SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

ELIZABETH ANNE GREENE, individually and as Administratrix of the Estate of MICHAEL J. GREENE,

Plaintiff(s),

-against-

350 EAST MONTAUK HIGHWAY CORPORATION, FRANK LIGUORI individually and FRANK LIGUORI d/b/a 350 EAST MONTAUK HIGHWAY CORPORATION, LONG ISLAND CHEESEBURGER, JUAN TAVERAS individually and JUAN TAVERAS d/b/a LONG ISLAND CHEESEBURGER, PRISCIRO TAVERAS individually and PRISCIRO TAVERAS d/b/a LONG ISLAND CHEESEBURGER, MIGUEL TURCIOS, COUSINS ELECTRIC, JOSEPH LaVOLPE individually and JOSEPH LaVOLPE d/b/a COUSINS ELECTRIC, KEITH CURTIN, CHAOPHAYA THAI RESTAURANT, INC., ARTHUR BARTOLOMEO individually and ARTHUR BARTOLOMEO d/b/a CHAOPHAYA THAI RESTAURANT, INC., BUTLER AT YOUR SERVICE, TOM BUTLER individually and TOM BUTLER d/b/a BUTLER AT YOUR SERVICE, ELECTRICAL INSPECTION SERVICE, INC., HUGO SURDI individually and HUGO SURDI d/b/a ELECTRICAL INSPECTION SERVICE, INC., BRUSH MASTER SIGN CO., DAVID BARONCELLI individually and DAVID BARONCELLI d/b/a BRUSH MASTER SIGN CO., J&B SIGNS p/k/a K&P SIGNS, WILLIAM R. MEYERS individually and WILLIAM R. MEYERS d/b/a K&P SIGNS p/k/a J&B SIGNS, ICON ELECTRICAL CORP., PETER LANTERI individually and PETER LANTERI d/b/a ICON ELECTRICAL CORP., UNIVERSAL LIGHTING TECHNOLOGIES, INC. and/or UNIVERSAL MANUFACTURING CO., GOSSIN COMMERCIAL REFRIGERATION, CARLOS GOSSIN, individually and CARLOS GOSSIN d/b/a GOSSIN COMMERCIAL REFRIGERATION, LEONARDO PERGUERO and MIGUEL DIAZ,

Defendant(s).

MOTION DATE: 4/31/2010

MOTION SEQ. NO.: 004, 005, 006, 007, 008

INDEX NO.: 002016/07

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The following motions were submitted to the Court in the period from December 2009 through March 2010. They were adjourned by the Court in the interests of justice, including the efficient and fair consideration of common questions of law and fact, and the consistency of outcome. The motions are determined below.

Motion by defendants WILLIAM R. MYERS ("MYERS") (s/h/a William R. Meyers) and K.P. INDUSTRIES, INC. ("KP") (s/h/a K&P Signs) for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims asserted against them [Motion Sequence 004];

Motion by defendant UNIVERSAL LIGHTING TECHNOLOGIES, INC. ("ULT") for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims asserted against it [Motion Seq. 005];

Motion by defendants BUTLER AT YOUR SERVICE, TOM BUTLER, individually, and TOM BUTLER d/b/a BUTLER AT YOUR SERVICE (collectively, the "BUTLER Defendants"), for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims asserted against them [Motion Sequence 006];

Cross-Motion by defendants GOSSIN COMMERCIAL REFRIGERATION, CARLOS GOSSIN, individually and CARLOS GOSSIN d/b/a GOSSIN COMMERCIAL REFRIGERATION (collectively, the "GOSSIN Defendants") for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims asserted against them [Motion Sequence 007]; and

Motion by defendants BRUSH MASTER SIGN CO. ("BRUSH MASTER") and DAVID BARONCELLI ("BARONCELLI") individually and BARONCELLI d/b/a BRUSH MASTER for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims asserted against them [Motion Sequence 008].

FACTS

This is an action to recover damages for, *inter alia*, personal injury and wrongful death in connection with the electrocution of plaintiff's decedent Michael J. Greene on June 16, 2006 (the "Incident"). Mr. Greene, a volunteer firefighter, had returned to the scene of a fire which had occurred three days earlier at a restaurant located at 350 East Montauk Highway in Lindenhurst, NY. He was attempting to retrieve a tarp from the roof of the restaurant, when he came into contact with an electric box sign (the "Sign") on the roof and was electrocuted.

