EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CIVIL TERM: PART 18
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MANUEL BERMEJO,

Plaintiff,

-against- INDEX NO. 23985/09

AMSTERDAM & 76th ASSOCIATES, LLC and IBEX CONSTRUCTION, LLC.,

Defendants.
----------X

IBEX CONSTRUCTION, LLC,

Third-Party Plaintiff,

-against- INDEX NO.

MARBLE TECHNIQUES, INC.,

Third-Party Defendant.
_____X

Supreme Courthouse
88-11 Sutphin Boulevard
Jamaica, New York 11435
July 1, 2013

B E F O R E:

HONORABLE DUANE A. HART,
Supreme Court Justice

A P P E A R A N C E S:

KEVIN CONNOLLY, ESQ.
Attorney for Plaintiff
585 Stewart Avenue
Garden City, New York 11530

PATRICK HACKETT, ESQ.
Attorney for the Plaintiff
585 Stewart Avenue
Garden City, New York 11530

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

GUS CONSTANTINIDIS, ESQ.
Attorney for the Plaintiff
35-01 35th Street
Long Island City, New York

PELTZ & WALKER, LLP
Attorneys for HHC
222 Broadway
New York, New York 10038
BY: STEVEN SILVERMAN, ESQ.

BARRY McTIERNAN & MOORE, LLC
Attorneys for Equinox & Eclipse
2 Rector Street
New York, New York 10006
BY: EMER FORDE, ESQ.

LONDON FISHER, LLP
Attorneys for Amesterdam & 76th Associates, LLC
59 Maiden Lane
New York, New York 10038
BY: RICHARD MENDELSOHN, ESQ.

ANDREA G. SAWYERS, ESQ.
Attorney for Ibex Construction
3 Huntington Quadrangle
Melville, New York 11747
BY: MICHAEL REILLY, ESQ.

ANNA ROSEN, ESQ.
Attorneys for Defendant in DJ Action
570 Lexington Avenue
New York, New York 10016

KERN, AUGUSTINE, CONROY & SCHOPPMANN, LLP
Attorneys for Dr. Michael Katz
865 Merrick Avenue
Westbury, New York
BY: DAVID VOZZA, ESQ.

AUDREY KEISER
OFFICIAL COURT REPORTER

THE COURT: This is Index Number 23985 of 2009, Manuel Bermejo, against Amsterdam & 76th Associates, LLC and Ibex Construction, LLC., defendants., et. al. Appearance of counsel, please.

MR. CONNOLLY: Kevin Connolly, 585 Stewart Avenue, Garden City, New York, for the plaintiff.

MR. HACKETT: Patrick Hackett, 585 Stewart Avenue, Garden City, New York, also representing the plaintiff.

MR. CONSTANTINIDIS: Gus Constantinidis, 35-01 35th Avenue, Long Island City, New York, for the plaintiff.

MR. SILVERMAN: Steven Silverman from the law office of Peltz & Walker, 222 Broadway, New York, New York, 10038. We are for the discontinued HHC, Medical malpractice.

MS. FORDE: Emer Forde, from the law office of Barry, McTiernan & Moore, LLC, 2 Rector Street, New York, New York, 10006 for second and third party defendant Equinox Holding, Inc., Equinox 76th Street, Inc., and Eclipse Development Corporation, Inc.

MR. MENDELSOHN: Richard Mendelsohn from the law office of London Fisher, LLP, 59 Maiden Lane, New York, New York on behalf of the defendant and second third party plaintiff Amsterdam & 76th Associates.

MR. REILLY: Michael Reilly from the law office of Andrea G. Sawyers, attorney for the defendant and third party Ibex Construction, 3 Huntington Quadrangle, Melville, New York,

11747.

MS. ROSEN: Anna Rosen, attorney for defendant DJ action that has been consolidated with the Labor Law action, 570 Lexington Avenue, New York, New York, 10116.

THE COURT: All right. At the outset, this record has a long and tortured history. At the outset, I would like the parties to know that pursuant to the Court rules and there is a case that I didn't bring with me, but I will attach it to the record. I cannot sanction Dr. Katz. He is not a party. I can sanction the attorneys that called him up to $10,000.00, which is my plan because you called him.

