Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IA Part 14

MICHELE FUCHS, etc. x

Index Number 23452 2004

- against -

Motion Date November 9, 2010

AUSTIN MALL ASSOCIATES, LLC, et al.

Motion Cal. Number 18

x

Motion Seq. No. 9

The following papers numbered 1 to 13 read on this motion by defendant Austin Mall Associates, LLC and related defendants for, inter alia, summary judgment dismissing all claims against defendant Joel Mandel, defendant Rosalyn Crane, defendant Annette Mord, defendant Herbert Aronoff, defendant Joel Aronoff, and defendant Estate of Louis Aronoff.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2-10
Reply Affidavits - Exhibits	11-13

Upon the foregoing papers it is ordered that the motion is disposed of as follows:

Defendant Austin Mall Associates, LLC (Austin Mall), allegedly owns a building located at 70-09 Austin Street, Forest Hills, New York. On or about August 30, 2004, the late Peter Fuchs, an employee of Elite Elevator Cab, Inc. and/or Elite Elevator Cab Remodeling, Inc. (Elite), performed renovation work in Austin Mall's building. Fuchs died

of electrocution while installing a lighting fixture in an elevator cab. This action for conscious pain and suffering and wrongful death ensued. The plaintiff filed a note of issue on May 15, 2006. After an IAS court granted the defendants' motion for summary judgment, the plaintiff appealed. On May 12, 2009, the Appellate Division, Second Department, reversed and denied those branches of the motion which were for summary judgment dismissing the causes of action based on Labor Law §§ 241(6) and 200 and based on common-law negligence. (*Fuchs v Austin Mall Associates, LLC*, 62 AD3d 746.) Thereafter, the parties restored this case to the trial calendar, and, at a pre-trial conference held on September 29, 2010, this court directed them to submit written motions in limine.

Those branches of the motion which are for summary judgment dismissing all claims against the individual defendants and dismissing the plaintiff's Labor Law §§ 200 and 241(6) claims and common-law negligence claims against defendant Austin Mall, defendant JSM Management, and defendant Aronoff Family Limited Partnership are denied. As the plaintiff's attorney and Elite's attorney properly object, this court only directed the submission of written motions in limine, and the court did not authorize the submission of another motion for summary judgment. Moreover, as the defendants' adversaries also properly object, the branches of the motion seeking summary judgment are untimely. (*See*, CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648; *Group IX, Inc. v Next Printing & Design Inc.,* 77 AD3d 530.)

That branch of the motion which is for an order pursuant to CPLR 603 directing a bifurcated trial of this action is denied. "Although trial courts are encouraged to conduct bifurcated trials in personal injury cases, a unified trial should be conducted where the nature of the injuries has an important bearing on the question of liability." (*Perez v Madoff,* 69 AD3d 821, 821-822; *see* 22 NYCRR 202.42 [a].) Elite intends to call Dr. Gerard Catanese, a Deputy Medical Examiner with the Nassau County Medical Examiner's Office, to testify concerning the issue of whether the decedent electrocuted himself from touching live wires or whether "stray" electricity killed him. Dr. Catanese will testify about the specific locations on the decedent's body that electricity burned and the path the electric current followed after entering his body. Dr. Catanese will also testify about whether the decedent experienced conscious pain and suffering and, if so, for how long. Under these circumstances, the nature of the injuries sustained by the decedent has a bearing on the question of liability (*see*, *Perez v Madoff*, *supra*), and Elite has shown that the issues of liability and damages are intertwined. (*See*, *Smith v McClier Corp*., 38 AD3d 322.)

That branch of the motion which is for an order deeming admissible the decedent's alleged statements about leaving the power on and leaving the elevator "the way it is" is granted. "Evidence of a statement offered not for the truth of its content but for the effect of its utterance is not hearsay ***." (*People v Kass,* 59 AD3d 77, 87; *People v Jordan*,

201 AD2d 961.) Moreover, the statements are not barred by the Deadman's Statute. (See the February 18, 2011 order rendered on the companion motion brought by the plaintiff.)