Following the Incident, an inspection of the Sign and surrounding electrical equipment was conducted by Robert R. Wass, an electrician retained by the Suffolk County Medical Examiner's Office. In his report dated June 21, 2006 (the "Wass Report") [Motion Exhibit B], Wass concluded that dangerously high voltage was available and present, and that this condition was due to the "blatant disregard for electrical codes and dangerous workmanship" in the Sign and surrounding equipment. The Wass Report noted that there was no grounding on the Sign, as required by the applicable code. Lack of proper grounding was also found in the surrounding equipment. Mr. Greene was electrocuted when, through contact, he became the path of the high voltage to the ground.

This action was commenced on February 1, 2007, against twenty-six persons or entities who had an alleged relationship to the property, the premises or the Sign, either at the time the Sign was manufactured or installed, or at the time of the Incident. Liability was asserted on the basis of negligence, violation of municipal law and/or products liability.

DISCUSSION

Defendants MYERS and KP

The Complaint states a cause of action sounding in negligence against all defendants, including the moving defendants MYERS, KP and non-appearing defendant J&B SIGNS ("J&B"). (According to the NY Department of State corporations database, J&B SIGN CO., INC. was dissolved in 2002.) Plaintiff alleges that defendants MYERS, J&B and/or KP negligently manufactured, installed and/or serviced the Sign in 1998, and are therefore responsible, at least in part, for the lack of electrical grounding, defective ballast and improper electrical wiring that contributed to the dangerous condition of the Sign. Plaintiff alleges that MYERS, J&B and/or KP either created the dangerous condition, or failed to appreciate, report or correct it in the course of installing or servicing the Sign.

Defendant MYERS contends that he is entitled to summary judgment dismissing the claims against him on the ground that he cannot be held liable in his individual capacity for corporate acts. He claims that his "sole relationship to the subject sign was as the President of non-appearing defendant J&B in or about 1997/1998 when the sign was created," and that there is no reason to "pierce the corporate veil" to hold him personally responsible for the alleged negligence. [Affirmation in Support of Roberta E. Tarshis, December 23, 2009 ("Movants' Affirmation"), ¶ 9; Memorandum of Law, p.4].

Defendant KP asserts that it is entitled to summary judgment dismissing the claims against it on the grounds that KP did not manufacture, install or maintain the Sign. Nor did KP perform any electrical work on the Sign. In fact, KP claims, "the identity of the person or entity which made the electrical connection to the sign in 1998 is still unknown." [Movants' Affirmation ¶20.] At most, KP admits, it made two service calls to the premises and performed one fifty ($50) dollar repair to the aluminum frame housing the plexiglass, in March of 1998. Further, KP argues, even if, *arguendo*, it did manufacture and install the Sign, the wiring of the Sign was "materially altered" subsequent to installation. Photographs show that between October 2005 and June 2006, the electrical connection to the Sign was moved from the bottom of the Sign to the side of the Sign. KP contends that this alteration was a superseding, intervening act sufficient to interrupt the causal nexus between KP's alleged negligence and the fatal injury to plaintiff's decedent eight years later. [*See* Memorandum of Law, pp. 8-11.]

In opposition, plaintiff asserts that MYERS is not being sued for corporate acts, but for his own negligence, to the extent that MYERS performed the work himself. Plaintiff contends that "[MYERS] in his individual capacity, [J&B] and [KP] are interrelated entities and that it is a question of fact as to which of them, or all, manufactured and installed the subject sign." [Affirmation in Opposition of Lucille A. Fontana, March 3, 2010, ¶ 6.] Further, plaintiff contends that even if KP did not install the Sign, it admittedly made a service call in March of 1998, and was negligent in failing to observe and report the ungrounded condition at that time. Finally, plaintiff argues that the relocation of the electrical connection was not a new or superseding event, but rather a continuation of the lack of grounding inherent in the original manufacture and install-ation. Therefore, plaintiff argues, it is a contributing, rather than superseding cause, and does not relieve the moving defendants of liability.

The Court finds that the evidence raises issues of fact regarding (i) which, if any, of the moving defendants performed or were responsible for the work of manufacturing, installing or maintaining the Sign; (ii) the specific nature of the work, if any, performed by the moving defendants; and (iii) the causal relationship between the work performed by the moving defendants, if any, and the fatal injury to plaintiff's decedent.

The moving defendants point to non-appearing defendant J&B as the entity that contracted with defendant BRUSH MASTER to construct and install the subject sign box. (BRUSH MASTER took the order from the restaurant operator, and supplied the plexiglass sign face.) This is supported by the deposition testimony of defendant BARONCELLI, owner of BRUSH MASTER, as well as a copy of a check from BRUSH MASTER to J&B. MYERS does not deny that J&B performed the job, but claims to have no personal recollection of it and to have kept none of the business records of J&B.