Based on what the conduct that he displayed in doing this not IME, somebody should have known. The interesting thing is if I sanction the attorneys that called him, they will appeal it. There will be a public record. Dr. Katz' future doing IME's because he lied in this one will probably be finished. I can and it is a shame Dr. Katz's attorney is not here. I can hold him in civil contempt for costing the state to expend thousands of dollars on a trial and then coming in here to lie about what he did, causing a mistrial. There has to be a subsequent retrial. That is my thinking. I

I will make a finding if the record appears so after we go through what we have to go through. On the other hand, again I am not happy with the non-notice of recording. I can sanction the plaintiff, but it would only be a nominal sanction.

This case is like a microchip, if you will with what is wrong with the PI system in this state. We have, the worst thing is that we have a doctor who clearly lied about the length of time he took to do an IME, clearly. No matter how you slice it, 10, 15, 20 minutes. It turns out he took 1 minute and 56 seconds.

He testified as to findings that he obviously could not have had in a minute and 56 seconds. But if he did 10, 20 IME, he could have had. And he could have done it, but he didn't do the test. So what am I to do? I have got to review it again at the cost, significant cost of the state of New York which is hemorrhaging money in the Court system. I have co-workers that have not gotten a raise in years. It took 14 years to get a raise for the judges.

We are wasting our time trying cases over and over and over again because a doctor who is making millions of dollars doing IME's decides that he is going to lie. I would hope frankly that the Law Journal and everybody else that covers the news sees this. Courts take a look at this record. Not because of my, and I am not sure because of a malicious intent of the attorneys, but it is a mess. Everybody is blaming everybody.

But the bottom line is the state of New York is not going to pay. Rule 130-2.2, the Court may impose sanctions or award costs on both and only upon written memorandum of decision or statement on the record setting forth the conduct of which the award or imposition is based and the reasons why the Court

found the attorneys failure to --well, that is a different one.

The section I am citing is the part where I could sanction a party, the section before. Award of costs and imposition of financial sanctions for frivolous conduct in a simple litigation, that is 130-1.1. I can only sanction a party or the attorneys. Since I can't sanction Dr. Katz for lying and let the record reflect and by the way, I am withdrawing any sealing of any prior record in this case. Dr. Katz lied. I am finding that he lied. He clearly, his clear unequivocal testimony that his IME took 10, 20 minutes, correct Mr. Hackett?

MR. HACKETT: I believe that was his final testimony, your Honor.

THE COURT: How long did the second IME take?

MR. HACKETT: 1 minute, 56 seconds.

THE COURT: It is not like frankly, and this is not the first time that I heard about doctors or that a doctor performing an IME. From what he says, is no a period of time than the testimony says it took two minutes, but I cannot blame Dr. Katz for the ills of the world, but I can blame him on this case.

I can blame the attorneys and the carrier who hired him to do an IME on this case because they should have known what this guy was doing. They should have known. And again the man is making literally millions of dollars doing IME's. Now, he gets caught lying. There is no other way to put it. He

lied. There is no other way to make it nice. He said the IME took between 10 to 20 minutes. It took a minute and 56 seconds.

So, I will and you can do whatever you want to to appeal on this record. Mr. Mendelsohn, I am sanctioning your law firm $10,000.00. You can appeal this. But clearly, for this reason, I can't sanction Dr. Katz. You can appeal this. I want you to appeal it. I want the Appellate Division to make a finding that I am right or wrong, but there is no doubt about the finding that Dr. Katz lied. I want you to appeal that finding so that every lawyer in the state that looks at the Law Journal and looks at the record will be able to see what went on during this trial.

Right or wrong, they are going to come out with a statement of fact. They are going to come out with my finding that he lied. Now, I can't sanction him pursuant to the Court rules, but I can hold him in contempt. I will have to have a hearing for that. He and his attorneys are not here, notwithstanding my order that they must be here. Again, pursuant to section, 130-1.1, et al.

MR. MENDELSOHN: Your Honor, if I might be heard?

THE COURT: I am sorry. I have to let you be heard. Please. I am also adopting what you said in prior Court proceedings, but I will hear you.

MR. MENDELSOHN: With all due respect, we would join in with the IME that my firm was not the firm that hired Dr. Katz.

THE COURT: Who hired Dr. Katz?

MR. REILLY: My office hired Dr. Katz.

THE COURT: I am not finished with you.

MR. MENDELSOHN: With all due respect your Honor, the defendants, both Mr. Reilly's office and my office, we had no notice of this. We did not and we have been over this before, we did not support this. We did not suborn the perjury that your Honor is finding.

