

<b>Campbell v LaFarge N. Am., Inc.</b>
2016 NY Slip Op 30440(U)
February 22, 2016
Supreme Court, Bronx County
Docket Number: 17950/2006
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 19

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DESMARIE CAMPBELL, as administratrix of the estate  
of MARTIN LEWIS, deceased, and DESMARIE  
CAMPBELL, individually,

DECISION AND ORDER

Index No. 17950/2006

Plaintiffs,

- against -

LAFARGE NORTH AMERICA, INC., KRAMER  
BUILDING CORP., PCL CONSTRUCTION SERVICES,  
INC. and ALCO CORPORATION, INC.,

Defendants.

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LAFARGE NORTH AMERICA, INC., KRAEMER  
BUILDING CORP. and PCL CONSTRUCTION  
SERVICES, INC.,

Third-Party Index No.  
84019/2009

Third-Party Plaintiffs,

- against -

GYP SUM TECHNOLOGIES, INC.,

Third-Party Defendant.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated of July 1, 2015 of third-party defendant Gypsum Technologies, Inc. and the affirmation, exhibits and memorandum of law submitted in support thereof (Motion Sequence # 8); the amended affirmation in opposition dated September 23, 2015 of third-party defendant Alco Corporation, Inc. and the exhibit submitted therewith; the reply affirmation dated December 11, 2015 of third-party defendant Gypsum Technologies, Inc.; the reply affirmation dated January 29, 2016 of third-party defendant Gypsum Technologies, Inc.; the notice of motion dated of June 22, 2015 of defendant Alco Corporation, Inc. and the affirmation, and exhibits submitted in

support thereof (Motion Sequence # 9); plaintiff's affirmation in opposition dated October 23, 2015 and the exhibits submitted therewith; the reply affirmation dated November 17, 2015 of defendant Alco Corporation, Inc.; the notice of motion dated of dated July 6, 2015 of defendants/third-party plaintiffs Lafarge North America, Inc., Kraemer Building Corp., and PCL Construction Services, Inc. and the affidavits and exhibits submitted in support thereof (Motion Sequence # 10); plaintiff's affirmation in opposition dated October 23, 2015 and the exhibits submitted therewith; the affirmation in opposition dated December 11, 2015 of third-party defendant Gypsum Technologies, Inc.; the reply affidavit dated January 21, 2016 of defendants/third-party plaintiffs Lafarge North America, Inc., Kraemer Building Corp., and PCL Construction Services, Inc.; the reply affidavit dated January 21, 2016 of defendants/third-party plaintiffs Lafarge North America, Inc., Kraemer Building Corp., and PCL Construction Services, Inc. and the exhibits submitted therewith; and due deliberation; the court finds:

In this Labor Law Action, decedent Martin Lewis alleges he was injured when he tripped over welding cables while working at a new building being constructed in Buchanan, New York.<sup>1</sup> Defendant Lafarge North America, Inc. ("LaFarge") owned the property and hired defendant PCL Construction Services, Inc. ("PCL") as its general contractor and construction manager. PCL retained defendant Kraemer Building Corp. ("Kraemer Building") to construct a new building adjacent to the existing Lafarge plant. Non-party Tradesource, Inc. provided Kraemer Building with workers, including plaintiff, for the project. PCL also hired third-party defendant Gypsum Technologies, Inc. ("Gypsum") to supply wallboard manufacturing equipment for the new addition. Gypsum subcontracted with defendant Alco Corporation, Inc. ("Alco") to install its equipment. Gypsum now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint, the third-party complaint, and all cross-claims asserted against it and for summary judgment on its claims for common law and

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<sup>1</sup> The court refers to decedent as "plaintiff." It is not disputed that his death was not caused by or related to the subject incident.

contractual indemnification against Alco.<sup>2</sup> Alco moves for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it. Lafarge, Kraemer Building, and PCL move for summary judgment dismissing plaintiff's complaint and for summary judgment on the claims of Lafarge and PCL for common law and contractual indemnification against Alco and Gypsum.<sup>3</sup>