Although the moving defendants claim to be separate and distinct from J&B, there is sufficient evidence of an interrelationship among the individuals and companies, and a connection between each of them and the Sign, to raise an issue of fact as to each defendant's role in the manufacture and installation of the Sign. MYERS admits that he was the president of J&B at the time the Sign was built and installed (sometime between December 1997 and March 1998), that he personally (as well as other employees) built and installed signs for J&B, and that at the time the Sign was built and installed, J&B was going out of business because of MYERS' personal problems. KP was incorporated in November 1997 by MYERS's mother, Karen Puchacz ("Puchacz"), who continued her full-time employment in an unrelated enterprise. MYERS stated that he assisted his mother by providing expertise and consultation. Puchacz testified that KP received several calls from customers of J&B, and that Puchacz contacted or consulted with ex-J&B employees to perform KP's first jobs. Puchacz and William Naranjo, a former employee of J&B, state that by the time KP was incorporated, J&B was a defunct corporation and all the employees had left. Nonetheless, BARONCELLI states that when the Sign was ordered (in or about December 1997), his contact person was MYERS (although he did not know who performed the actual work).

Based upon BARONCELLI's deposition testimony and his statements to the police investigator after the Incident, it appears that BARONCELLI did not distinguish between the two entities, J&B or KP, in connection with the Sign. He told the police investigator that he had contracted with KP. In his deposition, he states that J&B "did the box" and that he gave a check to J&B. Elsewhere in the deposition, BARONCELLI states that when he told the police that K&P Signs "did the box," he was referring to MYERS and KP. He states that he assumed that J&B changed its name to KP, but he didn't know when he stopped writing checks to J&B and started writing them to KP. An invoice from KP to BRUSH MASTER dated March 17, 1998 describes the work performed as "Second Trip - (Install 4 x 16, 18" x 10, 4 x 8 F/A)."

The foregoing is sufficient to raise an issue of fact regarding the extent to which KP, and MYERS individually, participated in the construction or installation of the Sign.

With respect to the nature of their involvement, the moving defendants deny doing any electrical work. Specifically, they deny having anything to do with the electrical connection of the Sign to the power source. MYERS admits, however, that the construction of a sign box includes the installation of ballasts and sockets for the lamps, as well as the wires that connect them to the inside of the sign box.

According to the affidavit of plaintiff's expert, who inspected the Sign in connection with this litigation, the Sign's internal wiring did not contain a ground screw

or ground wire, as required by the applicable electrical codes and standards. Plaintiff's expert stated his opinion that the Sign never contained a ground screw or ground wire, and that the manufacturer of the Sign shared responsibility for providing same with the electrician who connected the Sign. No evidence contradicts this opinion. The moving defendants argue that plaintiff's expert opinion is rendered meaningless by virtue of the fact that it was based upon an inspection performed twelve years after the Sign's manufacture and installation. Notably, however, MYERS detailed discussion of his method of sign construction did not include any mention of installing ground wires or ground screws. There is no evidentiary basis to infer that ground wires or ground screws were present in the original installation but subsequently removed.

The Court finds an issue of fact on the question of whether or not MYERS or KP breached a duty of care by failing to provide ground wires and ground screws in the course of installing the Sign's internal wiring.

With respect to causation, the Court finds an issue of fact regarding whether or not the relocation of the electrical connection to the Sign in 2005-2006 sufficiently altered the electrical composition of the Sign so as to constitute a superseding cause of the hazardous condition that killed plaintiff's decedent.

Accordingly, the Court cannot find, as a matter of law, that MYERS and KP are entitled to summary judgment dismissing the claims and cross-claims against them. The Court notes MYERS' and KP's objection to the untimely opposition submitted on behalf of defendants LONG ISLAND CHEESEBURGER, JUAN TAVERAS, PRISCIRO TAVERAS and MIGUEL TURCIOS. The Court found said opposition to be superfluous and did not rely upon it.

ULT

Plaintiff asserts products liability and negligence causes of action, as well as a claim for punitive damages, against defendant ULT, the entity that manufactured the ballasts used in the Sign. Plaintiff alleges that a manufacturing or design defect in one of the ballasts caused the leakage of current that, together with the lack of grounding, led to the electrocution of plaintiff's decedent. Further, plaintiff alleges that ULT failed to provide adequate warning of the danger of improper grounding.

