province of the jury to determine the issue of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses. McMillan v. Burden, 136 A.D.3d 1342 (4th Dept. 2016). Also, "A trial judge may not set aside a jury verdict simply because he disagrees with it." Mann v. Hunt, 283 A.D.3d 140, 141.

This Court finds based upon its review of the evidence produced at trial, which is summarized above and will not be rehashed here, that a reasonable jury may have believed the testimony of Defendant's expert and may not have believed the version of events which they

heard as recited by Plaintiff. This Court finds that the verdict is one which "reasonable persons could have rendered after receiving conflicting evidence," and thus, that this Court "should not substitute its judgment for that of the jury." (See, McMillan at 1342). For the foregoing reasons, the Plaintiffs motion to set aside the verdict on the grounds that it is against the weight of the evidence should be and hereby is DENIED.

3)Motion to set Aside in the Interest of Justice:

Finally, Plaintiff has moved this Court to set aside the verdict and order a new trial in the interest of justice pursuant to the final phrase of CPLR 4404(a). Plaintiff has argued that the verdict should be set aside because of the misconduct of the attorney for the Defendant. Plaintiff has set forth numerous instances of the Defense attorneys alleged misconduct and characterized the conduct as "so egregious as to imperil the jury verdict, etc."

It is well settled that attorney misconduct may warrant setting aside a verdict and ordering a new trial. Be that as it may, this Court is also aware of its mandate to give great deference to the trial jury, and only to upset a jury verdict on the basis of attorney misconduct if it actually deprived the Plaintiff of a fair trial. (See, Doody v. Gottshall, 67 A.D.3d 1347).

This Court has reviewed the record including its trial notes and portions of the stenographic record and has duly deliberated on the question of whether the misconduct of defense counsel rose to the level where it wrongly deprived Plaintiff of a fair trial. This Court presided over no less than seven jury trials in the calendar year which encompassed the instant trial, and notes that many of the others have faded from its immediate memory. The instant trial, though, is outstanding among others specifically because of defense counsel's conduct, which

could be construed at times during the trial as strident, disrespectful, disobedient, incorrigible and even alarming (to the Court).

Nevertheless, the determinative question is not whether the court was alarmed, but rather, "Did the defense counsel's conduct cause the jury to render its decision based on passion rather than proof." (See, Johnson v. Lazorowitz, 4 A.D.3d 334). It bears noting that a great deal of defense counsel's objectionable conduct took place outside the earshot of the jury during sidebar conferences, or otherwise outside the presence of the jury. Though counsel's conduct was objectionable on many occasions during the trial, and even at times in the jury's presence, there is no definitive indication that the jury was improperly influenced by counsel's inappropriate conduct. It is important to note that this Court directed the jurors back to the jury room many times during some of the more heated side-bar conferences. A review of the record indicates that this procedural step was an adequate safeguard to the harmful error which might have occurred had the jurors been exposed to defense counsel's dramatic, belligerent conduct. As such, there is no basis for this Court to set aside the verdict. Accordingly, Plaintiff's motion to set aside the verdict in the interest of justice is DENIED.

SO ORDERED

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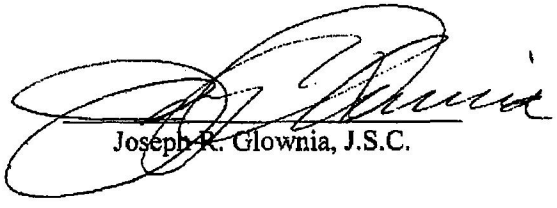

Joseph R. Glownia, J.S.C.

FILED: ERIE COUNTY CLERK 04/30/2019 11:44 AM INDEX NO. 804799/2014
NYSCEF DOC. NO. 196 RECEIVED NYSCEF: 04/30/2019

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID M. BONCZAR,

Plaintiff,

vs.

AMERICAN MUTLI-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.),

Defendants.

NOTICE OF ENTRY

Index No. 804799/2014

PLEASE TAKE NOTICE, that a Judgment, of which the within is a copy, was duly granted in the above-entitled action on the 22nd day of April, 2019, and duly entered in the office of the Erie County Clerk on the 25th day of April, 2019.