The motions are consolidated for decision herein. Submitted for consideration are the pleadings; deposition transcripts; photographs and a blueprint of the site; contracts; a certificate of insurance; a commercial insurance policy; and an affidavit from Don Kraemer ("Kraemer"), Kraemer Building's principal. According to the verified bill of particulars, the accident was caused by the accumulation of dirt, debris and scattered tools in a passageway. Plaintiff opposes dismissal of his complaint. However, he withdraws his Labor Law § 240(1) claim because the accident did not involve an elevation-related risk. Plaintiff also concedes that he was Kraemer Building's special employee and withdraws his claims against it. The only causes of action remaining are his common law negligence and Labor Law §§ 200 and 241(6) claims.

Plaintiff testified that on the day of the accident he and his partner were standing in lifts while putting up steel framing for the roof. No other trades were working in the general area, and the building was only partially enclosed. There were no walls or roof and the building was several hundred feet in length. The accident occurred when he went to retrieve nuts and bolts from a bucket on the ground five to ten feet away from the lift. Loose pieces of dunnage, welding cables and tools were scattered over the concrete floor.<sup>4</sup> He stepped over the coiled welding cables on his way to the bucket without incident

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<sup>2</sup> The pleadings show that no party asserted a direct claim or cross-claim against Gypsum.

<sup>3</sup> The motion by defendants Lafarge, Kramer, and PCL, which was served on July 6, 2015, is timely. *See* General Construction Law § 20, 25-a. Plaintiff filed his note of issue on March 5, 2015, and the deadline for making a timely summary motion was July 3. July 3, though, fell on a Friday and a public holiday, and July 4 and July 5 fell on Saturday and Sunday.

<sup>4</sup> Plaintiff and Kraemer described dunnage as pieces of wood used to keep construction material elevated off the ground.

but his right foot caught on the cables as he walked back to the lift. He was not aware of anyone performing welding work at the time of the accident. His work was solely supervised by Kraemer.

At his second deposition, plaintiff could not recall telling Kraemer what he had tripped over. He denied tripping on dunnage because he did not recall seeing dunnage where the welding cables were located. He did not know who placed the cables on the ground and he did not complain about them. Plaintiff, though, also testified that the welding cables over which he tripped on the day of the accident “were in use because you had welders there like installing other material and stuff that requires welding together.” Prior to his accident, “there were men there using the welding cable.” He did not know what they were welding but “there was a steel building being erected and they could have been welding anything at that time.” He did not know the individual using the welding cable but “at the time it was more than one of them there that was working.”

Kraemer testified that he had previously seen welding cables laying on the concrete slab but only when they were in use. On the day of the accident, he saw dunnage but could not recall seeing any welding cables on the ground. He was twenty feet away from plaintiff when he saw plaintiff “stumbling over dunnage” holding the purlins and girts plaintiff was installing. Kraemer Building or its subcontractor performed welding work once or twice on the project but not on the day of the accident.

William Grall (“Grall”), Alco’s vice president for field operations, testified that Gyp-tech supplied Lafarge or PCL with the board handling equipment and dryer and subcontracted with Alco to install them. Installation required the use of welding machines, and Alco kept its welding cables in a tool container when they were not in use. Alco was not working in same area as Kraemer Building on the day of the accident; they had finished their work there one month earlier. At his second deposition, Grall testified that Gypsum did not maintain any welding equipment on the project and did not supervise or direct Alco in how to install the equipment. Alco also contracted directly with PCL to perform other work at the Lafarge plant.

Cory Hrynyk (“Hrynyk”), PCL’s project manager, testified that PCL hired Gypsum to supply Lafarge with wallboard manufacturing equipment, non-party Vezer (“Vezer”) to perform millwright work, and Kraemer Building to erect steel framing and the roof. Gypsum subcontracted with Alco to install the equipment. Gypsum never used any welding equipment on the job and its two employees made periodic visits to the site to inspect the installation of the equipment. There were no complaints about debris or tools left at the site, and no one ever complained to him about Gypsum’s work.

