

To be Argued by:
JOHN A. COLLINS, ESQ.
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STATE OF NEW YORK
Supreme Court

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

Appellate Division
Docket Number:
CA 19-00899

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DAVID M. BONCZAR,

Plaintiff-Appellant,

vs.

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

—
Erie County Index No. 804799/2014.

REPLY BRIEF FOR PLAINTIFF-APPELLANT
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ARGUMENT

POINT I

THE JURY VERDICT FINDING THAT LABOR LAW § 240 (1) WAS NOT VIOLATED, AND THAT PLAINTIFF'S CULPABLE CONDUCT CONSTITUTED THE SOLE PROXIMATE CAUSE OF HIS FALL, IS IRRATIONAL OR, ALTERNATIVELY, CONTRARY TO THE WEIGHT OF THE EVIDENCE

In Point I of his principal brief, plaintiff demonstrated that he was entitled to a directed verdict under CPLR 4401 because the jury could not have rendered a verdict in defendant's favor by any rational process. In Point II of his principal brief, plaintiff demonstrated that, in the alternative, the verdict was contrary to the weight of the evidence, thus requiring that it be set aside pursuant to CPLR 4404 (a). Defendant's arguments to the contrary are predicated on a disregard of the evidence, the governing law, and the court's charge.

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, on the day of the incident, plaintiff (a) never checked the positioning of the ladder, which wobbled or shifted because it was improperly positioned, or (b) never checked whether the spreader bars were fully extended, as a result of which the ladder wobbled or shifted because the spreader bars were in fact not fully extended; and (4) plaintiff's failure to properly position the ladder and/or check the spreader bars constituted the sole substantial factor in causing the ladder to shift or wobble, and plaintiff to fall (R. 935-937).

At trial, David Bonczar described in detail the steps he took to ensure that, prior to using it, the ladder was properly positioned with the spreader bars fully extended in their locked position. He testified that he visually inspected the ladder, observed that it was free of any apparent defects, and “grabbed the – one of the rungs on the steps and the back support on the back of the ladder and made sure, tugged on it, that the ladder was fully opened to its furthest position” (R. 102-105; R. 115-116; R. 124-125; R. 161; R. 163; R. 205-206). Plaintiff explained that, by doing so, “the [hinged spreader] arms drop down to the bottom” and the legs are “fully extended”

(R. 104). And, he further explained, when the legs are fully extended with the spreader bars “forced downward,” the spreader bars are necessarily “locked into place” (R. 206).

Mr. Bonczar further testified that, during the course of his ensuing work, he climbed up and down the ladder four to six time without incident (R. 105-106; R. 138). Throughout that time he visually observed that the ladder remained fully opened, but did not physically test it before each 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 (Charge, R. 936-937), did not meet its evidentiary burden. In cross-examining Mr. Bonczar, defense counsel read a portion of his examination before trial, in which he testified that he could not recall if he had checked the position of the ladder and the spreader arms immediately before making the ascent that resulted in his fall (R. 161-162; see Bonczar Deposition, R. 1249-1250). Mr. Bonczar explained that his deposition answer was responsive to defense counsel’s question – which was limited “specifically [to] the time immediately prior to falling” – and reiterated that he had in fact visually and physically inspected and tested the

ladder to confirm its stability at the start of his installation work (R. 161-162).

Daniel Paine, defendant's construction site safety expert, did not criticize the methods that David Bonczar employed to ensure the ladder was properly positioned and set up, as described by Mr. Bonczar during the course of his testimony. Moreover, Mr. Paine did not opine that Mr. Bonczar had in fact improperly positioned or set up the ladder, and his testimony does not support an inference that plaintiff failed to do so. Indeed, Mr. Paine asserted on direct examination that the ladder plaintiff used had been "*properly set up*" (R. 662 [emphasis supplied]).

Nor does Mr. Paine's testimony support an inference that plaintiff's fall was proximately caused by the ladder's improper positioning. Mr. Paine asserted that the question of whether Mr. Bonczar "had set [the ladder] up properly and performed his work *isn't the issue*" (R. 659 [emphasis supplied]). Rather, he opined, Mr. Bonczar proximately caused his fall by failing to maintain three-point contact while descending (R. 657-659; R. 662). Mr. Paine asserted that, when the ladder shook and wobbled, plaintiff should not have missed a step or let go of the ladder with his hands (R. 718-722).

Defendant argues on appeal 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.” Brief for Defendants-Respondents, p. 19. Defendant's argument is fundamentally flawed because – in accordance with the trial court's charge (R. 935-937) – plaintiff's purported failure to maintain three-point contact did not constitute a basis upon which the jury could make a sole proximate cause determination. Rather, the only two potential grounds for such a finding were plaintiff's purported failure to check the positioning of the ladder, or to check whether the spreader bars were fully extended (R. 935-937).