THE COURT: Mr. Reilly, your firm, pending you being heard, just like Mr. Mendelsohn that was my anticipation. Go on, sir.

MR. MENDELSOHN: The defendants and I said this before are just as harmed as anyone else here. Dr. Katz was hired to perform a job. We are not there to oversee what Dr. Katz does. Dr. Katz tells us he performed a physical examination. We have to go under the presumption that he performed that physical examination.

For the Court to come after the defendants because he was hired on behalf of the defendants to perform the examination, we did not act frivilously. Dr. Katz based upon the Court's findings and the documents for the Court finding for this argument--

THE COURT: Who called him?

MR. MENDELSOHN: The defendant did.

THE COURT: How many times has your firm or your

carrier and I am not going to say your client, but the carrier that is involved in this case that you have an association with, how many times did they use Dr. Katz in the past and are continuing to use Dr. Katz?

MR. MENDELSOHN: I can't tell you that, your Honor. I know there have been other occasions where he has been retained. I know that there -- that we have had a discussion.

THE COURT: Did you ever bother to check up on the way he does business or you just like the results that he says there is minimum or no injury to the plaintiff? Did you ever try to do some quality control with this gentleman or you are happy that that man, he helps our case. We are going to go about our business.

MR. MENDELSOHN: I have gotten reports from physicians that don't help my case.

THE COURT: I am talking about Dr. Katz.

MR. MENDELSOHN: I have never had an occasion to deal with Dr. Katz before. I personally have never.

THE COURT: How about your firm?

MR. MENDELSOHN: My firm has had cases that he has been retained by either co-defendant and on very limited occasions by the firm.

THE COURT: How about by the carrier, then?

MR. MENDELSOHN: That I couldn't tell you, your Honor.

THE COURT: Mr. Reilly, I plan to do the same thing.

MR. REILLY: Absolutely, your Honor. He has been used with some frequency by my carrier for whom we are staff counsel. I have had occasions that he has given reports that are positive and not good for my client, your Honor. I had no way of knowing what was going to happen.

THE COURT: You mean he doesn't always lie?

MR. REILLY: I think your Honor is assuming if there is an exam not fair to the plaintiff, that is not true.

THE COURT: I have one lie here, a huge lie. Does anybody disagree that he lied on the stand?

MR. REILLY: Your Honor is asking me about other situations. I have used him with some frequency on orthopedic cases. We have offices, both staff counsel and outside counsel that have used him. I never had a problem like this your Honor, in all the years I have been practicing.

THE COURT: I am less interested in the money. I will eventually order your firm and Mr. Mendelsohn's firm to pay. It is the Scarlet letter that I am interested in. This gentleman is still doing IME's. He is still being used by defense firms. We have gotten calls to get the record of what went on when Dr. Katz testified; is that correct Mr. Hales?

MR. HALES: Yes.

THE COURT: I can't imagine the amount of extra trials and extra litigation and extra costs and extra everything that is occasioned by having this gentleman part of the system. I

don't know if he is a spy with little beady eyes and goes away because he is not here and neither is his attorney. He is going literally on because I can't sanction him. I can't sanction him, but I can hold him in civil contempt after a hearing. Your firm because you called him and you are responsible for him and you relied on him. That I could sanction.

Again, Mr. Reilly, Mr. Mendelsohn, I have the utmost respect for your integrity. I have dealt with your firms in the past. It is nothing malicious. I want the record to be clear there is nothing malicious against your firms. I have dealt with you gentlemen over a period of years.

I would put on the record that I find you both to be men of honor, and integrity. You are more than competent. You are among the most competent attorneys that appear in this building on a regular basis. I want you to appeal me.

I want you to appeal the finding that two of the carriers caused this gentleman to testify and he lied. And he lied. And he lied badly. It was two, three weeks worth of trial. Mr. Mendelsohn, do you have anything else to say except that you take exception to my finding?

MR. MENDELSOHN: First of all, I respectfully take exception your Honor. Second of all, going through the totality of what has occurred here, I respectfully request the Court to look back as to the two starting places of this. What we have is counsel acting outside of the scope of what they were

permitted to do.

THE COURT: I will deal with the plaintiffs. Their conduct wouldn't have caused a mistrial. It could have caused maybe a delay. It is the lie that caused the mistrial.