Richard Silversides (“Silversides”) served as Gypsum’s design manager for the Lafarge plant. Gypsum delivered equipment used to manufacture drywall and plaster pursuant to an agreement with PCL, and Gypsum subcontracted with Alco to install that equipment. Gypsum did not provide any materials or tools used in the installation of the equipment. Its employees on the job provided technical assistance to Alco but otherwise Gypsum did not supervise or control Alco’s work. Alco and other contractors used welding equipment but Silversides never saw any welding cables laying on the ground that could have caused someone to trip or fall. He could not recall anyone complaining to him about Alco’s welding activities.

**Labor Law § 241(6)**

“In order to prevail on a cause of action under Labor Law § 241(6), a plaintiff must establish a violation of an implementing regulation which sets forth a specific standard of conduct.” *Ortega v. Everest Realty LLC*, 84 A.D.3d 542, 544, 923 N.Y.S.2d 74, 77 (1st Dep’t 2011). Plaintiff alleges violations of 12 NYCRR §§ 23-1.7(e)(1) and (2) both of which are sufficiently specific to support the claim. *See Carty v. Port Auth. of N.Y. & N.J.*, 32 A.D.3d 732, 821 N.Y.S.2d 178 (1st Dep’t 2006), *lv denied*, 8 N.Y.3d 814, 870 N.E.2d 694, 839 N.Y.S.2d 453 (2007).

Liability under 12 NYCRR § 23-1.7(e)(1) depends on whether the accident occurred because of on an accumulation of dirt, debris or other obstructions in a passageway. The section is inapplicable because the accident occurred in an open working area. *See DePaul v. NY Brush LLC*, 120 A.D.3d

1046, 994 N.Y.S.2d 59 (1st Dep't 2014).

Section 23-1.7(e)(2) provides that “working areas” such as floors and platforms where persons work shall be kept free from accumulations of dirt, debris, and scattered tools and materials “insofar as may be consistent with the work being performed.” When the object over which plaintiff tripped is integral to the work, there is no violation. *See Burkoski v. Structure Tone, Inc.*, 40 A.D.3d 378, 836 N.Y.S.2d 130 (1st Dep't 2007). Movants have demonstrated that 12 NYCRR § 23-1.7(e)(2) is inapplicable. *See Singh v. 1221 Ave. Holdings, LLC*, 127 A.D.3d 607, 8 N.Y.S.3d 129 (1st Dep't 2015); *DeLiso v. State of New York*, 69 A.D.3d 786, 892 N.Y.S.2d 533 (2d Dep't 2010). Plaintiff's testimony shows that the welding cables were in use at the time of the accident and were integral to and consistent with ongoing work on the project. Even if plaintiff tripped over dunnage, the dunnage was used to support the material he was tasked with installing.

Plaintiff fails to raise a triable fact in opposition. He has not established that the welding cables were left behind by Alco or another trade. *See Orlino v. 2 Gold, LLC*, 2009 NY Slip Op 30516(U) (Sup. Ct. New York County Mar. 10, 2009), *affirmed*, 63 A.D.3d 541, 880 N.Y.S.2d 479 (1st Dep't 2009). Plaintiff testified that he had previously seen Alco employees use welding machines but he did not know who was using the welding cables at the time of the accident. He offered no evidence rebutting Grall's testimony that Alco stored its welding cables in a container when they were not in use. Further, Grall testified that Alco was working elsewhere when the accident occurred, and Silversides testified that other contractors in addition to Alco performed welding work. Plaintiff testified that the cables were in use. Accordingly, his Labor Law § 241(6) claim predicated on violations of 12 NYCRR §§ 23-1.7(e)(1) and (2) is dismissed.

**Labor Law § 200 and Common Law Negligence**

Labor Law § 200 codifies the common-law duty that an owner or general contractor provide construction workers with a safe work site. *See Comes v. N.Y. State Elec. & Gas Corp.*, 82 N.Y.2d 876,

631 N.E.2d 110, 609 N.Y.S.2d 168 (1993). Liability may be imposed where defendant supervised and controlled the injury-producing work, *see Suconota v. Knickerbocker Props., LLC*, 116 A.D.3d 508, 984 N.Y.S.2d 27 (1st Dep't 2014), or where defendant had actual or constructive notice of the specific defect or hazardous condition that caused plaintiff's accident. *See Mitchell v. N.Y. Univ.*, 12 A.D.3d 200, 784 N.Y.S.2d 104 (1st Dep't 2004); *see also Torkel v. NYU Hosps. Ctr.*, 63 A.D.3d 587, 883 N.Y.S.2d 8 (1st Dep't 2009).

