IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LEANDRO TLAPECHCO, Plaintiff, v. HANDLER CORPORATION, a Delaware corporation, FH WEST, LLC, a Delaware limited liability company, and HANDLER DEVELOPMENT, INC., a Delaware corporation, LEROY FISHER, JR., individually and d/b/a LEROY FISHER GENERAL CONTRACTOR and STATE DRYWALL CO., INC., AGUSTIN GUSMAN, individually and d/b/a GUZMAN BUILDERS, BOOTHWYN HEATING & AIR CONDITIONING, INC., a Pennsylvania corporation doing business in Delaware, BRACON, INC., a Delaware corporation, BROTHER'S ELECTRICAL CONTRACTORS OF DELAWARE INCORPORATED, a Delaware corporation, CATTS PLUMBING REPAIR, INC., a Delaware corporation, and VALLEJO DRYWALL, a company doing business in the State of Delaware and HERIBERTO CARREON, a sole proprietor, Defendants.	)	C.A. No. 02C-09-046 MMJ Non-Arbitration

HANDLER CORPORATION,	)
	)
Third-Party Plaintiff,	)
	)
v.	)
	)
ESPERANZA PROFESSIONAL PAINTING, and LEROY FISHER, JR., individually and d/b/a LEROY FISHER GENERAL CONTRACTOR and STATE DRYWALL COMPANY, INC.,	)
	)
Third Party Defendants.	)

Submitted: February 28, 2005
Decided: April 29, 2005

MEMORANDUM OPINION

Defendant Agustin Guzman, Individually and D/B/A Guzman Builders' Motion for Summary Judgment
GRANTED

Defendant Leroy Fisher's, Individually and D/B/A/ Leroy Fisher General Contractor, Motion for Summary Judgment
GRANTED

Procedural and Factual Context

On May 18, 2002, Plaintiff Leandro Tlapechco fell from a second story "bridge" or "catwalk" in a home under construction. Plaintiff was an employee of a painting contractor. Plaintiff filed this personal injury action against the builder and numerous general contractors and subcontractors, including Agustin Guzman, individually and d/b/a Guzman Builders (collectively "Guzman") and Leroy Fisher individually and d/b/a Leroy Fisher General Contractor (collectively "Fisher"). The builder, Handler Corporation ("Handler"), filed a third party complaint against certain contractors, including Fisher.

Plaintiff alleged that all defendants were negligent in: (a) failing to supervise and oversee the "catwalk"; (b) failing to provide a safe working environment to Plaintiff, including proper railings or warning devices; (c) failing to warn Plaintiff of a dangerous condition; (d) failing to train employees to maintain the premises in a safe manner; and (e) failing to comply with the requirements of the BOCA code, New Castle County Code, and OSHA.

Handler hired Fisher as the rough framing carpenter. The contract required Fisher to install temporary safety railings on the "catwalk." Fisher subcontracted the rough carpentry work to Guzman.

It is undisputed that Handler signed a purchase order dated April 4, 2002,

stating that the rough framing had been completed according to the terms and conditions of the contract. Neither Fisher nor Guzman returned to the job site after Handler approved payment on May 4, 2002. Several witnesses, including the homeowners, testified during depositions that the safety railings were actually built. There is no testimony contradicting the fact that as of April 4, 2002, the "catwalk" railings were in place.[1]

It is also undisputed that at the time of Plaintiff's fall, there were no safety railings on the "catwalk." The primary liability issue in this case is ***why*** there were no railings on May 18, 2002. There is substantial dispute as to who removed the railings and when. One or more of the contractors may have removed the safety railings to perform their work. There is some suggestion that the railings may not have been adequately constructed.

Analysis

Fisher and Guzman have filed separate motions for summary judgment. Summary judgment is appropriate when there are no material issues of fact in

[1]Handler's superintendent, John Knowlton, testified that there was no railing in place prior to installation of the drywall. However, Mr. Knowlton admitted that he first came to the building site well after the framing was completed. Although Mr. Knowlton's testimony supports Plaintiff's allegations that no railings were present at the time of the accident, the testimony does not raise a genuine issue of material fact as to whether the safety railings were, in fact, built in the first place.

dispute and the moving party is entitled to judgment as a matter of law.[2] The motions are supported by sworn testimony. Therefore, the burden shifts to the non-moving parties to demonstrate that there are material issues of fact.[3]

The law in Delaware is clear that summary judgment shall be granted if the pleadings, depositions, admissions and affidavits demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Superior Court Civil Rule 56(e) requires that any adverse party's response must be by affidavit or in such a manner presenting evidence beyond mere allegations, setting forth specific facts showing that there is a genuine issue for trial. Ordinarily, questions of negligence and causal relationships to an alleged injury are issues of fact for the jury. However, when undisputed facts compel only one conclusion, the Court has a duty to grant summary judgment.[4]

Assuming the facts in the light most favorable to the non-moving parties, there is no evidence of a causal connection between Guzman's work and Plaintiff's injury.[5] Plaintiff has presented some expert testimony that the safety

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[2]*Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991).

[3]*Carriere v. Peninsula Insurance Co.,* 2002 WL 31649167, at *2 (Del.).

[4]*Jones v. Diamond Ice & Fuel Co.,* Del. Super., C.A. No, 79C-OC-60, Bifferato, J. (September 17, 1981)(*citing Faircloth v. Rash,* 317 A.2d 871,872 (Del. 1974)).

[5]As of this date, Plaintiff does not oppose Fisher's and Guzman's motions for summary judgment. Defendants Handler and Vallejo Drywall are the only parties opposing the motions.

rail may have been constructed in an unsafe manner, necessitating its removal by another contractor. Nevertheless, that expert subsequently testified that while the quality of construction might be "interesting", given the fact that the railing was removed prior to the accident: "I really don't think it would change anything that much." Further, Plaintiff's other expert witness opined, based upon the known facts, that the safety railings were constructed in an acceptable manner. This expert also stated that the industry standard requires that the contractor who removes the railings has a duty to replace the railings.

Guzman and Fisher have adequately met their burden of providing evidence to show that the facts are not in dispute and that from those facts, only one conclusion can be drawn. As a matter of law, there is no evidence of negligent conduct by the framing contractor or subcontractor. The framing was completed and approved for payment at least two weeks prior to the accident. All of the evidence supports the moving parties' position that the railings were built. The non-moving parties have failed to present evidence refuting sworn testimony that the railings were removed by someone after the time Guzman was last on the job site.

There is no evidence that Fisher ever was on the job site. The only issue is whether Fisher retained active control over Guzman, the subcontractor, under

Delaware's work-area-control test. The Court need not resolve this issue. If Guzman is not negligent as a matter of law, *a fortiori,* Fisher cannot be found to be vicariously negligent.

THEREFORE, there are no genuine issues of material fact: (1) that the railings were constructed by Guzman, Fisher's subcontractor; (2) that the railings were in place as of the last time Guzman was on the job site; and (3) that someone removed the railings between the time Guzman completed its work and the time of Plaintiff's fall. The moving parties are entitled to judgment as a matter of law. Defendant Agustin Guzman, Individually and D/B/A Guzman Builders' Motion for Summary Judgment and Defendant Leroy Fisher's, Individually and D/B/A/ Leroy Fisher General Contractor, Motion for Summary Judgment are hereby **GRANTED.**

IT IS SO ORDERED.

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The Honorable Mary M. Johnston