Appellate Division Docket No. CA 19-00899
Erie County Clerk's Index No. 2014-804799

Court of Appeals

of the

State of New York

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.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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September 4, 2020

CORPORATE DISLCOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), Defendant hereby discloses the following: American Multi-Cinema, Inc. is a wholly-owned subsidiary of AMC Entertainment Holdings Inc. AMC Entertainment Holdings Inc. is a public company traded on the New York Stock Exchange under the symbol "AMC." AMC Entertainment Holdings' majority shareholder is Dalian Wanda Group Co., Ltd., which is a private company. No publicly held corporation owns 10% or more of AMC Entertainment Inc.'s stock.

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QUESTION PRESENTED

1. Viewing the evidence in the light most favorable to Defendant, whether the trial court erred in denying Plaintiff's motion for an order directing a verdict in his favor pursuant to CPLR 4401 on the issue of Defendant's liability under Labor Law § 240 (1) where Plaintiff's credibility was at issue, and where there were questions of fact as to whether Plaintiff properly positioned and inspected the ladder prior to his fall and whether Plaintiff was the sole proximate cause of his accident.

BRIEF ANSWER

1. The New York State Supreme Court, Appellate Division Fourth Department said "No," and affirmed the decision of the trial court.

STATEMENT OF JURISTICTION

Defendant does not contest this Court's subject matter jurisdiction pursuant to: (1) CPLR 5601(d) with regard to the Fourth Department's reversal of summary judgment on liability to Plaintiff; or (2) pursuant to CPLR 5602(a)(1)(i) with regard to the Fourth Department's affirmance of the trial court's denial of Plaintiff's motion to direct a verdict both before and after trial, and the entry of Judgment.

COUNTER-STATEMENT OF FACTS

A. Brief Summary of Plaintiff's Alleged Accident

Plaintiff's accident allegedly occurred on May 22, 2013, when he was working for All State Fire Equipment of WNY installing a fire alarm and sprinkler system at the premises owned by Defendant. Plaintiff was working in the "cash room" of the premises at the time. In order to perform his job, Plaintiff used a 6-foot, A-frame ladder that was already located in the cash room before Plaintiff started his work. Before first ascending the ladder, Plaintiff claimed that he visually inspected the ladder to ensure that it was free of defects and pulled the legs apart, so that they were fully extended and locked into place. Plaintiff ascended and descended the ladder several times prior to his fall. Critically, Plaintiff admitted that he did not inspect the ladder before the final time he ascended the ladder.

B. Plaintiff Could Not Recall Many Salient Facts Concerning His Accident, Which Created Credibility Issues For The Jury To Resolve

Plaintiff was working alone at the time of the alleged occurrence (R. 100,

135-136) and he was the only individual with first-hand knowledge of the occurrence who testified at trial. Although Plaintiff testified that his co-worker, Justin Dommegala witnessed his fall (R. 106-107, 141), opposing counsel never called this individual to the stand, therefore, no one corroborated Plaintiff's version of the events.

Indeed, Plaintiff—the claimant and only purported eyewitness—testified that he does not remember many of the circumstances which are germane to the Labor Law § 240 (1) analysis, without evidence of which the triers of fact could not have reasonably found in his favor. Specifically, Plaintiff testified at trial that inasmuch as his alleged fall occurred five (5) years prior, he could not recall:

a. how the subject ladder came to be present, set up, or positioned in the "cash" room in the first place (R. 159, 166) (but the jury also heard his deposition averment that it would have been "feasible" for him to have brought the ladder into the room and set it up himself (R. 158));

b. whether the ladder had been moved when he temporarily left the cash room at one point (the ladder "could have been [moved] between when I was there and when I came back.") R. 138-139;

c. whether he checked the ladder's positioning or whether the legs were fully-extended, fully opened, or locked, *i.e.* the ladder's stability, immediately before his last ascent. R. 105-106, 161-162. Plaintiff explicitly testified that he did not recall pushing the ladder's bars down or checking to make sure they were locked into place (R. 205-206), or inspecting the ladder's stability in any manner, relying instead on having visualized the arms in the down position and believing that they were "locked";

d. where the ladder was positioned in the cash room – alternating his testimony between the "center," "middle," "a few feet from the

door," and "inside of the doorway to the right a little bit." R. 137-142;

e. where the smoke detector which he was servicing was located in the ceiling and whether its placement required him to reach directly above or above and to one side of the ladder. R. 187-190; and

f. whether he used the ladder earlier that day. R. 164-165.