That branch of the motion which is for an order precluding the admission of violations issued to Austin Mall by the Buildings Department is granted. The violations are irrelevant to Austin Mall's liability because, inter alia, they concern defective conditions elsewhere in the building that were not shown on this motion to be a causative factor in Fuchs' death.[1]

That branch of the motion which is for an order permitting Austin Mall to introduce evidence of Elite's guilty plea to violations of the New York City Administrative Code for the purpose of proving an admission by Elite is denied. On June 30, 2005, Elite pleaded guilty to a charge based upon New York City Administrative Code § 26-248(a), a violation, not a crime. Contrary to the arguments made by Austin Mall, the guilty plea is neither admissible as an admission nor upon collateral estoppel grounds. While the Court of Appeals in *Ando v Woodberry* (8 NY2d 165), upon which both Austin Mall and Elite rely, states that, "[s]ince a prior plea of guilt represents an admission, it is not obnoxious to the hearsay rule," such statement exists against a backdrop of facts in which the defendant in *Ando* had taken a position inconsistent in the civil negligence action than he did pursuant to his plea of guilty in the prior proceeding. Herein, Elite admits that it was performing work without the requisite license or permit; as such, the hearsay exception which would otherwise allow the admission against interest (i.e. the guilty plea to the violation) is not applicable here.

Neither does collateral estoppel apply. "The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same ***." (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500; *Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343; *Altegra Credit Co. v Tin Chu*, 29 AD3d 718; *Sam v Metro-North Commuter Railroad,* 287 AD2d 378.) "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action ***." (*Parker v Blauvelt Volunteer Fire Co., Inc., supra*, 349; *Sam v Metro-North Commuter Railroad, supra.*) A criminal conviction, whether upon a plea or after a trial, has collateral estoppel effect where an identity of issues and a full and fair opportunity to contest the criminal action is shown. (*Blaich v Van Herwynen*, 37 AD3d 387; *Lili B. v Henry F.*,

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1. It is noted that Elite's concern that Austin Mall is attempting to introduce evidence of the former's guilty plea to violations of the Administrative Code is rendered moot in light of the fact that same is to be precluded (discussed, infra, as well as in this court's February 22, 2011 order rendered on the companion motion brought by Elite)

235 AD2d 512.) "The proponent of collateral estoppel has the burden of demonstrating that the issue was identical and necessarily decided in the first action, whereas the opposing party has the burden of establishing that there was no full and fair opportunity to litigate the matter in the prior action ***." (*Strough v Incorporated Village of West Hampton Dunes,* 78 AD3d 1037, 1039.) Here, the issues in the instant action are not identical to those which were raised in the Criminal Court. Introduction of Elite's conviction of the violation of the subject Administrative Code in the instant action would be prejudicial error, as the "conviction was not an adjudication upon the issue present here" (*Cofinas v Depot Constr. Co.*, 14 AD2d 521). Pleading guilty to performing work without the requisite license or permit is clearly not an adjudication on the issue of the existence of any potential negligence on the part of Elite.

That branch of the motion which is for an order precluding the plaintiff's expert, Les Winter, from testifying about alleged violations of code and industry standards is denied. Austin Mall objects to expected testimony from the expert concerning Industrial Code §§ 23-1.5 and 23-1.13. "Expert testimony as to a legal conclusion is impermissible" (*Measom v Greenwich and Perry Street Housing Corp*., 268 AD2d 156, 159; *Colon v Rent-A-Center, Inc*., 276 AD2d 58), and an expert cannot testify about the meaning and applicability of the law. (*Franco v Jay Cee of New York Corp.,* 36 AD3d 445.) However, "New York courts permit expert testimony on the question of whether a certain condition or omission was in violation of a statute or regulation ***." (*Franco v Jay Cee of New York Corp*. *supra*, 448; *Roux v Caiola*, 254 AD2d 182.)

That branch of the motion which is for an order precluding electrical experts retained by Elite from testifying is denied. Elite's experts are expected to testify about "critical parts of the grounding system for the electrical power which is designed to prevent stray electricity at the premises." Although the electrical experts inspected Austin Mall's building approximately six years after Fuch's death (in response to Austin Mall's delay in retaining its own expert, incidentally), they will testify, inter alia, that based on the appearance, texture, and color of a clamp, a dangerous condition existed on the date of the accident. On the present state of the record, the court cannot conclude that the testimony from the experts is irrelevant because of the passage of time. (*See*, *Oboler v City of New York,* 8 NY3d 888, 890 ["we note that the expert's opinion was not inadmissible merely because nearly four years elapsed between the accident and the expert's inspection of the site"]; *Linden Towers Co-op. No. 1, Inc. v Gerace & Castagna, Inc.,* 40 AD2d 524.) Moreover, the court does not find that testimony from two experts would be cumulative, as one expert may have certain expertise that the other may not. (*Shafran v St. Vincent's Hosp. & Med. Ctr.*, 264 AD2d 553.) In any event, to the extent that there may be overlap between the witnesses, the court can certainly limit the subsequent expert's testimony to material not previously addressed. (*Id.*)

That branch of the motion which is for an order precluding Elite from calling an elevator expert is denied. Issues relevant to the repair and renovation of elevators, not just electrical issues, are involved in this case.

Dated: February 23, 2011

J.S.C.