MR. MENDELSOHN: And without there being any proof that we were aware of this, I respectfully take exception, your Honor. There is no way that the defendant could have known that when Dr. Katz said he performed an examination, whether it was 30 seconds, 30 minutes, 3 minutes, ten minutes. If he says that he does it, we have to take him on his word. I understand what your Honor is saying about his word. We don't have an ability to be at the examinations. We don't have an ability to time what Dr. Katz does.

The defendants are precluded from being at the examinations. There is nothing at all that allows a defendant to be present while a plaintiff is being physically examined. For us to be able to even perform quality control which your Honor is saying, there is no way that we can possibly do that and a number of cases are out there. Your Honor is more than aware of how many personal injury cases there are in this county, New York county.

THE COURT: Queens, Nassau, Bronx, Kings county.

MR. MENDELSOHN: All of the state of New York. Every day there are physical examinations being scheduled. The manpower to view, to monitor a doctor is -- it just wouldn't be

possible.

THE COURT: Well, maybe this is the old attention getter. I am not trying to reinvent the wheel. I am trying to deal with this case and to some extent this is an abuse and not the first time that I have seen it, though this is clearly the most blatant example of a doctor getting up there and just not telling the truth. Because violation of the rules or not, Mr. Hackett recorded it. So again, Mr. Reilly, do you have any else to say?

MR. REILLY: Yes.

THE COURT: Please. I will hear you, sir.

MR. REILLY: I second Mr. Mendelsohn's comments. I feel the same way about the Court. However, I must respectfully and vehemently except to your Honor's sanctions.

THE COURT: Noted.

MR. REILLY: Your Honor characterized the defendants being responsible for Dr. Katz.

THE COURT: You called him.

MR. REILLY: That is a big difference from being responsible for Dr. Katz. He is not an employee of my firm nor of my principle, nor of my client. Again, I am going to tell you your Honor, nobody had any idea what was going to happen. Actually, the only person that had some idea was plaintiff's counsel that taped it. I know that your Honor will get to that in a second. For your Honor to say it is his lies as your Honor

characterized it, Dr. Katz.

THE COURT: Did he lie?

MR. REILLY: I am not going to say that is a lie. Your Honor characterized it as a lie.

THE COURT: If someone says it took him 10, 20 minutes to do an exam and in fact it took him 1 minute 56 seconds is that not and there is no way of cleaning it up, is that not a lie?

MR. REILLY: I believe the record says what it says. Your Honor has made that point. I am not going to get into that right now. The issue at hand is that whatever Dr. Katz said and your Honor characterized it as a lie, I would disagree with your Honor that is what caused a mistrial. I think your Honor the record is clear. The fact that we had taken this violation of the CPLR which your Honor said from the bench.

THE COURT: I am not happy with Mr. Hackett either.

MR. REILLY: I understand that, your Honor. I have a feeling that you are more unhappy with my client and me.

THE COURT: The only person that I am unhappy with is Dr. Katz. What I am doing with you and your firm and Mr. Mendelsohn and his firm is getting your attention.

MR. REILLY: I understand that, your Honor. You have it. I want to say just before I finish is that your Honor from the bench and I remember this as clear as yesterday, is that your Honor said that my application for a mistrial is granted

based on the fact that we had a suspicious tape reviewed before the record. I just want to say that for the record your Honor was kind enough to say there was no malicious behavior by myself, Mr. Mendelsohn or our office.

THE COURT: I will make it very clear. Again, there is nothing, I am finding no maliciousness, no lack of integrity, nothing on behalf of your firm except calling Dr. Katz and not monitoring what he was saying.

MR. REILLY: For the reasons that I already stated your Honor, and from what Mr. Mendelsohn said, I could not and nor am I responsible legally or anybody responsible legally for the monitoring that goes on. I would respectfully and vigorously except to your Honor's ruling. Thank you, your Honor.

THE COURT: I have to sanction your firms because I can't sanction the carrier pursuant to the Court rules. It is the carriers and Dr. Katz that I would love to sanction, but I can't do that. I can only sanction the attorneys or the parties pursuant to the Court rules. There is case law. One of the Appellate Division cases that I found. You can almost hear them grinding their teeth that the rule is limited to the party or the attorneys. You can probably hear my teeth grinding.