C. Plaintiff's Testimony Included Various Inconsistencies, Also Creating Credibility Issues That the Trial Court Properly Left To The Jury

Plaintiff's testimony also included various inconsistencies. At trial, Plaintiff testified that initially, there were "one or two ladders" in the cash room (R. 97-99; 102-103, 155), but that when he left and returned, there was one "six-foot A-frame ladder that was fully extended, standing freely in the middle of the room." R. 101, 155. On cross-examination, the jury heard Plaintiff's pre-trial deposition testimony that he could not recall how many ladders were available for his use (R. 156-157), and that he did not know whether he used one that was already there or one that he brought into the room (and set up and positioned himself). R. 1246-1248. Plaintiff also testified at trial that while he was not certain, the ladder he used looked like one belonging to his employer. R. 163, 166.

Additionally, although Plaintiff testified that the ladder was "fully extended" when he returned to the cash room, Plaintiff also testified that he was still able to "pull the legs apart". R. 104-105, 115-116, 124 - 125, 161, 163, and 205-206. If the ladder was indeed properly set up in the room before Plaintiff arrived, the

spreader arms would have been in place (*i.e.*, in the down position), and Plaintiff would not have been able to separate the two sides any further.

Among a host of other issues, the jury was left to decide, therefore, whether the ladder was set up and positioned with the legs fully extended and the hinged spreader bars locked in place when Plaintiff came back to the room or whether he did so himself. Indeed, the jury note that asked about the word "positioning" (R. 1057) evinces that at least at one juncture, the jurors were confused as to Plaintiff's testimony on this point, and that after getting clarification and deliberating further, they resolved the issue against Plaintiff.

D. Defendant's Safety Expert Opined That Plaintiff's Accident Was Caused By Plaintiff's Failure To Properly Inspect The Ladder, As Well As His Failure To Properly Use The Ladder

Contrary to Plaintiff's contention, Defendant's safety expert, Daniel Paine, did take issue with the manner in which Plaintiff inspected and tested the ladder if not initially, then immediately before he climbed it for the last time. As the trial court indicated in denying Plaintiff's motion, Mr. Paine told the jury that:

> the person who is using the [ladder] needs to use it properly and safely…should set it up properly and inspect and check to make sure the device is locked and stable *every time [he] use]s] it*.

R. 742. As indicated above, Plaintiff did not remember much about the set-up, positioning, securing, movement or location of the subject ladder. He testified repeatedly, however, that he "visually looked" at it and concluded that the device had

no "apparent defects" before he first climbed it. R. 102, 115-116. The critical point is that Plaintiff "could not say for sure" that he checked the device "that final time" (R. 161-162) which, according to Mr. Paine (R.742), he should have done.

Plaintiff also testified at trial that he was "transitioning down the ladder through the drop ceiling" and "shifting his hands" when the ladder "shifted" and "wobbled," causing him to fall. R. 106, 164, 166. He swore that he could not "say for sure" whether he released his right hand causing him to miss a step, testifying as follows:

> Q. As you were coming down off the ladder, first you released your right hand as you're transitioning down, right?
>
> A. First I would have probably released -- I can't say for sure but it was -- my left hand was solidly on the ladder and I was transitioning through the drop ceiling. As I was doing that and stepping down, when I lost balance, that's when I lost grip on my right hand and I fell to my back.

R.166-167. According to the above answer – in which he said nothing about the ladder moving – Plaintiff released his right hand as he started to descend, lost his balance, lost his grip, and fell to his back. Plaintiff's trial testimony about the occurrence is consistent with his examination before trial testimony that he had "changed positions with the right side of his body" (R. 168), released his hands from the ladder, "lost [his] balance and fell onto [his] back" (R. 169), again saying nothing about the ladder having moved in any manner. And while Plaintiff also testified at

his deposition and at trial that the ladder "shifted" and "wobbled" (but did not fall) as he descended it, he did not know what, if anything other than his own actions, caused it to do so.

For the above reasons, Mr. Paine's testimony with regard to Plaintiff maintaining safe and appropriate contact with the ladder on his descent was significant. Defendant's safety expert testified that whether Plaintiff continued "three-point contact" while climbing down the ladder is an important concern because "if you do that, you wouldn't fall... *(e)specially (since) the ladder didn't fall*, so he fell off the ladder, not the other way around." R. 659, 662-663.