ULT seeks to dismiss all of the claims and cross-claims against it, on the grounds that: (i) there was no design defect and plaintiff offers no proof of a safer design; (ii) there was no manufacturing defect – the product was tested twice at the factory and was

used for eight years without incident; and (iii) there was no evidence that the warning was defective or that a different warning would have changed the result. Further, ULT argues that the intervening acts of others – namely, those who installed the Sign without grounding – break the chain of causation between the purported defect and the fatal injury to plaintiff's decedent. Finally, ULT seeks to dismiss the punitive damages claim as unfounded.

Plaintiff does not oppose the motion with respect to the claim for punitive damages, and the Court finds that ULT is entitled to summary judgment dismissing that claim. With respect to the products liability and negligence claims, it is undisputed that the subject ballast leaked current into the Sign. It is also undisputed that proper grounding would have channeled the electricity away from the Sign and to the circuit breaker, thus averting the danger of electrocution. At issue is whether or not the leakage of current to the Sign was the result of a design or manufacturing defect, and whether or not the ungrounded condition of the Sign was an extraordinary, and thus superseding, causative event. The adequacy of the warning and causal relationship between the warning and the subject accident are also in dispute.

Design Defect. In support of its motion, ULT submits the affidavit of William Brosius IV ("Brosius") its "Director for Field Services" at ULT, Nashville, TN [Motion Exhibit P], as well as the affidavits of two expert witnesses, David Powell ("Powell") [Motion Exhibit R] and Norman C. Grimshaw ("Grimshaw") [Motion Exhibit S], which state that the design of the subject ballast was safe and complied with all recognized standards, including those of Underwriters Laboratories and the American National Standards Institute ("ANSI"). In addition, the affidavits note that the ULT magnetic ballasts share the same "basic" design used by all manufacturers in the United States since 1938.

Powell states that the leakage of current from the ballast was due to "an end of life event" of the insulation within the ballast. In the words of ULT counsel, "like all things, the ballast wore out." According to Brosius's deposition testimony [Motion Exhibit N], ballasts are only expected to last from five to nine years, depending on the conditions (particularly heat) to which they are exposed. Counsel argues that the applicable standards contemplate use of the ballast in a properly grounded sign or other fixture, which would have safely neutralized any leakage resulting from the inevitable deterioration of the ballast. Brosius opines that the subject ballast's design was "state of the art." Powell and Grimshaw state that "plaintiff's experts have not offered a feasible, safer alternative design," but fall short of saying that there is none.

In opposition, plaintiff submits the affidavits of her experts, Andrew J. Neuhalfen ("Neuhalfen") [Plaintiff's Opposition Exhibit 2] and Robert W. Miller ("Miller") [Plaintiff's Opposition Exhibit 4] which state that the design of the subject ballast was defective insofar as it did not require a layer of insulation on all sides of the transformer (it was present only on the top side) to prevent leakage of the current to the housing of the ballast. Neuhalfen notes that the inspection and testing of the Sign and component parts, performed on December 16, 2006, revealed leakage from the left ballast of a lethal amount of current, over 700 times the maximum acceptable leakage allowed by Underwriters Laboratories. Acknowledging that the breakdown of the ballast was inevitable, both experts opined that the ballast should have been designed to fail safely. In their view, it was unreasonable for ULT to rely on proper grounding or potting compound (to be discussed in connection with the manufacturing defect claim) when an insulating liner could have prevented the hazardous leakage. Neuhalfen and Miller propose that ULT could have used an epoxy called Uvalux (which ULT used on the top of the transformer) at a cost of pennies per ballast, and that the incorporation of such an insulating liner would not have affected the utility or marketability of the ballast.

ULT replies, in essence, that the design alternative proffered by plaintiff's experts is untested, and thus "worthless" in opposition to summary judgment. In fact, ULT argues, the design proposed by plaintiff's experts is actually less safe than the design used by ULT.

ULT cites no authority for the proposition that a proposed safer alternative must have undergone a testing protocol in order to defeat summary judgment. No case law found by the Court dictates that studies must be done, or prototypes built, in order to raise an issue of fact. If that were the rule, then products liability defendants would be able to avoid a trial in every case, unless a safer alternative had already been produced or introduced to the market. In the appellate decisions examined by this Court, the submission of expert opinion stating that the product's design was defective or dangerous, describing in detail the specific danger posed by the product and how it could made safer, and concluding that it is feasible to do so, was sufficient to submit the case to the jury. *See, e.g.,* **Pierre-Louis v. DeLonghi America, Inc.,** 66 AD3d 859 (and cases cited therein). This Court is neither required to, nor in the position to, weigh the conflicting expert opinions at this juncture. The Court finds that a genuine issue of material fact exists concerning the reasonableness of the ballast's design. It is the province of the jury to undertake the required risk-utility analysis. **Id.**

Manufacturing Defect. ULT relies on the affidavits of Brosius, Powell and Grimshaw, all of which state that "the subject ballast does not contain a manufacturing defect." Further, Brosius states that "[e]ach ballast is individually tested twice at the

factory by energizing it with 3400 volts, many times greater than what will be seen in operation, to check for manufacturing defects. None were found in this ballast." Counsel notes that the ballasts were used for eight years without incident.

