SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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April 10, 2013

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RE: *Clough v. Klabe Homes, Inc., et al.*, C.A. No. S11C-08-018 (RFS)

DATE SUBMITTED: February 22, 2013

Dear Counsel:

This is a personal injury action which Steve Clough and Leslie Clough ("plaintiffs") have filed against Klabe Homes, Inc.; Klabe Wood Concepts, Inc.; and Klabe Construction, Inc. seeking recovery for damages arising from a construction accident involving Steve Clough ("plaintiff").[1] Defendant Klabe Homes, Inc. ("defendant" or "Klabe") has filed a motion for

[1]Plaintiff Steve Clough alleges his hand was injured in the construction accident. Plaintiff Lesley Clough's claim is for loss of consortium. In this decision, the term "plaintiff" refers to Steve Clough only.

summary judgment.[2] Defendant argues that it did not owe any duty to plaintiff and thus, did not breach any duty. Since plaintiffs cannot establish the existence of an element essential to their case, the complaint must be dismissed.

The alleged accident occurred at a single-family home in Ocean View, Delaware ("job site") where defendant was the general contractor. Gary Lord ("Lord") was Klabe's construction manager of the job site. On October 21, 2009, plaintiff was working for Poore's Propane and was at the job site to install a Rinnai water heater. Before reaching the job site, plaintiff talked to Lord by telephone. Lord was not on site either during this conversation or when the accident occurred. Plaintiff needed to discuss with Lord about the venting of the water heater because each general contractor determines the location of the venting system in a particular house. Lord told plaintiff to go through the ceiling in the laundry room, take a 90 degree angle, and go through the side wall of the house in the attic.

Plaintiff knew how to properly vent the system and plaintiff was the expert, over Lord, as to how to install the system, including the vent. Lord merely informed him of the vent's location, nothing more.

Onsite with plaintiff were his co-worker and some painters. No Klabe employees were present. The house construction was nearly complete.

The first thing plaintiff did was to try to get up to the attic. It was obvious that the access to the attic was through the attic ladder. This attic ladder was one which pulls down from the

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[2]Kevin Klabe testified at his deposition that Klabe Wood Concepts, Inc. and Klabe Construction, Inc. had no involvement in the construction where plaintiff was injured. Deposition of Kevin Klabe, dated January 5, 2012, at 40-41. However, the parties have taken no steps to dismiss these two defendants.

attic and the stairs extend out.

The attic ladder already was down, or fully extended, when plaintiff arrived. It was not unusual to find an attic ladder in the down position. Plaintiff had to use the attic ladder; he could not get a step ladder into that area. As far as plaintiff knew, the attic ladder had been installed completely. He is absolutely certain that the ladder/stairs were touching the ground on which he was walking. Kevin Klabe disputed this fact, testifying he had been told that the attic ladder was two feet short and did not reach the ground.

Plaintiff climbed to the top of the attic ladder and then the entire unit fell to the ground. He injured his hand as a result of the fall. He testified that later, his co-worker told him that the attic ladder fell because it was not properly installed.

Defendant has moved for summary judgment, arguing that plaintiff has failed to show it owed him any duty. Defendant supports its motion with the deposition of Kevin Klabe. Kevin Klabe acquired his knowledge regarding the accident from Lord and his understanding of the attic ladder situation from Lord and Steve Stutzman of Precision Finish Carpentry, Inc. ("Precision").

Kevin Klabe explained that after the accident, Lord and Steve Stutzman told him the following. The workers for Precision put the trim around the attic hole, the attic ladder was nailed up, the attic staircase was pulled down, and the ladder was two feet short. They did not finish-nail it or screw it all the way around the frame because they knew they were going to get another attic ladder. Also, because they knew they were going to get another attic ladder, the workers did not see any sense in taking down the too-short attic ladder. Kevin Klabe believes there was no reason to put a sign on the attic ladder telling someone not to climb it when the

ladder was two feet short. It was his opinion that people do not ascend attic ladders which are too short.

Whether the ladder touched the ground is a disputed fact. However, it is not a fact central to a decision on the pending motion. Whether plaintiff climbed a too-short ladder would be an issue of comparative negligence. The pertinent questions are whether Klabe was aware that the attic ladder was not completely secured and whether it should have warned plaintiff of this fact.

The Court, viewing the facts in a light most favorable to plaintiff, infers that Lord was aware the ladder was not completely installed and had that knowledge at the time he spoke to plaintiff and told him to vent the water heater system through the attic. The only way into the attic was by way of the attic ladder. Lord, knowing the attic ladder was not completely installed, failed to warn plaintiff of that fact after directing him to go into the attic to perform his job.

The standard for summary judgment is well-established. When the moving party supports its summary judgment with evidence that no genuine issue of material fact exists, the burden shifts to the non-moving party to establish the existence of issues of material fact in dispute.[3] The Court must view the facts in a light most favorable to the non-moving party,[4] but uncontroverted evidence in support of summary judgment must be considered as true.[5] If, after viewing the evidence in the light most favorable to the non-moving party, the Court finds no

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[3]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[4]*Matas v. Green*, 171 A.2d 916 (Del. Super. 1961).

[5]*Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. 1982).

genuine issues of material fact exist, then summary judgment in appropriate.[6] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.[7]

Defendant argues that it had no duty to plaintiff, and thus, cannot be deemed to have breached that duty. Defendant, citing to *Handler Corporation v. Tlapechco ("Handler")*[8] argues that the law is clear; a general contractor owes a duty to an independent contractor's employees from the hazards of performing their job only if the general contractor:

> (1) actively controls the manner and method of performing the contract work;
> (2) voluntarily undertakes the responsibility for implementing safety measures; or
> (3) retains possessory control over the work premises during work.

Plaintiffs argue that the applicable law is that found in the Supreme Court's decision in *Emory, Hill, McConnell & Associates, Inc. v. Snyder* ("*Snyder*")[9] and the Superior Court's decision in *Learned v. Ronald M. Coffin General Contractors, Inc.* ("*Learned").*[10] *Snyder* and *Learned* address situations completely different from that in *Handler;* in *Snyder* and *Learned,* the dangerous conditions which caused the respective injuries were not inherent in the work being done by the subcontractor for which the injured parties worked. The ruling of these cases is that a general contractor has a duty to warn a subcontractor of a dangerous condition of which it knows,

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[6]*New Castle County v. State*, 698 A.2d 401 (Del. Super. 1996), *aff'd*, 688 A.2d 888 (Del. 1997).

[7]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[8]*Handler Corporation v. Tlapechco*, 901 A.2d 737, 743 (Del. 2006).

[9]*Emory, Hill, McConnell & Associates, Inc. v. Snyder*, 614 A.2d 1275 (Del. 1992).

[10]*Learned v. Ronald M. Coffin General Contractors, Inc.*, 2005 WL 2660068 (Del. Super. Aug. 12, 2005).

or has reason to know, when that dangerous condition is not inherent in the work the subcontractor is performing.

In this case, the facts, viewed in a light most favorable to plaintiffs, show that Klabe had knowledge that the attic ladder was not completely installed and that plaintiff would have to use the attic ladder to reach the attic. The dangerous condition which the incompletely installed attic ladder caused was not inherent in the work plaintiff was performing. *Snyder* and *Learned* apply. Klabe, through Lord, was required to warn plaintiff that the attic ladder was not completely installed and should not be used.

In light of the foregoing, I deny Klabe's motion for summary judgment.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office