To be Argued by:
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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.

## REPLY BRIEF FOR PLAINTIFF-APPELLANT DAVID M. BONCZAR

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## APPEAL NO. 1

### CONTRARY TO DEFENDANT'S ARGUMENT, PLAINTIFF ESTABLISHED HIS PRIMA FACIE ENTITLEMENT TO PARTIAL SUMMARY JUDGMENT UNDER LABOR LAW § 240 (1), AND DEFENDANT FAILED TO RAISE A TRIABLE ISSUE OF FACT

In contesting plaintiff's entitlement to partial summary judgment as to liability under Labor Law § 240 (1), AMC makes a number of assertions – both legal and factual – that are inaccurate, misleading, and/or irrelevant to the issues presented in this case. On the legal side, AMC asserts: "[T]his Court has stated that a defendant has not violated the statute when plaintiff cannot identify the ladder's defect or a reason why the device shifted before he fell." Brief for Defendant-Respondent, p. 6 (citing *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280 [(2003]). In reality, the Court of Appeals held the precise opposite in *Blake*, stating: "In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason, we have . . . continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection." 1 N.Y.3d at 289 n.8. *Accord O'Brien v. Port Auth. of N.Y. & N.J.*, 29 N.Y.3d 27, 33 (2017).

The lower courts have regularly applied that principle in upholding a plaintiff's right to partial summary judgment as to liability under section 240 (1). Thus, in *Martinez v. St-Dil LLC*, 192 A.D.3d 511 (1st Dep't 2021), the First

Department held: "[C]ontrary to defendants' argument, there is no requirement for Labor Law § 240 (1) purposes that plaintiff know exactly the cause of his accident, or what caused the scaffold or ladder to move, where there is no dispute that the safety devices failed. Moreover, it is not relevant that the ladder and scaffold were free from defects." 192 A.D.3d at 512-513 (citations omitted). *Accord Hoxhaj v. West 30th HL LLC*, 195 A.D.3d 503, 504 (1st Dep't 2021).

AMC further asserts that, to establish that a ladder or other statutorily enumerated device was unsafe, a plaintiff "must proffer an expert's admissible opinion identifying the safety device or devices that defendant should have provided to render the device safer and without such opinion his arguments are speculative, conclusory, specious, and fatal to the dispositive motion." Brief for Defendant-Respondent, p. 11 (citing *Borress v. 200 Park, L.P.*, 2015 N.Y. Slip Op. 32092[U], 2015 WL 7070072, *10 [Sup. Ct. N.Y. County, Apr. 30, 2015], *appeal withdrawn*, 2015 N.Y. Slip. Op. 91526[U], 2015 WL 7433594 [1st Dep't, Nov. 24, 2015]).

AMC mischaracterizes the trial court's holding in *Borress*, in which plaintiff sought damages for injuries he sustained when several panes of glass tipped over at a construction site, striking his leg. 2015 WL 7070072, *1. In granting defendants' motions for summary judgment dismissing plaintiff's cause of action under Labor Law § 240 (1), the court held: "Here, plaintiff has not submitted any evidence explaining how the accident could have been prevented if a certain device(s) had

been provided. . . . [P]laintiff's failure to submit an expert affidavit stating which device(s) should have been provided to prevent the alleged incident is a glaring omission from his papers." *Id.*, *10. In so holding, the court in *Borress* cited this Court's opinion in *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335 (2011), in which it held that "to prevail on summary judgment, plaintiff must establish that there is a safety device of the kind enumerated in section 240 (1) that could have prevented his fall, because 'liability is contingent upon . . . the failure to use, or the inadequacy of' such a device." 18 N.Y.3d at 340 (quoting *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 [2001]).

*Ortiz*, *Narducci*, and *Borress* have no arguable bearing in this action, in which plaintiff fell from a ladder that shifted and wobbled, causing him to lose his balance. Ladders are among the safety devices expressly identified in section 240 (1). Plaintiff therefore had no obligation to submit expert proof identifying a device that would have prevented his fall. The identity of the requisite device is self-evident, and is dictated by the statute: plaintiff should have been provided with a ladder that was "so constructed, placed and operated as to give proper protection," i.e., one that did not shift or wobble while he was on it.

AMC also cites precedents from this Court holding that not every fall at a work site implicates, or establishes the violation of, Labor Law § 240 (1). Brief for Defendant-Respondent, p. 7 (citing, inter alia, *O'Brien v. Port Auth. of N.Y. & N.J.*,

29 N.Y.3d at 33; *Abbatiello v. Lancaster Studio Assocs.*, 3 N.Y.3d 46, 50 [2004]). In the case of ladders, the defendant further notes, the courts will not presume that the device failed to afford the requisite "proper protection" unless it "collapse[d]," "malfunction[ed]," or had "some type of defect." Brief for Defendant-Respondent, p. 7 (citing *O'Brien* and *Blake*).

Plaintiff does not dispute those well-settled principles. The record evidence, however, belies the baseless argument that AMC attempts to construct in reliance upon them, i.e., that plaintiff: (1) "did not present a speck of evidence that the subject ladder 'malfunctioned' "; (2) "proffered no evidence that the subject ladder was defective, dangerous, or unstable, except to posit, in sum and substance, 'I fell, ergo it must not have been an adequate safety device' "; and (3) "failed to identify any defects or deficiencies in the equipment he was using . . . ." Brief for Defendant-Respondent, pp. 15-16, 19.

Contrary to defendant's argument, the very fact that a ladder shifts, wobbles, or otherwise moves when it should remain stationary, thereby causing a worker to fall, establishes that the device "malfunctioned" and was "unstable," and is thus sufficient to warrant the imposition of liability under Labor Law § 240 (1). *See Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 560-561 (1993) (in affirming the grant of partial summary judgment in plaintiff's favor, the Court held that, where a ladder "tipped, causing [plaintiff] to fall," "the 'core' objective of section 240 [1]

was not met"); *Hoxhaj v. West 30th HL LLC*, 195 A.D.3d at 503 (plaintiff entitled to summary judgment where he was caused to fall "when the unsecured ladder on which he was standing . . . began to wobble and he lost his equilibrium"); *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) (plaintiff entitled to summary judgment based on proof that the ladder upon which he was working "shifted as he descended, thus causing his fall"); *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," resulting in his fall).

In moving for summary judgment in the present action, plaintiff satisfied his threshold burden of proof by submitting the transcript of his pretrial deposition, in which he testified that his ladder shifted and wobbled as he was descending it, causing him to lose his balance and fall (R. 316; R. 362-365; R. 374). Contrary to defendant's argument, the fact that no one else witnessed plaintiff's accident does not raise inherent factual issues compelling the denial of his motion. Rather, to raise a triable issue of fact regarding the circumstances of plaintiff's fall, defendant was obligated to interpose evidence affirmatively contradicting plaintiff's account or

otherwise calling into question his credibility. *See Panek v. County of Albany*, 99 N.Y.2d 452, 458 (2003) (in reversing the Appellate Division and granting plaintiff's motion for partial summary judgment under Labor Law § 240 [1], the Court held that because "[p]laintiff's allegation that the ladder 'gave way' or collapsed beneath him . . . was uncontested, . . . defendants failed to create an issue of fact regarding proximate causation"); *Klein v. City of New York*, 89 N.Y.2d 833, 835 (1996) (in upholding the grant of partial summary judgment to plaintiff, who was the sole witness to his accident, 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").

Here, as in *Panek* and *Klein*, defendant interposed no evidence contradicting plaintiff's account or otherwise calling into question his credibility (R. 419-468). Thus, plaintiff established his prima facie entitlement to partial summary judgment.

Contrary to AMC's further argument, it neither made a prima facie showing that plaintiff was the sole proximate cause of his fall nor raised a triable issue of fact as to that issue. In support of its position, the defendant cites four factors: (1) plaintiff did not "identify any defects or deficiencies in the" ladder; (2) plaintiff acknowledged that it was "feasible" he moved or repositioned the ladder before using it; (3) plaintiff could not recall checking the ladder's positioning, or whether

he had locked it into place; and (4) prior to his accident, plaintiff had ascended and descended the ladder multiple times without incident. Brief for Defendant-Respondent, p. 19. Those factors do not, either individually or collectively, raise a triable issue of fact as to whether plaintiff's own acts or omissions constituted the sole proximate cause of his accident.

Plaintiff's inability to identify a particular defect or deficiency that caused the ladder to shift and wobble is not material. As stated above, it is well settled that, where a ladder malfunctions for no apparent reason, there is a legal presumption that it "was not good enough to afford proper protection." *Blake*, 1 N.Y.3d at 289 n.8. It is therefore irrelevant that the ladder may have been free of defects, and that the plaintiff did not know why it shifted, causing him to fall. *Martinez*, 192 A.D.3d at 512-513. Likewise, "it is not dispositive that the [ladder] had recently been used without incident." *Sanchez v. 1 Burgess Road, LLC*, 195 A.D.3d 531, 531 (1st Dep't 2021).

The fact that plaintiff may have moved or repositioned the ladder before beginning his work does not raise a triable issue of fact on the sole-proximate-cause issue. The record is devoid of any evidence that such conduct contributed to the ladder's instability, much less that it constituted the *only* reason the ladder wobbled and shifted. Thus, a trier of fact would have to engage in pure speculation to find

that plaintiff's movement or repositioning of the ladder constituted the sole proximate cause of his accident.

And, as the Appellate Division dissent opined, no triable issue of fact arises from plaintiff's testimony 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 reasoned 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 recognized, this action is not analogous to *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.* (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 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, "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]).

Accordingly, as demonstrated above and in plaintiff's principal brief, plaintiff established his prima facie entitlement to partial summary judgment as to liability under Labor Law § 240 (1), and defendant failed to raise a triable issue of fact. The Appellate Division's Memorandum and Order entered February 2, 2018 should therefore be reversed, and the trial court's order granting plaintiff's motion reinstated.

## APPEAL NO. 2

### DEFENDANT FAILED TO REBUT PLAINTIFF'S SHOWING THAT HE WAS ENTITLED TO A DIRECTED VERDICT ON THE ISSUE OF DEFENDANT'S LIABILITY UNDER LABOR LAW § 240 (1)

As plaintiff demonstrated in his principal brief, he was entitled to a directed verdict because:

- He testified without contradiction that he ensured the ladder was properly positioned and fully opened in its locked position before first using it on the day of his accident (R. 582-585; R. 595-596; R. 604-605; R. 641; R. 643; R. 685-686).

- The ladder nevertheless wobbled and shook as plaintiff was descending it, causing him to lose his balance and fall to the floor (R. 586; R. 623; R. 644; R. 646-648).
- Defendant's expert not only stated that the question of whether the ladder was properly set up "isn't the issue," but conceded that the ladder was in fact "*properly set up*" (R. 1139; R. 1142 [emphasis supplied]).
- According to defendant's expert, the critical factor – and the proximate cause of the accident – was plaintiff's failure to maintain three-point contact with the ladder after it wobbled and shifted, as a result of which he fell (R. 1139; R. 1142; R. 1198-1199; R. 1201).

As so articulated by its expert, AMC's defense to liability under Labor Law § 240 (1) is insufficient as a matter of law. Coupled with plaintiff's trial testimony describing the steps he took to ensure the ladder was properly set up before he first used it, the defense expert's concession that the ladder was "properly set up" negated the factual issue identified by the Appellate Division majority when it denied plaintiff's motion for summary judgment, i.e., that plaintiff's acknowledgement that he may not have "checked the positioning of the ladder or the locking mechanism" immediately before his final ascent raised a triable issue of fact as to whether " 'there

was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident' " (R. 13a [quoting *Blake*, 1 N.Y.3d at 289 n.8]).

The fact that plaintiff did not establish why the ladder shifted and wobbled as he descended it is immaterial because, under *Blake*, the very fact that it "malfunction[ed]" raises a "presumption that the ladder . . . was not good enough to afford proper protection," i.e., that it was not compliant with section 240 (1). *Blake*, 1 N.Y.3d at 289 n.8. Moreover, given the existence of a statutory violation and its undisputed role in causing plaintiff to lose his balance, plaintiff's failure to maintain three-point contact after the ladder shifted and wobbled cannot be deemed the sole proximate cause of his fall. *See Blake*, 1 N.Y.3d at 290 ("if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it"). Rather, plaintiff was at most comparatively at fault, which "is not a defense to absolute liability under the statute." *Id.* at 289.

Accordingly, plaintiff's motion for a directed verdict should have been granted because, "upon the evidence presented, there [was] no rational process by which the fact trier could base a finding in favor of" AMC. *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997). In particular, there was no basis upon which the jury could have found in defendant's favor under the only permissible rationales identified by the trial court in its charge, i.e., that the sole proximate cause of the accident was plaintiff's failure to (1) ensure that the ladder was properly positioned, or (2) ensure

that the spreader arms were fully extended, as a result of which the ladder shifted or wobbled (R. 1416-1417).

In contending that the trial court properly denied plaintiff's motion for a directed verdict, AMC mischaracterizes the trial proof and raises arguments unsupported by the facts or the law. Addressing the testimony by Arthur Dube, plaintiff's expert witness, AMC asserts that Mr. Dube opined that, merely because plaintiff fell from a ladder, he was not provided with proper protection under Labor Law § 240 (1). That is false. In eliciting Mr. Dube's opinion, plaintiff's counsel recounted plaintiff's testimony that the ladder shifted and wobbled as he was descending it, causing him to fall, and then asked whether in Mr. Dube's opinion plaintiff had not been provided with the proper protection mandated by section 240 (1) (R. 733-734). Mr. Dube responded: "Yes. Obviously. He fell. So he wasn't properly protected." (R. 734.)

Thus, contrary to defendant's contention, Mr. Dube did not opine that the mere fall from a ladder establishes a statutory violation. Rather, the critical factor underlying his opinion was that the ladder upon which plaintiff was working shifted and wobbled, causing him to lose his balance and fall. Mr. Dube's opinion that proper protection was lacking is fully consistent with the settled case law interpreting and applying section 240 (1). *See Blake*, 1 N.Y.3d at 289 n.8 (the fact that a ladder "malfunction[s]" raises a "presumption that [it] . . . was not good enough to afford

proper protection"); *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d at 560-561 (holding that, where a ladder "tipped, causing [plaintiff] to fall," "the 'core' objective of section 240 [1] was not met").

AMC similarly mischaracterizes plaintiff's trial testimony by quoting a fragment thereof while omitting an earlier portion that gave critical context to the quoted testimony. The defendant cites a segment of plaintiff's testimony in which he describes stepping down, losing his balance, releasing his right hand, and then falling. Brief for Defendant-Respondent, p. 24 (quoting R. 646-647). Defendant asserts that plaintiff "said nothing about the ladder moving," and contends that plaintiff therefore simply lost his balance, lost his grip, and then fell. *Id.*

That contention is disingenuous and misleading, however, because in the immediately preceding colloquy plaintiff testified as follows:

> Q. You had released your right hand first off the ladder, right?
>
> A. I was transitioning down the ladder through the drop ceiling, shifting hands, when *I was forced to let go of the ladder was* [sic] *because I had – the ladder shifted and it wobbled, causing it me to miss a step.* And when I missed that step, it pulled me away, and I fell back.
>
> Q. So you released your right hand from the ladder first?
>
> A. It was forced to be released because I was falling back.
>
> [R. 646 (emphasis supplied).]

Thus, contrary to AMC's argument, plaintiff did not "[say] nothing about the ladder moving" when he described the chain of events leading to his fall. Rather, he expressly testified that the ladder's sudden movement precipitated his fall by causing him to miss a step.

AMC likewise mischaracterizes the testimony of Daniel Paine, its own expert. Specifically, AMC cites the trial court's post-trial decision (and not the trial transcript) for the proposition that " 'Mr. Paine testified that Plaintiff's failure to make sure the spreader arms were locked and his failure to maintain three points of contact with the ladder, was the only cause of the accident.' " Brief for Defendant-Respondent, p. 32 (quoting Supreme Court's Decision and Order, R. 490). Supreme Court was in error, however, because Mr. Paine did not attribute the accident to plaintiff's failure to ensure the spreader bars were locked. Rather, Mr. Paine: (1) conceded that the ladder was "properly set up" when plaintiff used it (R. 1142); (2) asserted that the ladder's set-up was in any event not "the issue" (R. 1139); and (3) opined that plaintiff fell because he failed to maintain three-point contact after the ladder wobbled (R. 1139; R. 1198-1199).

As previously stated, Mr. Paine's testimony negated the factual issue that the Appellate Division majority identified in denying plaintiff's motion for partial summary judgment, i.e., whether plaintiff failed to properly position the ladder and/or ensure that the spreader bars were locked, thus establishing that there was no

statutory violation and that plaintiff's own acts or omissions constituted the sole proximate cause of his accident. As also previously stated, the ladder's movement establishes that it did not afford the proper protection mandated by Labor Law § 240 (1), and plaintiff's failure to maintain three-point contact after the ladder wobbled and shifted constituted at most comparative negligence.

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. In particular, given plaintiff's trial testimony describing the steps he took to ensure the ladder was properly set up before he first used it and the defense expert's concession that the ladder was "properly set up," the jury could not have rationally found that there was no statutory violation, and that the sole proximate cause of the accident was plaintiff's failure to ensure that the ladder was properly positioned.

## 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
August 16, 2021

Respectfully submitted,

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

I hereby certify that:

1. This reply 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 reply brief contains 3,821 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: August 16, 2021

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