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January 11, 2021

Hon. John P. Asiello
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Bonczar v. American Multi-Cinema
APL-2020-00121

Dear Mr. Asiello:

I submit this letter on behalf of plaintiff-appellant David M. Bonczar pursuant to 22 NYCRR 500.11 (c) (2). Preliminarily, I note that the Court is reviewing two separate orders of the Appellate Division, Fourth Department: (1) the Memorandum and Order entered February 2, 2018 (Exhibit A hereto), in which the court, by a vote of 3 to 2, reversed the trial court and denied plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1); and (2) the Order entered July 17, 2020 (Exhibit B hereto), in which the court unanimously affirmed the trial court's final Judgment entered April 25, 2019 (Exhibit C hereto), which dismissed plaintiff's complaint based upon a jury verdict of no cause of action. The appeal from the final Judgment brought up for review the trial court's post-trial Decision and Order entered December 7, 2018

(Exhibit D hereto), which denied plaintiff's motion for a directed verdict as to liability.

Although the two appeals involve the same fundamental issue – whether plaintiff established defendant's liability under Labor Law § 240 (1) as a matter of law – the appellate records are distinct. Plaintiff will therefore address each appeal separately. Record references in the section relating to the Appellate Division's Memorandum and Order entered February 2, 2018 (Appeal No. 1) will be to the one-volume Record on Appeal filed herewith. Record references in the section relating to the Appellate Division's Order entered July 17, 2020 (Appeal No. 2) will be to the three-volume Record on Appeal filed herewith.

APPEAL NO. 1

THE NATURE AND PROCEDURAL HISTORY OF THE CASE

David M. Bonczar commenced this action to recover damages for personal injuries arising out of an accident that occurred on May 22, 2013, when he fell from an unstable ladder while engaged in the renovation of a movie theater in Webster, New York (Summons and Complaint, R. 19-25). Plaintiff named as defendant American Multi-Cinema, Inc. d/b/a AMC Theatres Webster 12 (as Successor in Interest to Loews Boulevard Cinemas, Inc. f/k/a Loew's

Boulevard Corporation and/or Loews Theater Management Corp. (hereafter, "AMC"), the theater's owner (R. 22, ¶ 4; R. 404, ¶ 6).

Following pretrial disclosure, plaintiff moved for partial summary judgment as to liability under section 240(1) (R. 7-18). Supreme Court, which did not render a written decision, granted the motion by order entered March 1, 2017 (R. 4-5). AMC appealed to the Fourth Department (R. 2-3).

By Memorandum and Order entered February 2, 2018, the Appellate Division reversed Supreme Court's order and denied plaintiff's motion (Exhibit A hereto). The three-justice majority held that, because plaintiff "acknowledged that he might not have checked the positioning of the ladder or the locking mechanism . . . [t]here is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." (Exhibit A hereto, p. 1.) 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." (Exhibit A hereto, p. 3 [Whalen, P.J. and Lindley, J., dissenting].)

As addressed more fully below in connection with Appeal No. 2, the issue of AMC's liability under section 240 (1) was subsequently tried before a jury from April 17 through 25, 2018. The jury returned a verdict in AMC's favor, and a final Judgment was entered on April 25, 2019 (Exhibit C hereto).

Plaintiff timely appealed to the Fourth Department, which affirmed the Judgment by Order entered July 17, 2020 (Exhibit B hereto). Plaintiff now appeals to this Court as of right pursuant to CPLR 5601 (d), thereby bringing up for review the Appellate Division's prior nonfinal Memorandum and Order entered February 2, 2018, denying plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1).

QUESTION PRESENTED

> Did the Appellate Division err in reversing Supreme Court's order granting plaintiff's motion for partial summary judgment as to liability under Labor Law § 240 (1)?

THE FACTS

In February 2013, AMC contracted to have its movie theater in Webster, New York renovated (R. 55-57; R. 107-132). The theater's fire alarm and sprinkler system were upgraded as part of the project (R. 93-94). All State Fire

Equipment of WNY (hereafter, "All State") performed the fire alarm work (R. 133-164).