Plaintiff notes that ULT presents no evidence by anyone with personal knowledge of the testing, which must have been performed in September of 1997, when the ballast was manufactured. Nor is there documentary evidence substantiating the performance or nature of such testing. Plaintiff submits the opinions of her own experts, Neuhalfen and Miller, which state that the post-accident examination of the ballast revealed substantial voids and gaps in the potting compound surrounding the core of the transformer. Miller states that such incomplete encapsulation violates Underwriting Laboratories standards. Neuhalfen and Miller opined that these voids and gaps occurred during the manufacturing process, and Miller states that (and describes how) the high voltage test referred to by ULT's experts would not necessarily have revealed the voids in the potting compound. According to Neuhalfen and Miller, a proper fill of potting compound around the transformer would have prevented the electrical voltage that was present on the core of the transformer from energizing the housing of the ballast.

In reply, ULT's counsel disputes that voids or gaps in the potting soil had any causal relation to the leakage of current, insofar as the potting compound is not an electrical insulator. Rather, counsel states, is it designed to dissipate heat, insulate sound, and keep out water.

At best, the Court finds a conflict between the experts on the issue of whether or not the gaps or voids in the potting soil were a manufacturing defect that contributed to the dangerous high-voltage condition of the Sign. Accordingly, the Court is compelled to submit the matter to a jury for findings of fact and issue determination. Plaintiffs negligence claims are based upon the same facts as the products liability claims, and, accordingly, must also be submitted to the jury.

Causation. Based upon the evidence submitted to date, the Court cannot find, as a matter of law, that the lack of grounding was a superseding cause that interrupted the chain of causation between the alleged defects in the ballast and the fatal injury to plaintiff's decedent. A jury could reasonably determine that the lack of grounding was a foreseeable, concurrent cause, and that both the product defect and the lack of grounding contributed to the fatal event.

Failure to Warn. ULT asserts that a warning label on the ballast adequately warned of the necessity for grounding. Alternatively, ULT argues that it had no duty to warn, insofar as the intended and reasonably foreseeable users of the product were sign

professionals and licensed electricians who are expected to have knowledge of the dangers inherent in the lack of grounding, and to whom such warnings would have been superfluous. Finally, ULT contends that plaintiff is unable to prove causation because there is no evidence that the unknown sign installer even read the label on the ballast or that a different warning would have produced a different result.

Plaintiff maintains that there is a duty to warn, derived from the foreseeable risk of a failure to ground, and that ULT's warning was inadequate. Plaintiff argues further that a sign installer is not a "knowledgeable user" within the meaning of the exception, citing an admission by Brosius that there are instances in which the sign will not be grounded.

A manufacturer is relieved of its duty to warn its customers of foreseeable risks associated with the use of the product when the intended or foreseeable users are knowledgeable of those potential risks, or should be, by virtue of their training, experience, or expertise. **Travelers Ins. Co. v. Federal Pacific Elec. Co.,** 211 AD2d 40. In this case, the evidence in the record indicates, without contradiction, that the purchaser and/or user of the ballasts was MYERS, J&B or KP. One (or more) of those parties was responsible for installing the ballasts in the Sign. Even if, for sake of argument, these parties are deemed to be sign manufacturing professionals, that status does not allow this Court to attribute to them sufficient knowledge of electrical hazards so as to render any warning superfluous, particularly since MYERS was not a licensed electrician. ULT concedes that sign manufacturers such as MYERS were foreseeable users of their product. Accordingly, the Court finds that the "knowledgeable user" exception does not apply. Insofar as ULT concedes that a failure to ground was foreseeable, the Court finds that ULT had a duty to warn of the dangers of an ungrounded ballast.

Although plaintiff raised questions regarding what label actually appeared on the subject ballast, the Court shall assume for purposes of this discussion only, that the warning on the subject ballast was in substantially the form attached to ULT's Reply Brief as Exhibit Y. That is, on the side of the label appears: "! WARNING/ HAZARDOUS VOLTAGE/ DISCONNECT ALL INPUT POWER BEFORE INSTALLING OR MAINTAINING." On the instructional diagram depicting the internal wiring scheme, the box representing the ballast case reads: "GROUND BALLAST CASE." The label also directs the user to "install in Accordance with the National Electrical Code" (which, according to ULT, requires grounding).