I would like to sanction Dr. Katz. I would like to put Dr. Katz out of the business of doing IME's period. But I can't do that in this type of proceeding. I can order an eventual when they are before me, a civil contempt hearing to be

done by another Judge. I am not going to do it. I will discuss with the powers that be in this building a civil contempt hearing with regards to Dr. Katz. That is Michael Katz, an orthopedist.

So I am staying enforcement of the penalty for 90 days so that you could have a complete hearing before the Appellate Division. I will sanction the law office of Andrea G. Sawyers $10,000.00, and the law office of London Fischer $10,000.00 for staying ninety days. I know that you want to order the record.

I am giving you time for the Appellate Division, not the summer session to be there because they kind of take a break during the summer. I am going to give you the 90 days so it goes into September and you will be able to go before the full Appellate Division. Time is not of the essence for you gentlemen. You have an exception. Now, Mr. Hackett.

MR. CONNOLLY: Your Honor, may I be heard because I believe I know where we are going with this?

THE COURT: Yes.

MR. CONNOLLY: Thank you. Your Honor, we are standing here for one reason. Dr. Katz is a known purveyor falsehood. In connection with this, Mr. Hackett was there in his office on a prior independent medical examination. During the report of that examination, he for the first time in Mr. Hackett's career, attacked Mr. Hackett for his misrepresentation of his client.

THE COURT: I did it on the stand. It was an adhomin

attack.

MR. CONNOLLY: We have an upstanding member of the bar in front of us right now, right now. He took the measures he needed to take in order to pretext his representation. That is he set forth a digital recording of that examination to prove to the world at large that he did not interfere one way at all with that examination.

THE COURT: What happened to the notice? Why do I have to go three weeks on trial and get this surprise?

MR. CONNOLLY: There is never a reason for Mr. Hackett to bring it out of the pocket. All Dr. Katz has to do is tell the truth. If Dr. Katz would have gone to the Second Department, Appellate Division and this gentleman is not an upstanding member of the bar. That he acts in a way that is inappropriate for lawyers to be acting during the IME. Now, he has something to defend himself from. The known purveyor of falsehood can say whatever he wants. We know that he lies.

THE COURT: We don't know that he lies. We know he lied.

MR. CONNOLLY: He doesn't have respect for the Court, your Honor. What would make you think that he would have any respect for Mr. Hackett? This happened because of Dr. Katz, no other reason your Honor. You are talking about sanctions, your Honor.

How many times does the plaintiff have to try the

case? How many times does the plaintiff have to spend $40,000.00 to get the expert to come in here? This is ridiculous. This is all because of Dr. Katz. Had I known of the truth, none of this would have happened. None. I am sorry for interrupting your Honor. I couldn't wait to get that out. I would also respectfully ask your Honor that you at least take and accept an opportunity to look at the papers that we have submitted.

THE COURT: Let me see them.

MR. CONNOLLY: I would ask that you reserve decision on sanctions.

THE COURT: I have been thinking about this for a month. It has been bothering me for a month. I have looked at the cases. I know the sanction for Mr. Hackett is going to be significantly less than that for the defendants because I believe Mr. Hackett acted, I don't want to say in good faith, but in our system there is just nothing worse than lying.

You can't do business if the witness is going to lie or if the lawyers don't have integrity. Failure to give proper notice of discovery, that is one thing. You know, the system is what it is and I am not trying to reinventing the wheel. All the accusations around, who is doing what, the plaintiff's bar, one form of tort reform. The defendant's bar with another form of tort reform. The various parties are taking sides. I am not into that. What we can't have under any system 1: A witness

getting up and lying. We just can't do that. That is just not the way it is done. Mr. Hackett.

MR. HACKETT: May I be heard?

THE COURT: Yes. You have to be heard pursuant to the Court rules.

MR. HACKETT: Your Honor just going into it without remarks, most of it, but on the day, the first time when we were actually considering using the video was here in Court when Dr. Katz testified as he did. We didn't just shoot from the hip at that point. We looked at the CPLR. We read the CPLR. We respectfully disagree with the Court's position that, we read it as him being a nonparty in the case.

Therefore, that set him apart from the language in the CPLR that required the disclosure. We also during the lunch break before he came on, we got on the phone. We called and spoke to in the Courthouse and spoke to other prominent trial attorneys asking their opinion.

THE COURT: The trial attorney said that trial by ambush or confronting a witness by ambush is the way we do business?

