Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

MICHELE FUCHS, etc. x

- against -

AUSTIN MALL ASSOCIATES, LLC, et al.

x

Index Number 23452 2004

Motion Date November 9, 2010

Motion Cal. Number 19

Motion Seq. No. 10

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits - Exhibits	3

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 this court directed them to submit written motions in limine.

That branch of Elite's motion which is for an order directing the redaction of medical records where they make reference to the specific manner in which the accident is alleged to have occurred is granted. Hospital records make reference to "electrical wires." While Elite does not seek to redact references to electrocution and electrical burns, Elite will contest the issue of whether the decedent died from making contact with electric wires. The statements from the medical records quoted herein are not germane to a patient's diagnosis and treatment, and, thus, they are not admissible under the business entry exception to the hearsay rule. "It is well settled that 'an entry in a hospital record comes within the statutory business records rule only if it is relevant to diagnosis or treatment of the patient's ailment' ***." (*Passino v DeRosa* 199 AD2d 1017, 1017, quoting Richardson, Evidence, § 302, at 277 [Prince 10th ed] [information in plaintiff's medical records concerning precise cause of her fall was not relevant to her diagnosis or treatment]; *see, Musaid v Mercy Hosp. of Buffalo,* 249 AD2d 958*; Gunn v City of New York*, 104 AD2d 848.) The history section of a hospital record is not admissible as a business record under CPLR 4518 where it is not germane to a patient's diagnosis or treatment. (*Gunn v City of New York, supra.)*

That branch of the motion which is for an order directing the redaction of the autopsy report and death certificate where they make reference to the specific manner in which the accident is alleged to have occurred is denied. The autopsy report states in relevant part: "contacted electric wiring while working on ceiling lighting of elevator." The death certificate states in relevant part: "Contacted electric wiring while working on ceiling lighting of elevator." "A properly certified copy of the record of a death is prima facie evidence of the facts stated in it, including the fact of death. While there is some question as to whether a death certificate is admissible for the purpose of establishing the cause of death, there is authority that it is reversible error to limit the evidentiary effect of a death certificate in a wrongful death case to the time and place of death, and to exclude from the jury's consideration that part of the certificate showing the cause of death, and that a death certificate, as supported by a coroner's report, may be accepted as proof of the cause of death." (37 NYJur2d, "Death," § 525[footnotes omitted]; *see* CPLR 4520; *Stein v Lebowitz-Pine View Hotel, Inc.,* 111 AD2d 572, 573[the death certificate, supported by the Coroner's report, was properly admitted as proof of causation]; *Gioia v State*, 22 AD2d 181; *Scicchitano v Algazi*, 12 Misc 3d 1152(A)[Table], 2006 WL 1317140 [text] ["A death certificate, as supported by a medical examiner's report, is properly accepted as proof of causation."]) Similarly, the autopsy report concerning Fuchs need not be redacted. (*See*,

Broun v Equitable Life Assur. Soc. of U.S., 69 NY2d 675; *Collymore v Montefiore Medical Center,* 39 AD3d 237.)

That branch of the motion which is for an order precluding the introduction of Elite's settlement agreement of OSHA charges is granted. The settlement agreement entered into between OSHA and Elite states in relevant part: "By entering into this agreement, the employer does not admit that it violated the cited standards for any litigation or purpose other than a subsequent proceeding under the Occupational and Safety and Health Act." Where the settlement agreement between OSHA and an employer contains such a clause, the document is inadmissible in a wrongful death action. (*See*, *Callahan v P.J. Carlin Const. Co.*, 223 AD2d 459; *Seaman v A.B. Chance Co.*, 197 AD2d 612; *Kollmer v Slater Elec., Inc*., 122 AD2d 117.) The court notes that relevant OSHA regulations may be admitted into evidence. (*Kollmer v Slater Elec., Inc*., *supra*.) However, contrary to Austin Mall's contention, the fact statements contained in the OSHA reports (that decedent was working in proximity to electric power circuits and was not protected, and that decedent was installing an elevator ceiling in proximity to electrical power circuits – same which formed the basis of the violations) are inadmissible, as it is for the jury to determine whether violations exist (*id.*). To that end however, given the fact that the fact statements are deemed inadmissible, Elite is precluded from arguing in its summation the failure of any party to prove the existence of OSHA violations issued to it.

That branch of the motion which is for an order precluding evidence of Elite's guilty plea to violations of the New York City Administrative Code is granted. On January 5, 2005, Elite was charged with violating New York City Administrative Code §§ 27-3017(a) and 27-3018(b), which are both misdemeanors. The charges concerned (1) the performance of electrical-related work without an electrician's license and (2) the performance of electrical-related work without a permit. On June 30, 2005, Elite pleaded guilty to a reduced 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 or 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.*, 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 evidence of statements allegedly made by Elite's employees that they regularly work on electric wiring with the electricity on is denied. An OSHA report states that an Elite employee told an agency investigator "that he has been working with the company for 6 years *** But he did not know what was Electrical Lock-out/Tag-out [sic]. The employer did not provide any locks or Tags to his [sic] employees. He never turns off a circuit breaker when replacing the elevator ceiling." These statements are not admissible as evidence of the decedent's work habits. It is true that under certain circumstances, a party may offer proof of habit to create an inference that a person acted in conformity with the habit on the occasion in question. (*See*, *Halloran v Virginia Chemicals, Inc.*, 41 NY2d 386.) However, the statement in the OSHA report about never turning off a circuit breaker concerns the declarant's work habits, not the decedent's work habits. Defendant Austin Mall denies that it will attempt to introduce the statement as evidence of habit and argues that it may introduce evidence of the statement made to OSHA as proof that Elite failed to properly equip its employees and failed to properly train them. The statement made to OSHA is relevant to issues pertaining to Elite's alleged negligence in failing to properly equip and train its workers, and the statement cannot be excluded pursuant to the habit evidence rule if offered for proof on these issues. Finally,

under all of the circumstances of this case, including the lack of prejudice, evidence of the statements is not excludable because of Austin Mall's alleged failure to make disclosure. It is noted that Austin Mall furnished to Elite, on December 13, 2005, statements that the latter's employees made to OSHA.

Dated: February 22, 2011

J.S.C.