Plaintiff's expert opined that an adequate warning would have included the following language: "! WARNING/ Hazardous voltage may cause fire, shock, or electrocution. Disconnect power before installing or servicing. MUST GROUND SIGN TO EARTH."

The Court finds that, in this case, the adequacy of the warning is an issue properly determined by the jury. Further, there is insufficient evidence on the record to determine whether or not the alleged deficient warning was a substantial factor in the death of plaintiff's decedent. At this juncture, the Court cannot determine as a matter of law that the warning was not a factor. Accordingly, summary judgment on the failure to warn claim is unavailable.

The BUTLER Defendants

TOM BUTLER, a licensed electrician, maintains an electrical contracting company called BUTLER AT YOUR SERVICE. It is undisputed that the BUTLER Defendants were hired by CHAOPHAYA THAI RESTAURANT (the "Thai Restaurant"), the restaurant that occupied the subject premises in 1998, to supervise two unlicensed individuals, referred to as "Sing" and "Song," in connection with the electrical wiring of at least a portion of the premises.

The BUTLER Defendants maintain that they are entitled to summary judgment dismissing the claims and cross-claims against them because, among other things: (i) the electrical work supervised by the BUTLER Defendants was limited to the installation of light fixtures, outlets and switches in the dining room of the Thai Restaurant only – they had nothing to do with the wiring or installation of the Sign; (ii) the work supervised by the BUTLER Defendants was completed prior to the installation of the Sign; and (iii) the electrical work supervised by the BUTLER Defendants passed two electrical inspections performed by defendant ELECTRICAL INSPECTION SERVICE ("EIS"); (iv) extensive changes were made to the wiring of the premises sometime after December 2004, when defendant LONG ISLAND CHEESEBURGER took possession of the premises; and (v) none of the violations found by EIS in its 2006 inspection were present when EIS inspected the BUTLER Defendants' work in 1998. Accordingly, the BUTLER Defendants conclude that they cannot be held responsible for the dangerous ungrounded condition that resulted in the electrocution death of plaintiff's decedent.

The Court finds that an issue of fact has been raised with respect to the scope of the work supervised and approved by the BUTLER Defendants. Although the BUTLER Defendants claims that their work was limited to the dining room area of the premises, plaintiff submits evidence that their work included wiring for the Sign – namely, the on/off wall switch for the Sign, which was located in the dining room, and the wires leading from that switch to the outside of the building for ultimate connection to the Sign. Defendant KEITH CURTIN, who did carpentry work during the renovation of the premises in December 1997 through March 1998, testified: "Only thing I saw Sing and

Seoul [sic] do was put a switch for an outside light and an outside sign. They took a wire, they shoved it through the wall and that was for a future hookup for the sign." CURTIN testified further: "They were putting a switch in the wall for the sign. They did that and I saw them do that. The wire went up to the ceiling and I don't know what happened after that point." [*See* Motion Exhibit J.] Although there is no documentary evidence substantiating this testimony, neither is there any documentary evidence to the contrary. The EIS electrical inspection certificate is inconclusive on that point. [*See* Plaintiff's Opposition Exhibit 15.] Essentially, on the record to date, the issue turns on the contradictory assertions of TOM BUTLER and KEITH CURTIN, which present a matter of credibility, appropriate for submission to the jury.

Plaintiff also presents testimony refuting the BUTLER Defendants' contention that their work was completed prior to the installation of the Sign. The Court need not set forth this testimony in detail, as the determination of this motion does not depend upon it. If the BUTLER Defendants supervised and approved the installation of the switch and wiring leading from the switch to the Sign, the fact that they may have completed the work prior to the Sign's installation does not exonerate them from liability for any defects in their work that contributed to the Incident.

The Court also finds an issue of fact with respect to whether or not the defective wiring and electrical code violations cited in the Wass Report and the EIS Inspection Report of June 29, 2006 [Plaintiff's Opposition Exhibit 17] were present in 1998, at the time that the BUTLER Defendants completed their work. In support of the BUTLER Defendants' position, there is evidence indicating that the work of the BUTLER Defendants passed two inspections in 1998. Further, photographs show that there was alteration of the wiring to the sign when LONG ISLAND CHEESEBURGER took over the premises in 2004; namely, the location of the electrical connection to the Sign was moved from the bottom to the side of the Sign.