Here, there is no evidence that movants supervised or controlled plaintiff's work or that they created or had actual or constructive notice of a dangerous condition. *See Singh v. 1221 Ave. Holdings, LLC, supra*; *Kinirons v. Teachers Ins. & Annuity Assn. of Am.*, 34 A.D.3d 237, 828 N.Y.S.2d 293 (1st Dep't 2006). Kraemer Building directly supervised plaintiff's work. Plaintiff never complained about the welding cables, and no party ever received such a complaint. Plaintiff also failed to show that Alco created the condition. *See Carrera v. Westchester Triangle Hous. Dev. Fund Corp.*, 116 A.D.3d 585, 984 N.Y.S.2d 339 (1st Dep't 2014). He testified that Alco was "the only name that [he was] familiar with" but contractors other than Alco, including Vezer, performed welding work on the project. Alco worked in a different area than Kraemer Building on the day of the accident, and plaintiff did not know who was using the welding cables at the time. There was no evidence of how long the cables were present before plaintiff tripped, and a general awareness of a purportedly dangerous condition is insufficient. *See Mitchell v. N.Y. Univ.*, 12 A.D.3d 200, 784 N.Y.S.2d 104 (1st Dep't 2004). Plaintiff's common law negligence and Labor Law § 200 claims are dismissed.

### **The Third-Party Complaint against Gypsum**

The third-party complaint alleges that plaintiff's injuries were caused by Gypsum's acts or omissions. In light of the dismissal of the complaint in the primary action, the third-party complaint is dismissed. *See Ayala v. Lockheed Martin Corp.*, 22 A.D.3d 394, 802 N.Y.S.2d 362 (1st Dep't 2005). The claims by Lafarge and PCL for common law and contractual indemnification against Alco and

Gypsum are also denied as moot. *See Doodnath v. Morgan Contr. Corp.*, 101 A.D.3d 477, 956 N.Y.S.2d 11 (1st Dep't 2012). As for Gypsum's indemnification claim, it has not established that Alco was the party responsible for placing the welding cables at the accident location.

Accordingly, it is

ORDERED, that the motion of third-party defendant Gypsum Technologies, Inc. (Motion Sequence # 8) for summary judgment it is granted to the extent of dismissing the third-party complaint against it and denied as to its claim for indemnification against defendant Alco Corporation, Inc.; and it is further

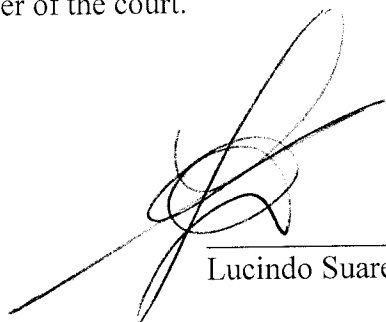
ORDERED, that the motion of defendant Alco Corporation, Inc. (Motion Sequence # 9) for summary judgment dismissing plaintiff's complaint and the cross-claims against it is granted; and it is further

ORDERED, that the motion of defendants/third-party plaintiffs Lafarge North America, Inc., Kraemer Building Corp., and PCL Construction Services, Inc. (Motion Sequence # 10) for summary judgment dismissing is granted to the extent of dismissing plaintiff's complaint against them and denied as to their claims for contractual or common law indemnification against defendant Alco Corporation, Inc. and third-party defendant Gypsum Technologies, Inc.; and it is further

ORDERED, that the clerk of the court shall enter judgment in favor of all defendants dismissing plaintiff's complaint against them and in favor of third-party defendant Gypsum Technologies, Inc. dismissing the third-party complaint against it.

This constitutes the decision and order of the court.

Dated: February 22, 2016

  
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Lucindo Suarez, J.S.C.