Plaintiff David Bonczar, a senior fire protection and security technician with All State, worked on the upgrade (R. 171-172; R. 333). Mr. Bonczar testified that the work entailed retrofitting the existing fire alarm system by, among other things, running new wiring above the drop ceiling and installing new smoke detectors (R. 309-312; R. 317; R. 348). Other trades were working in the theater at the same time, he said, and there were a number of ladders present and available throughout the jobsite (R. 300; R. 315-323; R. 334). Mr. Bonczar used several of those ladders during the course of his work at the theater (R. 321-323).

On the morning of May 22, 2013, Mr. Bonczar and Bob Lutz, a fellow All State technician, were directed to install an additional smoke detector in the theater's cash room (R. 307-308). To do so, they had to run new wiring above the drop ceiling (R. 310-313; R. 334-335; R. 343). There were a number of ladders in the room, and they used them in order to reach the space above the ceiling (R. 334-338; R. 344-345; R. 391).

Mr. Lutz subsequently left the cash room and plaintiff remained behind, working alone (R. 300; R. 307; R. 311-313). During the course of that work,

plaintiff climbed to the third or fourth step of one of the ladders in order to reach the area above the ceiling (R. 344-348). The ladder, plaintiff said, was a six-foot fiberglass step ladder (R. 300; R. 338-339; R. 346). Plaintiff further stated that, prior to the time he used it, the ladder was "fully open" and "standing up" in the center of the room (R. 340-342).

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

> Q. Before you went up the ladder – I'm talking about specifically the time immediately prior to falling. So before you went up that ladder, did you check to make sure that the ladder was properly positioned?
> A. I don't recall. I'd like to say that, you know, that's something I try to do. I just can't be sure I did it that specific time.
> . . . .
> Q. Do you remember whether or not you looked to check whether the ladder was locked into place?
> A. I don't recall. [R. 343-344.]

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

ARGUMENT

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

Labor Law § 240 (1) provides:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

An owner's statutory duty to ensure that safety devices are "constructed, placed and operated as to give proper protection" is "nondelegable." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513 (1991). Owners are therefore absolutely liable for injuries proximately caused by a statutory breach even if they exercised no supervision or control over the work. *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 559 (1993). Furthermore, an owner's liability is not diminished by the worker's comparative negligence. *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 N.Y.3d 280, 286-287 (2003).

In *Blake*, this Court held that, "[i]n cases involving ladders . . . that collapse or malfunction for no apparent reason, we have . . . continued to aid plaintiffs with presumption that the ladder . . . was not good enough to afford proper protection." *Id.* at 289 n.8 (citations omitted). In accordance with that principle, New York's courts have held that summary judgment as to liability is appropriate not only where the ladder on which the plaintiff was positioned fell over (i.e., "collapsed"), but also where it tipped, wobbled, skidded, or shifted (i.e., "malfunctioned"), thereby causing the plaintiff to fall and sustain injuries.

Thus, in *Gordon*, this Court affirmed the Appellate Division's order granting partial summary judgment as to liability based on proof the plaintiff fell from a ladder when it "tipped." 82 N.Y.2d at 560. "The ladder did not prevent plaintiff from falling; thus, the 'core' objective of section 240 (1) was not met," the Court held. *Id.* at 561. *See also Garcia v. Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 A.D.3d 524, 525 (1st Dep't 2017) (holding that "[p]laintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240 [1]" [citations omitted]); *Hill v. City of New York*, 140 A.D.3d 568, 570 (1st Dep't 2016) (partial summary judgment granted in favor of plaintiff who fell when the ladder he was on "wobbled"); *Picano v. Rockefeller Center North, Inc.*, 68 A.D.3d 425,

425 (1st Dep't 2009) (partial summary judgment in plaintiff's favor warranted based on proof that the ladder upon which he was working "suddenly shifted or wobbled, and that no safety devices were provide to prevent the ladder from slipping or plaintiff from falling if it did").

Once a plaintiff satisfies his or her threshold evidentiary burden by establishing the existence of a statutory violation and proximate cause, plaintiff's motion for partial summary judgment will be denied only if defendant interposes competent, admissible proof "that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake*, 1 N.Y.3d at 289 n.8. *See also Batista v. Manhattanville College*, 28 N.Y.3d 1093, 1094 (2016) (reversing the Appellate Division, the Court granted plaintiff's motion for partial summary judgment under Labor Law § 240 [1] because "[d]efendants failed to raise a triable issue of fact whether the plaintiff was the sole proximate cause of his accident").

Partial summary judgment on the issue of liability is not precluded merely because no one other than the plaintiff witnessed the injury-producing incident. Thus, in *Klein v. City of New York*, 89 N.Y.2d 833 (1996), the Court of Appeals upheld the grant of partial summary judgment to a plaintiff who was the sole witness to his accident, in which he fell after the ladder upon which he was

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

In the present case, David Bonczar testified that he lost his balance and fell backward because the ladder shifted and wobbled as he was descending it (R. 300; R. 348-349; R. 358). AMC introduced no evidence contradicting that testimony or otherwise calling plaintiff's credibility into question. Thus, notwithstanding that his accident was unwitnessed, plaintiff is entitled to partial summary judgment as to liability under section 240 (1) based on the undisputed evidence establishing that he fell because the ladder wobbled and shook as he was descending it, causing him to lose his balance.

Contrary to the Appellate Division majority's opinion, plaintiff's testimony that he did not know why the ladder wobbled and shifted, and that he may not have checked the positioning of the ladder or the locking mechanism, does not raise a triable issue of fact as to whether " 'there was no statutory violation and that plaintiff's own acts or omissions were the sole proximate cause of the accident.' " (Exhibit A hereto, p. 1 [quoting *Blake,* 1 N.Y.3d at 289 n.8].) As stated by the dissent, "[t]he fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that 'malfunction[s] for no apparent reason' is entitled to 'a presumption that the ladder . . . was not good enough to afford proper protection' " (Exhibit A hereto, p. 2 [quoting *Blake*, 1 N.Y.3d at 289 n.8]).

As further stated by the dissent, the majority also erred in concluding that plaintiff himself raised a triable issue of fact by testifying that he could not recall whether, immediately before ascending the ladder, he had "checked the positioning of the ladder or checked that it was 'locked in place' " (Exhibit A hereto, p. 2). The dissent correctly concluded that, in light of plaintiff's testimony "that the ladder was upright and 'fully open' " before he ascended it, "it would be unduly speculative for a jury to infer from plaintiff's testimony that

the sole proximate cause of the accident was his alleged failure to check its positioning or its locking mechanism" (*id.* [citation omitted]).

As the dissent also stated, the majority erred in holding that this action was analogous to *Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.* (*id.*, pp. 2-3). In *Blake*, the plaintiff admitted that he was not sure if he had checked the locking clips on an extension ladder that retracted while he was on it. 1 N.Y.3d at 283-284. Thus, as the dissent in this case noted, "[b]ased on the injured worker's uncertainty and the fact that the accident occurred in the very manner that the extension clips were meant to prevent, it was logical for the jury to infer both that he had failed to lock the clips and that his negligence in that regard was the sole proximate cause of his injuries" (Exhibit A hereto, pp. 2-3 [citations omitted]).

In the present case, by contrast, the dissent correctly concluded that, "given that an A-frame ladder can wobble or shift for various reasons unrelated to its positioning or locking mechanism, and even for no apparent reason . . . plaintiff's deposition testimony does not support a nonspeculative inference that the sole proximate cause of his injuries was his alleged failure to check the positioning of the ladder or whether it was locked into place" (*id.*, p. 3 [citation omitted]).

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

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

APPEAL NO. 2

THE NATURE AND PROCEDURAL HISTORY OF THE CASE

The issue of AMC's liability under Labor Law § 240 (1) was tried before a jury from April 17 through 25, 2018. At the close of the evidence, plaintiff

moved for a directed verdict (R. 812-825). The court reserved decision (R. 825). The jury then returned a verdict in which it found that: (1) Labor Law § 240 (1) was not violated by a failure to provide proper protection; (2) plaintiff failed to check the positioning of the ladder; (3) the ladder was improperly positioned to perform the work; (4) plaintiff fell because the ladder was improperly positioned to perform the work; and (5) the improper position of the ladder was the only substantial factor in causing plaintiff's fall (Trial Transcript, R. 960-961; Verdict Sheet, R. 1048-1051, ¶¶ 1, 3-6).

Plaintiff thereafter made a post-trial motion, seeking, inter alia, a directed verdict under CPLR 4401 based on his trial motion (on which the court had reserved decision) (R. 1323-1350). By Decision and Order entered December 7, 2018, the trial court denied plaintiff's post-trial motion in its entirety (Exhibit D hereto). A final Judgment in defendant's favor was entered on April 25, 2019 (Exhibit C 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, which did not write a decision, unanimously affirmed the Judgment by Order entered July 17, 2020 (Exhibit B hereto). In addition to appealing the Order as of right pursuant to CPLR 5601 (d), thereby

bringing up for review the Appellate Division's prior Memorandum and Order denying plaintiff's motion for partial summary judgment, plaintiff moved pursuant to CPLR 5602 (a) (1) (i) for leave to appeal from the Order entered July 17, 2020, thereby allowing him to obtain review of the Order insofar as it affirmed the trial court's post-trial order denying plaintiff's motion for a directed verdict. The Court of Appeals granted leave to appeal by order entered November 24, 2020.

QUESTION PRESENTED FOR REVIEW

> 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?

THE FACTS

1. *The Trial Proof.*

In 2013, David Bonczar's employer was installing and upgrading fire alarm systems in conjunction with the renovation of a movie theater owned by defendant AMC (R. 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. 205-206). 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. 718-719). 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) (Exhibit A hereto), 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).

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

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

Pursuant to CPLR 4401, "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of evidence presented by an opposing party with respect to such cause of action or issue . . . ." Judgment is warranted where, "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997). Although the sufficiency of the

trial evidence is, initially, a matter for the trial court's consideration, it presents a question of law and is thus subject to Court of Appeals review. *See Killon v. Parrotta*, 28 N.Y.3d 101, 108 (2016) ("Because determining whether a jury verdict was utterly irrational involves a pure question of law, this Court may look at the trial evidence and make that determination").

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

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

That principle applies with equal force where, as in the present action, the Appellate Division rather than the trial court denied a party's motion for summary judgment. In *Smith v. Hooker Chemicals & Plastics Corp.*, 89 A.D.2d 361 (4th Dep't 1982), *appeal dismissed*, 58 N.Y.2d 824 (1983), the Fourth Department – reversing the trial court – denied the plaintiff's motion for partial

summary judgment as to liability under Labor Law § 240 (1). Noting that plaintiff had testified he fell because safety lines that were attached to his safety belt gave way, while a coworker testified that plaintiff was not using the safety lines or belt, the court held that there was a triable question of fact as to whether plaintiff had "declined to use the available safety devices . . . ." 89 A.D.2d at 363-363.

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

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

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

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

C. DAVID BONCZAR WAS ENTITLED TO A DIRECTED VERDICT.

As stated by the drafters of New York's Pattern Jury Instructions, 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." N.Y. PJI, General Principles. 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 (a) plaintiff never checked the positioning of the ladder, which wobbled or shifted because it was improperly positioned, or (b) plaintiff never checked whether the spreader bars were fully extended, as a result of which the ladder wobbled or shifted because the spreader bars were in fact not fully extended, and (c) plaintiff's failure to properly position the ladder and/or check the spreader bars constituted the sole substantial factor in causing the ladder to shift or wobble, and plaintiff to fall (R. 935-937).

Upon applying those instructions in light of the trial proof, the jury could not have rationally rendered the verdict that it did. At trial, David Bonczar described in detail the steps he took to ensure that, prior to using it, the ladder was properly positioned with the spreader bars fully extended in their locked position. He testified that he visually inspected the ladder, observed that it was free of any apparent defects, and "grabbed the – one of the rungs on the steps and the back support on the back of the ladder and made sure, tugged on it, that the ladder was fully opened to its furthest position" (R. 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. 205-206).

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 ascent 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 (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 temporally limited "specifically [to] the time immediately prior to falling" – and reiterated that he had in fact visually and physically inspected and tested the ladder to confirm its stability at the start of his installation work (R. 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 trial testimony. Moreover, Mr. Paine did not opine that Mr. Bonczar had in fact improperly positioned or set up the ladder, and his testimony does not support an inference that plaintiff failed to do so. Indeed, Mr. Paine acknowledged on direct

examination that the ladder plaintiff used had been "*properly set up*" (R. 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 (Appeal No. 2), 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*, 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 due to plaintiff's failure to check its position, the jury's finding that Labor Law § 240 (1) was not violated by a failure to provide proper protection is equally infirm. Consistent with settled

New York law,[1] 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 as to that issue, 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 Defendant-Respondent (Appeal No. 2), pp. 17-18. Such a finding would be precluded by the court's charge that (1) it was undisputed the ladder shifted or wobbled for no apparent reason, and (2) the presumption that the ladder failed to provide adequate protection could be overcome only by evidence establishing

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[1] *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").

that plaintiff failed to check that the ladder was properly positioned and that the spreader arms were fully extended (R. 935-938).

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 inference, "there is no rational process by which the fact trier could base a finding in favor of" the defendant. *Szczerbiak v. Pilat*, 90 N.Y.2d at 556. Based upon its independent review of the trial evidence, this Court should therefore grant a directed verdict in plaintiff's favor. *Killon v. Parrotta*, 28 N.Y.3d at 108.

CONCLUSION

As demonstrated above, in Appeal No. 1 the Court 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, as the Memorandum and Order "necessarily affects the judgment" within the meaning of CPLR 5601 (d) and its reversal renders the jury's verdict and the Judgment entered thereon legal nullities.

Lipsitz Green Scime Cambria LLP

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).

Respectfully submitted,

LIPSITZ GREEN SCIME CAMBRIA LLP

John A. Collins

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EXHIBIT A

Memorandum and Order of the Appellate Division, Fourth Department, 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

EXHIBIT B

Order of the Appellate Division, Fourth Department, 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

EXHIBIT C

Judgment of the Supreme Court, County of Erie, entered April 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

Corp.) have judgment dismissing plaintiff David M. Bonczar's Complaint in this action.

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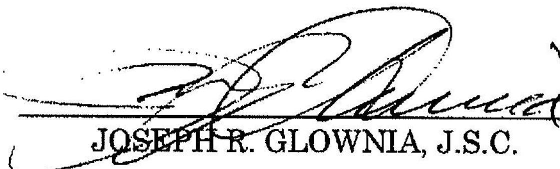

JOSEPH R. GLOWNIA, J.S.C.

GRANTED:

EXHIBIT D

**Decision and Order of the Supreme Court, County of Erie,
entered December 7, 2018**

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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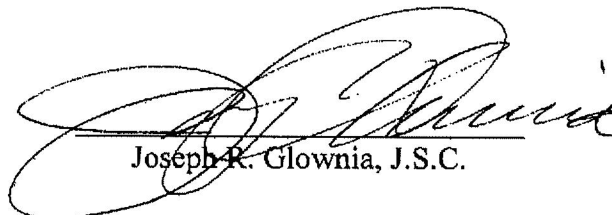

Joseph R. Glownia, J.S.C.

CERTIFICATE OF COMPLIANCE
PURSUANT TO
22 NYCRR 500.11 (m)

1. Plaintiff's letter submission 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 letter submission contains 6,992 words, as determined by the word count of the above-identified word processing system, inclusive of all text in the body of the letter but exclusive of the exhibits annexed thereto.

Dated: January 11, 2021

LIPSITZ GREEN SCIME CAMBRIA LLP

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