Plaintiff could not identify the reason the ladder shifted or wobbled. The trial court articulated several ways in which Defendant could overcome the presumption that it failed to provide the required proper protection, to wit, by showing: (1) that Plaintiff did not check the ladder's positioning, which positioning was improper and caused the device to shift and wobble; or (2) that Plaintiff did not check whether the spreader arms were fully extended, that said arms were not fully extended, and that that caused the device to shift and wobble. R. 936-937.

The jury ultimately correctly reached a verdict "in accordance with the principles of law charged by the court and *the facts as (it) found them to be ..."* in Defendant's favor as follows: (1) Defendant did not violate Labor Law § 240(1) by failing 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. R. 960-961, 1048-1051.

The trial judge should have had the jury end its inquiry after determining that Defendant had not violated Labor Law § 240(1), and not proceed to consider whether Plaintiff was the sole proximate cause of this occurrence. Instead, the court had the jury return its verdict after deciding that Plaintiff fell because he failed to check and properly position the ladder and failed to maintain a safe level of contact with the device. R. 1048-1051.

ARGUMENT

POINT I

PLAINTIFF HAS NOT ESTABLISHED THAT THE ISSUE IN THIS CASE REQUIRES CONSIDERATION BY THIS COURT

Pursuant to 22 NYCRR § 500.22 (b) (4), motions for permission to appeal to the Court of Appeals in civil cases must contain "[a] concise statement of . . . why the questions presented merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."

Here, Plaintiff has made no such statement to this Court. Indeed, although Plaintiff asserts that the questions in this appeal present "significant" issues, he in no way identifies or explains why the issues are significant. He certainly does not allege that these "issues" are "novel" or "of public importance" and, indeed, they are not. This is likely because he cannot support such an allegation with competent evidence from the record. This appeal presents no novel issues, issues that present a conflict with prior decisions of this Court, or issues that involve a conflict amount the departments of the Appellate Division. Instead, this motion seeks review of the jury's legitimate and factually supported verdict in a Labor Law § 240(1) dispute where there are questions of fact as to whether Plaintiff properly positioned and inspected the ladder at the critical time and whether he was the sole proximate cause of his accident. These questions of fact where properly determined by the jury at the

trial court level who had the opportunity to review the evidence first-hand and make important credibility determinations. Thus, the trial court properly denied Plaintiff's motion for a directed verdict and the Appellate Division properly affirmed that decision. There is no issue in the case that merits review by this Honorable Court.

POINT II

THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AS TO DEFENDANT'S LIABILITY UNDER LABOR LAW § 240(1) AND THERE IS, THEREFORE, NO REASON FOR THIS COURT TO ENTERTAIN THIS APPEAL

CPLR 4401 provides as follows:

> 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 the motion shall be specified. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties.

In considering a motion to direct a verdict,

> the court cannot properly undertake to weigh the evidence. Its duty is to take that view of the evidence most favorable to the nonmoving party, and from the evidence and the inferences reasonably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the moving party. The test is whether the trial court could find 'that by no rational process could the trier of the facts base a finding in favor of the [party moved against] upon the evidence presented'.

Wessel v Krop, 30 AD2d 764, 765 (4th Dept. 1968); *Fernandes v Allstate Ins. Co.*, 305 AD2d 1065, 1065 (4th Dept. 2003); *See also, Martin v Fitzpatrick*, 19 AD3d 954 (3rd Dept. 2005); and *Butler v N.Y. State Olympic Reg'l Dev. Auth.*, 292 AD2d 748 (3rd Dept. 2002). It is also a basic principle of law that "it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual

issue of fact, that the court may properly direct a verdict". *Cohen v Hallmark Cards, Inc.,* 45 NY2d 493, 499 (1978).

All of the elements which determine whether a plaintiff was the sole proximate cause of his injury present issues of fact for a jury to decide. *Lopez* v. *FAHS Canst. Grp., Inc.,* 129 AD3d 1478, 1479 (4th Dept. 2015); *Beesimer* v. *Albany Avenue/Route 9 Realty,* 216 AD2d 853, 854 (3rd Dept. 1995). Thus, in *Weininger, supra,* the Appellate Division 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."