In support of the plaintiff's position, the owners of the Thai Restaurant and LONG ISLAND CHEESEBURGER have testified that no electrical work was done inside the restaurant after the 1998 renovations except for the installation of a wire for a walk-in freezer located outside the restaurant. Further, the Wass Report describes a lack of grounding at several junctures in the wiring from the on/off switch to the Sign. Even if there was an alteration in the wiring at the connection to the sign, that does not prove that there was an alteration at any of the other junctures where a lack of grounding was found.

In his Reply Affirmation, counsel for the BUTLER Defendants adds two items to his list of reasons for granting summary judgment: (1) "The electrical wiring installed under the supervision of Butler in 1998 consisted of metal clad wiring known as BX,"

and (2) "The path of the electrical wiring that was improperly ground consisted of plastic coated wiring known as Romex. Butler did not install or supervise the installation of Romex wiring in 1998." Counsel cites, as proof of these assertions, portions of the deposition testimony of KEITH CURTIN:

> "Electrical work was in. I remember that because the Koreans did the whole store in Romex. Mr. Lyman [the Building Inspector for the village] flew off the handle, started screaming. He says, what's wrong with you guys? You don't know what you're doing. They did everything in Romex. He said, you're not supposed to use Romex. So the Koreans had to rip it all out and put BX cable into the store." . . .
>
> "Q When you put the ceiling tiles in, what did you observe about the wiring?
> A I saw it was all BX cable." . . .
>
> "Q During that two-week time, did you see the Romex being changed to BX?
> A Within a few days after Lyman was there, the Koreans showed up with all new rolls of BX and they started changing all the BX to Romex – from Romex to BX, ripping out all the Romex, recoiling it up and putting up the BX cable in the ceiling grid."

The Court finds that this newly cited evidence fails to tip the balance in favor of summary judgment. First, the testimony is too vague. It is not clear which wires CURTIN was talking about, and whether or not CURTIN had any first-hand knowledge about the extent of the re-wiring (from Romex to BX) he claims to have seen performed by Sing and Song. Second, if CURTIN's testimony is that *all* of the wiring was converted from Romex to BX, then at least some of the wiring (the wiring cited in the Wass Report) would have to have been changed *back* to Romex after the completion of the renovations in 1998. That proposition is contradicted by the testimony of the owners of the two restaurants, who stated that no rewiring was done subsequent to the completion of the 1998 renovations. Again, the Court finds that the evidence raises issues of fact that cannot be determined in the context of a motion for summary judgment.

The Court notes the BUTLER Defendants' objection to the untimely opposition submitted on behalf of defendants LONG ISLAND CHEESEBURGER, JUAN TAVERAS, PRISCIRO TAVERAS and MIGUEL TURCIOS. The Court found said opposition to be superfluous and did not rely upon it. Nor did the Court rely upon the Reply submitted by the BUTLER Defendants in response thereto.

The GOSSIN Defendants

The GOSSIN defendants seek summary judgment on the ground that there is no evidence of negligence on their part. According to the GOSSIN Defendants, their only connection to the Incident was the presence of GOSSIN employees at the premises on the date of the fire, three days before the Incident. The GOSSIN defendants state that GOSSIN employees were at the premises for the purpose of repairing an air conditioning unit on a different side of the roof from where the Sign was located. They neither created nor contributed to the Sign's ungrounded condition which caused the fatal injury to plaintiff's decedent.

Plaintiff responds that she does not oppose the GOSSIN Defendants' motion. The Court has received no other response or opposition to this motion. The Court finds that the GOSSIN Defendants are entitled to summary judgment dismissing the claims and cross-claims against them.

BRUSH MASTER and BARONCELLI

BRUSH MASTER AND BARONCELLI seek summary judgment on the ground that there is no evidence of negligence on their part. According to BARONCELLI, his and BRUSH MASTER's role in creating the Sign was limited to taking the order for the Sign, subcontracting with J&B for the construction of the sign box, and providing the plexiglass face for the Sign, portraying the name of the Thai Restaurant. BARONCELLI states that the plexiglass face was the only portion of the Sign provided by BRUSH MASTER. "The box, bulbs, ballasts and electrical wiring inside the box was subcontracted out to J&B Signs." Affidavit in Support of BARONCELLI, sworn to on February 26, 2010, ¶ 8. Further, BARONCELLI states that the plexiglass face that he created in 1998 for the Thai Restaurant was replaced prior to the Incident, by a plexiglass face portraying the name of defendant LONG ISLAND CHEESEBURGER.

Plaintiff responds that she does not oppose this motion. The motion is opposed, however, by defendant 350 EAST MONTAUK HIGHWAY CORPORATION on the ground that the motion was not timely filed.