DATED: Buffalo, New York
April 30, 2019

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
JOHN A. COLLINS
Attorneys for Plaintiff
Office and P.O. Address
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(716) 849-1333

TO:

RUSSO & TONER, LLP
Attorneys for Defendants
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d/b/a AMC Theaters Webster 12
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(716) 800-6389

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NYSCEF DOC. NO. 195 RECEIVED NYSCEF: 04/25/2019

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID M. BONCZAR,

Plaintiff,

vs.

AMERICAN MUTLI-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.),

Defendants.

JUDGMENT

Index No. 804799/2014

The issues in the above-captioned action having come on for trial before Hon. Joseph R. Glownia, J.S.C. and a jury at a Trial Term of the Supreme Court, County of Erie held in the Erie County Courthouse, located at 92 Franklin Street, Buffalo, New York, commencing on April 17, 2018, and the jury having rendered a verdict in favor of the defendants on April 25, 2018, and the Court having reserved decision at trial on plaintiff's motion for a directed verdict pursuant to CPLR 4401, and the Court by Decision and Order entered December 7, 2018 having denied plaintiff's motion for a directed verdict pursuant to CPLR 4401 and having denied as well plaintiff's post-trial motion to set aside the verdict pursuant to CPLR 4404(a), it is hereby

ORDERED AND ADJUDGED, that defendants 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 Loew's Theater Management

FILED: ERIE COUNTY CLERK 04/30/2019 11:44 AM INDEX NO. 804799/2014
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Corp.) have judgment dismissing plaintiff David M. Bonczar's Complaint in this action.

APR 22 2019

JOSEPH R. GLOWNIA, J.S.C.

GRANTED:

Exhibit E - Appellate Division, Fourth Department Order, Entered July 17, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

582

CA 19-00899

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, CURRAN, AND WINSLOW, JJ.

DAVID M. BONCZAR, PLAINTIFF-APPELLANT,

V ORDER

AMERICAN MULTI-CINEMA, INC., DOING BUSINESS AS AMC THEATRES WEBSTER 12 (AS SUCCESSOR IN INTEREST TO LOEWS BOULEVARD CINEMAS, INC., FORMERLY KNOWN AS LOEW'S BOULEVARD CORPORATION AND/OR LOEWS THEATER MANAGEMENT CORP.), DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUSSO & TONER, LLP, NEW YORK CITY (JOSH H. KARDISCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 25, 2019. The judgment, entered upon a jury verdict in favor of defendant, dismissed plaintiff's complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Entered: July 17, 2020

Mark W. Bennett
Clerk of the Court

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Exhibit F - Notice of Entry of Appellate Division, Fourth Department Order, Dated July 21, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

----------X

DAVID M. BONCZAR,

Plaintiff(s),

-against-

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

Defendant(s).

----------X

Index No.: 804799/14

ORDER WITH NOTICE OF ENTRY

PLEASE TAKE NOTICE, that within is a true copy of an Order of the Appellate Division, Fourth Department, entered in the Office of the Clerk of the within named Court on July 17, 2020.

Dated: New York, New York
July 20, 2020

Yours etc.,
RUSSO & TONER, LLP

Josh H. Kardisch, Esq.
Attorneys for Defendant(s)
AMERICAN MUTLI-CINEMA, INC., d/b/aAMC THEATERS WEBSTER 12
33 Whitehall Street, 16th Floor
New York, New York 10004
(212) 482-0001
R&T File No.: 218.237

TO: **LIPSITZ GREEN SCIME CAMBRIA, LLP**
John Collins, Esq.
Attorneys for Plaintiff(s)
DAVID M. BONCZAR
42 Delaware Avenue, Suite 120
Buffalo, New York 14202

Bonczar v American Multi-cinema, Inc.
2020 NY Slip Op 04043
Decided on July 17, 2020
Appellate Division, Fourth Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on July 17, 2020 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Fourth Judicial Department
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, CURRAN, AND WINSLOW, JJ.

582 CA 19-00899

[*1]DAVID M. BONCZAR, PLAINTIFF-APPELLANT,

v

AMERICAN MULTI-CINEMA, INC., DOING BUSINESS AS AMC THEATRES WEBSTER 12 (AS SUCCESSOR IN INTEREST TO LOEWS BOULEVARD CINEMAS, INC., FORMERLY KNOWN AS LOEW'S BOULEVARD CORPORATION AND/OR LOEWS THEATER MANAGEMENT CORP.), DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUSSO & TONER, LLP, NEW YORK CITY (JOSH H. KARDISCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 25, 2019. The judgment, entered upon a jury verdict in favor of defendant, dismissed plaintiff's complaint.