In any event, plaintiff's failure to maintain three-point contact after the ladder shifted or wobbled constituted nothing more than comparative negligence, and does not negate defendant's statutory liability based on the ladder's sudden and unexpected movement. *See Blake v. Neighborhood Hous. Servs. of New York City*, 1 N.Y.3d 280, 289 (2003) (“comparative negligence is not a defense to absolute liability under the statute”); *Hill v. City of New York*, 140 A.D.3d 568, 568-570 (1st Dep't 2016) (where the

ladder upon which plaintiff was working wobbled, causing him to lose his balance and fall, his alleged comparative fault was not a defense to liability under section 240 [1]). Thus, contrary to defendant's argument and its expert's assertion, 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, as demonstrated above and in plaintiff's principal brief, the jury's finding that the ladder was improperly positioned because plaintiff failed to check its position is without evidentiary support and thus impermissibly speculative. For that reason, 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

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").

conduct in failing to check the ladder's position and/or check whether the spreader bars were extended constituted the only substantial factor in causing the ladder to shift or wobble (R. 936-937). Given defendant's failure to sustain its burden, the jury's finding that no statutory violation occurred is irrational or – at a minimum – against the weight of the evidence.

Contrary to defendant's further argument, the jury could not have found that plaintiff "simply lost his balance and fell." Brief for Defendants-Respondents, pp. 17-18 (quoting *Kopasz v. City of Buffalo*, 148 A.D.3d 1686, 1686 [4th Dep't 2016]). Such a finding would be precluded by the court's charge that it was undisputed the ladder shifted or wobbled for no apparent reason, and that the presumption that the ladder failed to provide adequate protection could be overcome only by evidence establishing that plaintiff did not check the ladder's positioning and/or never checked to ensure the spreader arms were fully extended (R. 935-938).

In sum, David Bonczar is entitled to judgment as a matter of law under CPLR 4401 because, when the evidence is viewed in the light most favorable to defendant, and defendant is afforded the benefit of every inference, there is no rational process by which the jury could have found in its favor. *See Chune v. Moore*, 142 A.D.3d 1330, 1331 (4th Dep't 2016). This Court's prior denial of plaintiff's motion for partial summary judgment

on the issue of liability does not preclude a directed verdict based on the evidence presented at trial. *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).

Alternatively, the verdict should be set aside, and a new trial granted, because “the evidence so preponderated in favor of [plaintiff] that the verdict could not have been reached on any fair interpretation of the evidence.” *Lolik v. Big V Supermarkets, Inc.*, 86 N.Y.2d 744, 746 (1995). As addressed above, plaintiff described in detail the steps he took to ensure the ladder was properly set up and positioned before he began his work, and defendant’s expert did not assert that the steps plaintiff took were improper or inadequate. Rather, the expert conceded that the ladder was properly placed, and opined that plaintiff was remiss in letting go of it after it shifted or wobbled. Such proof does not support the jury’s finding that there was no statutory violation and that the sole proximate cause of plaintiff’s fall was his failure to check the position of the ladder before using it (R. 1049-1051).

POINT II

CONSIDERED IN CONJUNCTION WITH THE LACK OF EVIDENTIARY SUPPORT FOR THE VERDICT, DEFENSE COUNSEL'S IMPROPER CONDUCT ESTABLISHES THAT THE VERDICT SHOULD ALSO BE SET ASIDE IN THE INTEREST OF JUSTICE

Defendant contends that its attorney engaged in nothing more than zealous advocacy during the course of the trial. As detailed in plaintiff's principal brief, however, defense counsel posed irrelevant questions to plaintiff and made unfounded factual assertions in an improper effort to prejudice plaintiff before the jury (Brief for Plaintiff-Appellant, pp. 36-38). In adjudicating plaintiff's motion to set aside the verdict in the interest of justice, the trial court acknowledged that defense counsel engaged in objectionable and improper conduct throughout the trial, both in the jury's presence and outside of it (R. 12-13).

Although the trial court concluded that "there is no definitive indication that the jury was improperly influenced by counsel's inappropriate conduct" (R. 13), defense counsel's improper conduct, and its influence on the verdict, must be considered in conjunction with the question of whether the verdict was against the weight of the evidence. *See Nicaastro v. Park*, 113 A.D.2d 129, 133-134 (2d Dep't 1985) (the court recognized that CPLR 4404 (a)'s interest-of-justice factors may "intervene[] to flavor" the

resolution of a weight-of-the-evidence motion brought under the same provision); *Brown v. Petracca & Son, Inc.*, 124 A.D.2d 772, 773 (2d Dep't 1986) (noting that defendant's injection of irrelevant arguments in defense of a Labor Law § 240 [1] claim "could have affected the jury's determination," which was contrary to the weight of the evidence).

As demonstrated above and in plaintiff's principal brief, the verdict in this case was not supported by the trial proof, and is thus contrary to the weight of the evidence. Even if defense counsel's improper conduct would not, in and of itself, warrant setting aside the verdict solely in the interest of justice, the Court can reasonably infer that, to some degree, it flavored both the jury's perception of the issues and resolution of the facts. The verdict should therefore be set aside on both weight-of-the-evidence and interest-of-justice grounds.

CONCLUSION

When viewed in the light most favorable to defendant, and with all permissible inferences drawn in its favor, there is no rational process by which the jury could find in defendant's favor. Plaintiff is therefore entitled to a directed verdict pursuant to CPLR 4401.

Alternatively, and at a minimum, the verdict should be set aside and a new trial granted because (1) the verdict is contrary to the weight of the evidence, and (2) defense counsel's improper conduct was unduly prejudicial and tainted the proceeding, thus requiring that the verdict be set aside in the interest of justice.

Dated: June 1, 2020

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CERTIFICATE OF COMPLIANCE
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1. This Brief was prepared on a computer with Microsoft Word using double spaced Times New Roman 14-point type, a serified, proportionally spaced type font.
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Dated: June 1, 2020

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