CPLR §3212(a) provides that summary judgment motions must be made no later than the date specified by the Court, or, if no date is specified, then no later than 120 days after the filing of the Note of Issue. Regardless of the merits of the motion, the Court has discretion to extend this deadline only if good cause for the delay is shown. **Miceli v.**

State Farm Mut. Auto. Ins. Co., 3 NY3d 725; **Brill v. City of New York,** 2 NY3d 648; **Hesse v. Rockland County Legislature,** 18 AD3d 614.

In this case, the Court, in its Certification Order, specified that all summary judgment motions must be filed within 80 days of the filing of the Note of Issue. The Note of Issue was filed on October 8, 2009. The instant motion, dated February 26, 2010, was made after the expiration of both the 80-day deadline specified by the Court and the 120-day deadline specified by the Legislature. No explanation for the delay was given. Although counsel states that his office has no record of ever receiving the Note of Issue, he does not attempt to justify the delay on that basis.

Absent an excuse for the delay, the Court generally cannot extend the deadline or consider the untimely summary judgment motion. An exception has been recognized, however, for an untimely motion or cross-motion which was made on nearly identical grounds as a prior timely motion for summary judgment. "In such circumstances, the issues raised by the untimely motion or cross-motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212[a]) to review the untimely motion or cross motion on the merits." **Grande v. Peteroy,** 39 AD3d 590, 592. This exception is based on the power of the Court to search the record and award summary judgment to a nonmoving party [**CPLR 3212(b)**], but only with respect to a cause of action or issue that is the subject of the motion before the court. **Dunham v. Hilco Const. Co., Inc.,** 89 NY2d 425.

The issue presented to the Court in the instant motion concerns the manufacture of the Sign, particularly, which party or parties were responsible for the provision and installation of the internal wiring or other electrical components of the Sign. The nearly identical issue was presented to the Court in the motion to dismiss brought by MYERS and KP. The evidence presented in the motion brought by MYERS and KP showed that at least one of J&B, MYERS or KP was responsible for the internal wiring and electrical components of the Sign, and that BRUSH MASTER and BARONCELLI were responsible solely for the plexiglass face. That is precisely the argument made by the moving parties in the instant motion.

The Court finds, accordingly, that it is authorized to consider the instant motion on the merits. The Court holds that BRUSH MASTER and BARONCELLI are entitled to summary judgment in their favor, dismissing the Complaint and all cross-claims against them.

CONCLUSION

The Court has considered the remaining contentions of the parties and finds that they are without merit or have been rendered academic. Based upon the foregoing, it is

ORDERED, that the motion by defendants MYERS and KP for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims against them [Motion Sequence 004] is **denied**; and it is further

ORDERED, that the motion by defendant ULT for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims against it [Motion Sequence 005] is **granted in part and denied in part**, as follows: it is **granted** insofar as the claim for punitive damages is dismissed, without opposition; it is **denied** with respect to the remaining claims; and it is further

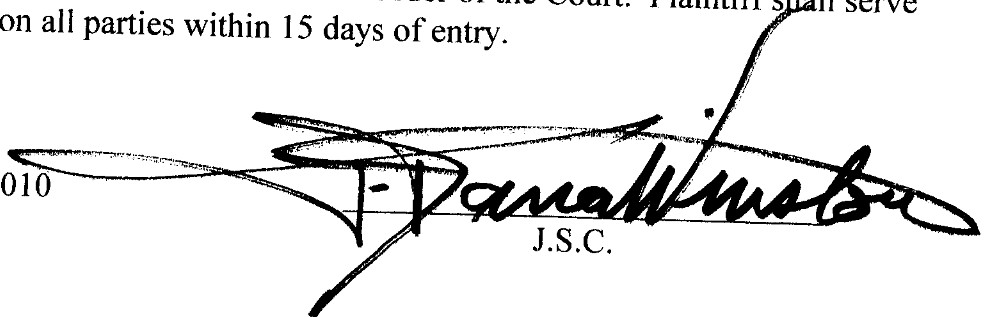
ORDERED, that the motion by the BUTLER Defendants for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims asserted against them [Motion Sequence 006] is **denied**; and it is further

ORDERED, that the cross-motion by the GOSSIN defendants for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims against them [Motion Sequence 007] is **granted,** without opposition; and it is further

ORDERED, that the motion by defendants BRUSH MASTER and BARONCELLI for summary judgment pursuant to **CPLR §3212** dismissing the complaint and all cross-claims against them [Motion Sequence 008] is **granted.**

The foregoing constitutes the decision and Order of the Court. Plaintiff shall serve a copy of this Order upon all parties within 15 days of entry.

Dated: September 30, 2010



J.S.C.

ENTERED
NOV 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE