To be Argued by:
JOSH H. KARDISCH
(Time Requested: 15 Minutes)

Erie County Clerk's Index No. 2014-804799

New York Supreme Court

Appellate Division—Fourth Department

DAVID M. BONCZAR,

Plaintiff-Respondent,

– against –

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

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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– and –

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PRELIMINARY STATEMENT

Defendant-Appellant AMC respectfully submits this Reply Brief to address the points which Plaintiff-Respondent Bonczar raises in his appellate Brief (hereinafter, "P-R Brief"). AMC maintains that the material facts and applicable case law militate in favor of this Court overturning the lower Court's grant of summary judgment to Plaintiff-Respondent on the Labor Law § 240 (1) claim and allowing a jury to decide the issues which are relevant to that cause of action.

STATEMENT OF FACTS

Plaintiff-Respondent ignores many of the facts which are germane to the Labor Law § 240 (1) analysis. Defendant-Appellant reiterates and discusses these facts herein, noting that all derive from Plaintiff-Respondent's own deposition testimony.

While repeatedly admitting that he does not know which of the "number of... present and available..." ladders he was using on the subject date (P-R Brief at p. 2, citing R. 300, 315-23 and 334; P-R Brief at p. 3, citing R. 338; and P-R Brief at p. 3-4, citing R. 340), Plaintiff-Respondent claims that "the" device from which he fell was "unstable" (P-R Brief at p. 1), and that it "failed." P-R Brief at p. 9. And although he testified that the A-frame apparatus "shifted" and "wobbled" as he descended, Bonczar swore under oath that he does not know what, if anything other than his own actions, caused it to do so. R. 299: 23-300:9; 348:17-22; 351: 6-

8. Significantly, he averred that immediately prior to falling, he had "chang(ed) positions with the right side of his (5 foot, 11 inch, nearly 300-pound, R. 248; 344:23-345:1) body" (R. 349: 6-9), "lost [his] balance," released his hands (R. 349: 14-23), and fell onto [his] back". R. 348: 17-22. There is nothing in the deposition testimony or any other discovery material that so much as suggests that "(Bonczar) fell due to the failure of a safety device," as he posits in his Brief. P-R Brief at p. 9.

Plaintiff-Respondent also swore that there was nothing more that Defendant-Appellant could or should have done to "stabilize" the ladder. Specifically, he testified that:

1) "generally...the ladder would not be affixed to anything" and **"it was not common practice to have any additional mechanical means to hold this type of ladder in place"** (R. 393:23-394:21; 395:17-396:8). These statements reflect applicable OSHA regulations which require only that "fixed" ladders (i.e., those which "cannot be readily moved or carried because they are an integral part of a building or structure"), not A-frame ladders such as the within, be tied off, nailed down, held, or otherwise stabilized. 29 USC 1926.1050b and 1926.1053;

2) although the only "precaution" which might have been taken

was to have someone hold the ladder, Plaintiff-Respondent decided to "work alone" (P-R Brief, at p. 3), without requesting a "spotter" or other assistance, and without anyone else even present in the room. R. 299:23-300:18; 396:19-397: 21; and

3) "a rope, net, guardrails or barricades would not have prevented the alleged occurrence." R. 393:23-394:21.

Moreover, Bonczar stated under oath that "it's very feasible" that he may have brought the subject apparatus into the room in which he was working (R. 337: 5- 338:15), and that it may even have been his own ladder. R. 3791-18; 382:12-383:12. As he testified and admits in his Brief (P-R Brief at 4), Plaintiff-Respondent "may have" moved and set-up the device up himself (R. 341: 3-11), and that while he should have done so, ***he does not recall locking the ladder into place***. R. 343: 12-19; 344:4-14).

Finally, Bonczar, a "senior fire protection and security technician" (P-R Brief at p. 2), admitted under oath that he had used a ladder to perform the same tasks "hundreds, possibly thousands of times" before the alleged occurrence. R. 311: 8-19; 333:3-7; 394:22-395:7. On the subject day, in fact, Plaintiff-Respondent had gone up and down the subject A-frame ladder "for a fair portion of the day," **without incident** (R. 346:8-15; 346:23-347:8), indicating that the ladder he claims

to have been using was not "unstable," unsafe, or defective and did not "fail" or "malfunction" in any manner.

ARGUMENT

I

THE LOWER COURT SHOULD HAVE DENIED PLAINTIFF-RESPONDENT SUMMARY JUDGMENT ON THE LABOR LAW § 240 (1) CLAIM

A. Plaintiff-Respondent Must Make a *Prima Facie* Showing That A Hazard Which Labor Law § 240 (1) Contemplates Existed

As it applies to the present case, Labor Law § 240 (1) requires owners to furnish ladders which are "so constructed, placed and operated as to give proper protection" to the workers utilizing them. Labor Law § 240 (1). Within the last two months, the Court of Appeals reiterated its holding in *Narducci v Manhasset Bay Assocs.*, 96 NY2d 259 (2001), to wit, that "liability is contingent upon the existence of a hazard contemplated in Section § 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein." *O'Brien v Port Auth. of N.Y. & N.J.*, 2017 N.Y. LEXIS 725, *7-8, 2017 NY Slip Op 02466, 2 (Mar. 30, 2017), *citing Narducci*, 96 NY2d at 267. *See also*, *Ortiz v Varsity Holdings, LLC*, 18 N.Y.3d 335, 340 (2011), *citing Narducci; Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014); and *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Accordingly, a ladder's condition, i.e., its

fitness to perform the intended function and protect the user, is very much relevant to whether it presented a "hazard" under Labor Law § 240 (1).

Contrary to that which Plaintiff-Appellant urges this Court to accept, *O'Brien* reminded that "the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1)". *O'Brien*, 2017 N.Y. LEXIS 725, *7-8. The *O'Brien* Court cited *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 (2003), for the proposition that "[t]he terms ['strict' and 'absolute'] may have given rise to the mistaken belief that a fall from a scaffold or ladder, in and of itself, results in an award of damages to the injured party... [t]hat is not the law, and we have never held or suggested otherwise." 1 NY3d 280, 287-288. In granting summary to a defendant in a similar case, New York's highest Court in *Abbatiello v Lancaster Studio Assocs.*, 3 NY3d 46, 50 (2004), cited the following important language from *Blake:* a) "an accident alone does not establish a Labor Law § 240 (1) violation;" and b) "absolute liability requires a violation of the statute." 3 NY3d at 50.

B. The "Fact" That The Ladder "Shifted" Or "Wobbled" Does Not Establish That It Was Not Constructed, Placed and Operated So As To Give Proper Protection

Clarifying its prior decisions, the Court of Appeals in *O'Brien* noted that it:

> has applied...a presumption that [a] ladder or scaffolding device was not good enough to afford proper protection ***in cases involving ladders or scaffolds that collapse or malfunction for no apparent reason***...

O'Brien, 2017 N.Y. LEXIS 725, *7-8, *citing*, *Blake*, 1 NY3d at 289 (emphasis added) (also cited by Plaintiff-Respondent in P-R Brief at p. 10.) Like it did in *Blake* 14 years earlier, the *O'Brien* Court applied the presumption that ladders are "not good enough to afford proper protection" under the law when they "collapse" or "malfunction". In this context, Defendant-Appellant notes that Plaintiff-Respondent misstates *Blake* by leaving the word "collapse" out of its quotation of footnote 8, which actually states:

> [i]n 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 NY3d at 289, fn. 8. Clearly, *Blake, O'Brien* and its progeny stand for the concept that in the absence of a "collapse" or "malfunction," courts should not presume that the device did not "afford proper protection".

Defendant-Respondent did not mischaracterize the *Blake* decision, as Bonczar accuses. The trial court in *Blake* described the jury's "conclusion" as "inescapable" that "the accident happened not because the ladder malfunctioned, was defective or was improperly placed, but solely because of plaintiff's own negligence in the way he used it." *Id.* at 292. Like the Plaintiff-Respondent herein, *Blake* did not recall whether he had engaged the ladder's locking mechanism prior to use. *Id.* at 284. The First Department and the Court of Appeals

affirmed the denial of summary judgment to plaintiff and declined to overturn the jury verdict in defendant's favor. New York's High Court premised its decision, at least in part, on plaintiff's inability at several junctures to identify a defect, deficiency, or the absence of any mandated safety equipment, which it discussed as follows:

> Plaintiff contended that [defendant] was strictly liable as a statutory agent under the section for having failed to provide a proper workplace and mandated safety equipment. ***In his deposition, however, plaintiff stated that the ladder was securely placed and not broken or defective.*** He also said there was no need to have anyone hold the ladder while he was using or ascending it.

Id at 283-84. In affirming the lower courts, the Court of Appeals acknowledged that plaintiff's failures as aforementioned, both at the dispositive motion and the trial stages, were fatal to his Labor Law § 240 (1) claim. 1 NY3d at 284.

The condition of the ladder is most certainly a factor which the Courts consider in determining an owner's liability under Labor Law 240 § (1). In *Trippi v. Main-Huron, LLC*, 28 A.D.3d 1069 (4th Dept 2006), for example, the Fourth Department found a "triable issue of fact (as to) whether (a) stepladder, ***which did not 'collapse, slip or otherwise fail to perform its [intended] function of supporting the worker,'*** " provided proper protection within the meaning of section 240 (1)". *Id.* at 1070 (emphasis added). And in the very recent case of *Jones v Nazareth College of Rochester*, 147 A.D.3d 1364 (4th Dept 2017), this Court

unanimously affirmed the denial of summary judgment to plaintiff with respect to a Labor Law § 240 (1) claim, concluding that:

> there are questions of fact . . . whether . . . the ladder, ***which was not shown to be defective in any way***, failed to provide proper protection, and whether . . . plaintiff should have been provided with additional safety devices.

Id., citing, Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 (2003).

In addition to the seminal *Blake* and *Nazario* decisions, the *Jones* Court cited *Grogan v Norlite Corp.*, 282 AD2d 781, 782-783 (3d Dept 2001) (in which the Third Department found a summary judgment-precluding question of fact as to whether the subject ladder provided proper protection because there was "no evidence that the ladder slipped, collapsed or was otherwise defective"); *Donovan v CNY Consol. Contrs.*, 278 AD2d 881, 881, 718 N.Y.S.2d 760) (in which the Fourth Department found a question of fact as to "whether the alleged failure to secure the ladder or provide a safety device was 'a substantial factor leading to the plaintiff's injuries,' where plaintiff had claimed that the ladder "swayed," but did not allege that the ladder was defective); and *Gange v Tilles Inv. Co.*, 220 AD2d 556, 558 (2d Dept 1995) (in which the Second Department reached precisely the same conclusion as *Jones*). *See also*, *Bruce v Actus Lend Lease*, 101 A.D.3d 1701, 1702 (4th Dept 2012) and *Brown v. Concord Nurseries, Inc.*, 37 A.D.3d 1076 (4th Dept 2007).

Whether a device constitutes proper protection is normally an issue of fact for the jury. *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 (1st Dept 2013). If a reasonable factfinder could conclude that the defendant provided proper safety devices, the worker's summary judgment motion should be denied. *See, Georgia v Urbanski*, 84 AD3d 1569 (3d Dept 2011); *Ramsey v Leon DeMatteis Construction Corp.*, 79 AD3d 720 (2d Dept 2010). This Court has stated that "the cause of plaintiff's injuries may not be determined as a matter of law," and a "determination based on circumstantial evidence is essentially one to be made by the fact-finder, guided by the legal principles appropriate to such a determination." *Abramo v Pepsi-Cola Buffalo Bottling Co.*, 224 A.D.2d 980, 981 (4th Dept 1996).

Plaintiff-Respondent does not address, much less distinguish, any of the cases from this and/or other jurisdictions in which the courts found questions of fact regarding the adequacy of the safety equipment which defendants provided. *See, Lopez v FAHS Const. Grp., Inc.*, 129 AD3d 1478, 1479 (4th Dept 2015); *Sponholz v Benderson Prop. Dev., Inc.*, 273 AD2d 791, 792 (4th Dept 2000); *see also*, *Beesimer v. Albany Avenue/Route 9 Reality*, 216 AD 853 (3d Dept 1995).

As he did in the court below, Plaintiff-Respondent cites cases in which defendants' failures to provide safety devices were obvious and undeniable. In several, the subject ladders were clearly inadequate (e.g., *Burke v APV Crepaco, Inc.*, 2 AD3d

1279 (4th Dept 2003) (ladder was "too short" and shook when not held); *Woods v Design Ctr., Inc.,* 42 AD3d 876, 877 (4th Dept 2007) (ladder was locked it into place and fell anyway); and *Nephew v Klewin Bldg. Co., Inc.,* 21 AD3d 1419 (4th Dept 2005) (ladder in question actually buckled, i.e., bent, crumpled or collapsed), or were the type which lean up against or are permanently affixed to a wall and clearly must be secured in some manner (e.g., *Whalen v. ExxonMobil Oil Corp.*, 50 A.D.3d 1553, 1553-1554 (4th Dept 2008); and *Morin v Machnick Bldrs.,* 4 AD3d 668, 670 (2004); and *Garcia v Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 A.D.3d 524, 525 (1st Dept 2017) (ladder which had been on site and in position, was "jerry-rigged" at the top to a joist beam with grey metal wires), consisted of a makeshift configuration of separate ladders balanced on one another (e.g., *Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d 1135 (4th Dept 2008), or were placed in a clearly precarious fashion (e.g., *Alligood v Hospitality W., LLC,* 8 AD3d 1102 (2004) (ladder placed on ice); *Losurdo v Skyline Assoc, L.P.,* 24 AD3d 1235 (4th Dept 2005) (ladder erected on an uneven surface). In none, however, did plaintiff testify that the "type of ladder" in issue was "generally not ... affixed to anything" or that "it was not common practice to have any additional mechanical means to hold this type of ladder in place," as Plaintiff-Respondent did herein.

Plaintiff must proffer evidence that the owner improperly placed the ladder or failed to provide legally-mandated safeguards or "proper protection." Plaintiff-Respondent proffered no evidence that his ladder was unsecured, unstable, improperly placed or in any way, unsafe. Indeed, the device did not even collapse or malfunction in any fashion before, during or after the accident. Moreover, the subject ladder could have been locked into place, but Plaintiff-Respondent does not know if he did so prior to using it. He admitted that there was no device, piece of equipment or "safety" mechanism which, if provided, would have protected him from *his own decisions and actions*. While it alone may not require denial of summary judgment, the fact that the "manner in which the accident occurred is within the exclusive knowledge of the plaintiff...," taken with the other factors enumerated above, dictates that "plaintiff's testimonial version should be subjected to cross-examination and his credibility assessed by the fact-finder after a trial." *Carlos v Rochester General Hosp.*, 163 AD2d 894 (4th Dept 1990). *See also*, *Doan v Aiken & McGlauklin, Inc.*, 217 AD2d 908 (4th Dept 1995) (same result); *Marasco v Kaplan*, 177 AD2d 933 (4th Dept 1991) (same result).

Bonzcar continues to fail to demonstrate that he was not provided with enumerated safety equipment or that the device he was utilizing was defective or inadequate and proximately caused his accident, as the case law requires. For all of these reasons, AMC submits that the lower court erred in granting Bonczar

summary judgement on the Labor Law § 240 (1) claim and that this Court should reverse that decision.

C. **Defendant-Respondent Made a *Prima Facie* Showing that Plaintiff-Respondent was the Sole Proximate Cause of his Injuries**

Plaintiff-Respondent addresses the sole proximate cause defense simply by repeating that: 1) he need not prove the existence of a defect; and b) his testimony that the ladder "wobbled" is sufficient to create liability under the Labor Law. If that were the case, there would not be any sole proximate cause defense.

As the *Blake* Court stated, "it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury," and "if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation." *Id. See also, Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554, (2006); *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 (1998); *Cioffi v Target Corp.*, 114 AD3d 897, 898 (2014); *Corchado v 5030 Broadway Props., LLC*, 103 AD3d 768, 768-769 (2013); *Piotrowski v McGuire Manor, Inc.*, 118 AD3d 1368 (4th Dept 2014); *Bascombe v West 44th St. Hotel, LLC*, 124 AD3d 812, 813 (2d Dept 2015). "Extending the statute to impose liability in such a case," *Blake* held, "would be inconsistent with statutory goals since the accident was not caused by the absence of (or defect in) any safety device, or in the way the safety device was placed. *Blake*, 1 NY3d 280, *citing, Weininger v Hagedorn & Co.*, 91

N.Y.2d 958, 960 (1998) (in which the High Court held that the "Supreme Court erred . . . in directing a verdict in favor of plaintiff...on the issue of proximate cause" where "a reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under Section 240 (1) did not attach").

The cases on which Plaintiff-Respondent relies are identical to those discussed in the previous sections. The Court of Appeals has stated that defendant has not violated the statute when plaintiff cannot identify a defect in the ladder or a reason why a latter shifted before he fell. *See, Blake.* The Court emphasized that "[e]ven when a worker is not 'recalcitrant'... there can be no liability under Section 240(1) when there is no violation and the worker's actions . . . are the 'sole proximate cause' of the accident." Id.

Defendant-Respondent is not "speculating" when it refers to Bonczar's own sworn deposition testimony. In this case, Plaintiff-Respondent fails to identify any defects, deficiencies or improprieties in the equipment he was using. He testified that prior to using the ladder, "it's feasible" that he moved or re-positioned it and that he does not recall checking the positioning and whether he ensured that the ladder was locked into place. Bonczar was sure, however, that he had climbed and descended the device many times without incident on the day of the subject occurrence.

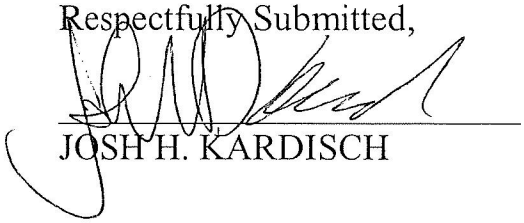
Clearly, there are questions of fact as to whether Plaintiff-Respondent was the sole proximate cause of this event. Therefore, it is respectfully submitted that the Court below should have denied Plaintiff-Respondent summary judgment on his Labor Law 240 (1) claim.

CONCLUSION

The Court below erred in granting Plaintiff-Respondent David Bonczar summary judgment on the issue of liability under Labor Law § 240 (1). Bonczar proffered no evidence that there was any defect, deficiency or inadequacy in the ladder with which he performed his job function or with any related safety equipment and he, therefore, did not establish *prima facie* that AMC violated the law. Moreover, Bonczar controlled the entire process which he claims proximately caused the alleged accident and he was, accordingly, the sole proximate cause of his injuries. Clearly, there are material issues as to Defendant-Appellant AMC's liability under Labor Law § 240 (1) which militate against summary disposition for Plaintiff-Respondent on that claim, and this Court should reverse the Lower Court's decision granting same.

Dated: New York, New York
May 26, 2017

Respectfully Submitted,



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