FILED: ERIE COUNTY CLERK 07/21/2020 12:48 PM INDEX NO. 804799/2014
NYSCEF DOC. NO. 202 RECEIVED NYSCEF: 07/21/2020

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Entered: July 17, 2020

Mark W. Bennett

Clerk of the Court

Return to Decision List

FILED: ERIE COUNTY CLERK 07/21/2020 12:48 PM INDEX NO. 804799/2014
NYSCEF DOC. NO. 202 RECEIVED NYSCEF: 07/21/2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

----------X Index No.: 804799/14

DAVID M. BONCZAR,

Plaintiff(s),

AFFIDAVIT OF SERVICE

-against-

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

Defendant.

----------X

State of New York, County of Erie, ss.:

Nneka Wharton, being duly sworn, deposes and says:

That deponent is not a party of this action, is over 18 years of age and resides in the County of Kings, State of New York.

That on the 21st day of July, 2020 served the within **ORDER WITH NOTICE OF ENTRY** upon:

LIPSITZ GREEN SCIME CAMBRIA, LLP
Attorneys for Plaintiff(s)
DAVID M. BONCZAR
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
Attn: Katherine Gillette, Esq. (Of-Counsel)

to be served by the New York State Supreme Court Electronic Filing Service.

Nneka Wharton

Sworn to before me on
the 21st day of July, 2020

Notary Public

WADE H. KORNEGAY
STATE OF NEW YORK
NOTARY PUBLIC
Qualified in Queens County
01KO6394280
MY COMMISSION EXPIRES 20

FILED: ERIE COUNTY CLERK 07/21/2020 12:48 PM INDEX NO. 804799/2014
NYSCEF DOC. NO. 202 RECEIVED NYSCEF: 07/21/2020

Index No.: 804799 Year: 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

----------X

DAVID M. BONCZAR,

Plaintiff,

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 Corporation and/or
Loews Theater Management Corp.)
2190 Empire Boulevard
Webster, NY 14580

Defendant.

----------X

ORDER WITH NOTICE OF ENTRY

RUSSO & TONER, LLP
Attorneys for Defendant
33 Whitehall 16th Floor
New York, New York 10004
(212) 482-0001

[This Page Intentionally Left Blank.]

Exhibit G - Defendant's Consent to Change Attorney, Filed July 13, 2020.

FILED: ERIE COUNTY CLERK 07/13/2020 12:43 PM INDEX NO. 804799/2014
NYSCEF DOC. NO. 201 RECEIVED NYSCEF: 07/13/2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

----------X

DAVID M. BONCZAR,

Plaintiffs,

-against-

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

Defendant(s)

----------X

Index No.: 804799/2014

CONSENT TO CHANGE ATTORNEY

IT IS HEREBY CONSENTED that **GANNON ROSENFARB & DROSSMAN**, 100 William Street #7, New York, New York 10038 be substituted as attorneys of record for Defendant, **AMERICAN MULTI-CINEMA, INC. d/b/a AMC THEATERS WEBSTER 12** the above-entitled action in place and stead of the undersigned as of the date hereof.

IT IS HEREBY STIPULATED that an electronic or facsimile signature shall constitute an original signature and that this stipulation may be signed in counterparts.

Dated: New York, New York
June 29, 2020

Alan Russo, Esq.
RUSSO & TONER, LLP
Outgoing Attorneys
33 Whitehall Street, 16th Floor
New York, New York 10004
Tel : (212) 482-0001

Peter J. Gannon
By: Peter J. Gannon
GANNON ROSENFARB & DROSSMAN
Incoming Attorneys
100 William Street #7
New York, New York 10038
Tel : (212)^55-5000

FILED: ERIE COUNTY CLERK 07/13/2020 12:43 PM INDEX NO. 804799/2014
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AMERICAN MULTI-CINEMA, INC. d/b/a AMC THEATERS WEBSTER 12

By:
Title:

STATE OF NEW YORK)
) ss.:
COUNTY OF New York)

On the 8th day of July, 2020, before me personally came Matthew Ecton, to me known, and known to me to be the same person described in and who executed the foregoing consent and acknowledged to me that (s)he executed the same.

NOTARY PUBLIC

NNEKA WHARTON
Notary Public, State of New York
No. 01WH6301990
Qualified in Kings County
Commission Expires April 28, 2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID M. BONCZAR,

Plaintiff,

vs.