Here, it is clear that Plaintiff was not entitled to a directed verdict either during trial or after trial. Plaintiff testified: (1) that he visually inspected the ladder before *first* ascending it, and that he observed that it was free of any defects (R. 102); (2) that he had climbed and descended the device "maybe four to six times" before the occasion on which he fell (R. 105, 142, 162-163); and (3) that he released his right hand causing him to lose his balance and miss a step as he "transitioned down the ladder" for the last time. R. 102, 115-116.

Apart from the aforementioned, Plaintiff "forgot" more about the circumstances which are relevant to his case and the Labor Law § 240(1) analysis than he "remembered." As discussed above, Plaintiff did not recall whether or not he brought the ladder into the room and set it up, which of several ladders he used,

whether he did anything other than visually inspect the device to determine its stability, where the ladder was placed in proximity to the smoke detector he was wiring in the ceiling, and whether he checked to see if the ladder was properly positioned and locked *immediately before his last ascent.* R. 161-162.

Just as Plaintiff did, defense expert Thomas Paine told the jury that there was nothing unstable or defective about the subject ladder. Defendant's expert did not reject one manner in which Plaintiff was the sole proximate cause of this event in favor of another, as Plaintiff suggests. Rather, he linked two acts/omissions together, testifying that if Plaintiff had set up the ladder properly and maintained three-point contact, he would not have missed a step, much less fallen, as evidenced by the undisputed fact that only Plaintiff—not the ladder—fell to the ground. R. 721-722. But whether Mr. Paine concluded that the ladder wobbled because Plaintiff 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.

In sum and substance, defense expert Paine, testified: (a) that there was nothing unstable or defective about the ladder in question; and (b) that plaintiff's acts and/or omissions–in one form or another–were the sole proximate cause of this event. Thus, the jury quite reasonably concluded from Plaintiff's and the defense

expert's testimony that Plaintiff's acts and/or omissions, in one form or another, were the sole proximate cause of this event.

Given Plaintiff's admission that he did not find the ladder to be defective, he had (and has) no choice but to insist, as he did at every juncture and throughout the trial, that the mere fact that his client fell from a height proves, *prima facie*, that Defendant violated the Labor Law. In accordance with the case law cited above, however, the mere fact that Plaintiff fell does not prove that Defendant violated the Labor Law by any measure.

Further, while Plaintiff highlights several differences between his deposition and trial testimony, he does not recognize that the jury is charged with judging credibility and reconciling contradictory statements, believing one or the other, or rejecting all. The jury heard Plaintiff's live trial testimony and several contradicting excerpts from his deposition testimony, and reasonably determined that Plaintiff did not make out a *prima facie* showing that Defendant violated Labor Law § 240(1) by failing to provide proper protection and that Plaintiff's acts and/or omissions as described above were the sole proximate causes of his fall.

In deciding Plaintiff's motions for a directed verdict, the trial recognized that: (1) "Plaintiff testified that he went up and down the ladder several times and could not recall having checked the spreader arms/locking mechanism immediately before going up… for the last time"; and (2) "that Mr. Paine testified that Plaintiff's failure to make sure the spreader arms were locked and his failure to maintain three points of

contact on the ladder, was the only cause of the accident". R. 10. Accordingly, the court concluded, "a rational jury could conclude that the Plaintiff's conduct was the sole proximate cause of the accident." R. 10-11. Insofar as the jury determined that Defendant did not violate the law and that Plaintiff was the sole proximate cause of the subject occurrence, the trial below properly denied Plaintiff's motion for a directed verdict pursuant to CPLR 4401, and the Appellate Division correctly affirmed that denial. As such, there is no reason for this Court to entertain this appeal.

CONCLUSION

For the foregoing reasons, Defendant respectfully submits that Plaintiff did not set forth any basis upon which the trial court should have either directed a verdict in his favor – either during or after trial. Moreover, Plaintiff did not articulate any issues which are "novel" or "of public importance" sufficient to trigger this Court's review. Accordingly, this Court should deny Plaintiff's motion for leave to appeal in its entirety and award further and other relief as may seem just and proper under the circumstances.

Dated: September 3, 2020
East Meadow, New York

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 500.13(c)(1)

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this Brief, the total word count for all printed text in the body of the Brief exclusive of material omitted under Rule 500.13(c)(3), is 3,512 words.

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Dated: September 3, 2020

Trishé L.A. Hynes, Esq.