AMERICAN MUTLI-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.),

Defendant.

NOTICE OF APPEAL

Index No. 804799/2014

Hon. Joseph R. Glownia, J.S.C.
Justice Presiding

PLEASE TAKE NOTICE, that plaintiff, David M. Bonczar, hereby appeals to the Court of Appeals pursuant to CPLR 5601 (d) from the order of the Appellate Division, Fourth Department, entered July 17, 2020, affirming the final judgment of the Supreme Court, County of Erie, entered April 25, 2019, dismissing plaintiff's complaint, thereby bringing up for review the memorandum and order of the Appellate Division, Fourth Department, entered February 2, 2018, in which the court, by a vote of three to two, reversed the order of the Supreme Court, County of Erie, entered March 1, 2017, and denied plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1), and from the whole of said orders.

DATED: Buffalo, New York
August 13, 2020

LIPSITZ GREEN SCIME CAMBRIA LLP

By: _____
JOHN A. COLLINS
Attorneys for Plaintiff
Office and P.O. Address
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333

TO:

Erie County Clerk
Erie County Hall
92 Franklin Street
Buffalo, New York 14202

GANNON ROSENFARB & DROSSMAN
Attorneys for Defendant
American Multi-Cinema, Inc.
d/b/a AMC Theaters Webster 12
Office and P.O. Address
100 William Street No. 7
New York, New York 10038
(212) 655-5000

INDEX NO. 804799/2014
NYSCEF DOC. NO. 204 RECEIVED NYSCEF: 08/13/2020

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAVID M. BONCZAR,

Plaintiff,

vs.

AMERICAN MUTLI-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.),

Defendant.

AFFIDAVIT OF SERVICE VIA E-FILING

Index No. 804799/2014

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

DENISE M. NICOLOFF, being duly sworn, deposes and says:

Deponent is not a party to this matter and is over the age of 18 years. On August 13, 2020, deponent caused to be served upon:

Peter J. Gannon, Esq.
Gannon Rosenfarb & Drossman
Attorneys for Defendant
American Multi-Cinema, Inc.
d/b/a AMC Theaters Webster 12
Office and Post Office Address
100 William Street No. 7
New York, New York 10038
(212) 655-5000

a true and correct copy of Plaintiff's Notice of Appeal by e-filing same with the Erie County Clerk through the NYSCEF System.

DENISE M. NICOLOFF

Sworn to before me on this
13th day of August, 2020.

Notary Public

JOHN ALBERT COLLINS
Notary Public, State of New York
Qualified in Erie County
Commission Expires 7/28/2022

NYSCEF - Erie County Supreme Court

Confirmation Notice

The NYSCEF website has received an electronic filing on 08/13/2020 09:13 AM. Please keep this notice as a confirmation of this filing.

804799/2014

DAVID M BONCZAR - v. - AMERICAN MULTI-CINEMA, INC. d/b/a AMC THEATRES WEBSTER 12

Assigned Judge: Joseph Glownia

Documents Received on 08/13/2020 09:13 AM

Doc #	Document Type
203	NOTICE OF APPEAL - COURT OF APPEALS
204	AFFIRMATION/AFFIDAVIT OF SERVICE

Filing User

John Albert Collins | jcollins@lglaw.com
42 Delaware Ave Ste 120, Buffalo, NY 14202

E-mail Notifications

An email regarding this filing has been sent to the following on 08/13/2020 09:13 AM:

FLORINA ALTSHILER - faltshiler@russotoner.com
JOHN A. COLLINS - jcollins@lglaw.com
KATHERINE A. GILLETTE - kgillette@ecwa.org
LISA L. GOKHULSINGH - peanutgal1@yahoo.com
TRISHE' L. HYNES - thynes@russotoner.com
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CHERIE L. PETERSON - cpeterson@lglaw.com
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MELISSA D. WISCHERATH - mwischerath@lglaw.com

NYSCEF - Erie County Supreme Court
Confirmation Notice

804799/2014
DAVID M BONCZAR - v. - AMERICAN MULTI-CINEMA, INC. d/b/a AMC THEATRES WEBSTER 12
Assigned Judge: Joseph Glownia

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

Michael P. Kearns, Erie County Clerk
Website: http://www.erie.gov/clerk

NYSCEF Resource Center, nyscef@nycourts.gov
Phone: (646) 386-3033 | Fax: (212) 401-9146 | Website: www.nycourts.gov/efile