MR. HACKETT: In light of the fact that this is a nonparty witness, this could be considered as attorney product and not necessarily be disclosed after the party testified as rebuttal evidence, not evidence in chief.

THE COURT: Well, maybe that has to be discussed by

the Court of Appeals and Appellate Division.

MR. HACKETT: Your Honor, in addition papers that we had submitted to the Court included a treatice by a prominent law firm in Manhattan that that again he took the position that what we did was proper. Although the Court has a different opinion as to what should have been done and frankly in light of the cost that is going to be incurred by our office and the significant amount of time that we spent on this case, you know if I could do a redo, I would. But nevertheless, what I did was not some frivolous action. It clearly was not.

THE COURT: I didn't say it was frivolous.

MR. HACKETT: It was not an act that I knew or that any case law indicated was improper. In fact, the case law that I have submitted to the Court indicates in my reading of it that what I did was appropriate. I went beyond.

THE COURT: Give me a case that says what you did was appropriate. Taping an IME, sitting on the tape until you can cross-examine the witness, getting the witness to lie which I have to, I have to again parrot that Dr. Katz' attorney said probably the stupidest thing that I have ever heard in Court, I caused him to perjure himself by forcing him to tell the truth. That is quite possibly the dumbest thing I have ever heard. That I caused the witness to perjure himself by forcing him to tell the truth. So, I want the Appellate Division and the Court of Appeals to get that guy's number. Go on, sir.

MR. HACKETT: There are specific cases that we have set forth in the papers that we have submitted.

THE COURT: Let me see them. Madam clerk, do you have a copy of their papers what in case, by the way all of your papers are deemed part of this record for Appellate purposes.

MR. CONNOLLY: Exhibit D, your Honor.

MR. HACKETT: Exhibit D which is a treatise written by Steven Kesselman of counsel to the litigation department of Ruskin, Moscower & Valdish. On the second page, it talks about nonparties. Specifically says what about a nonparty? CPLR 3101.1, by the terms do not apply to nonparty.

THE COURT: Again, what about the PC order that said you will turn over all papers? Does it say all parties?

MR. HACKETT: I disagree with your reading of the PC order.

THE COURT: What does it say?

MR. HACKETT: Section C, in the PC order, 6A says that all parties shall exchange names and addresses of all witnesses, and shall exchange statements of opposing party and photographs. That is what it says. It seems to indicate they are talking about--

THE COURT: So you took a photograph of an event. That tape is a photo. It doesn't say photo of a party. It says a photo. That is a photograph.

MR. HACKETT: Your Honor, I respectfully disagree. I

understand what you are saying. You know when I read that, I do not read it that way.

THE COURT: That is the way I read it.

MR. HACKETT: I understand. In good faith, I did not read that as you are interpreting that. It certainly doesn't say videotapes of nonparty. It doesn't say digital recordings.

THE COURT: Excuse me. Well if the CPLR hasn't caught up to the pleasantries, excuse me. If it hasn't caught up to the pleasantries of what is a photograph, I think one can reasonably assume that the image on a microchip. However, it appears is the equivalent of a photo. It doesn't say and photographs of a party. It says photographs. Photographing the party is not knowing the party, for instance. It says photographs.

MR. HACKETT: There is specific language in the CPLR. It makes it clear as to what one is required to do requiring a party and nonparty. Again your Honor, I understand what you are saying. As you very well know, I very much respect this Court and yourself and your opinions. However, when we were making the decisions we were making, we weren't doing something, trying to get over on anybody or anyone else. We weren't even intending, possibly if we had more of an opportunity to think about it, we would have handled it differently.

THE COURT: I think you would have.

MR. HACKETT: You are probably right, your Honor. Frankly after I did what I did to Dr. Katz on the stand, I didn't need that. In his testimony he agreed that he was going to have to change his opinion based on the cross. That is what he testified to. I didn't really need to do anything else to him. It was just how it came out. For the first exam, he testified took 45 minutes which is completely outrageous. That is why Ms. Romres (phonetic) had the reaction she did because he was absolutely full of lies at that point.

It was only based on his perjury in the degree that he testified to that caused us to do what we did. That may have been somewhat of a knee jerk reaction your Honor but it doesn't come to the level of imposing sanctions on us.

Frankly, I don't know what that means for me with the bar association and the Appellate Division what I have to do in that regard. I know it comes into play with the legal malpractice insurance and things like that that has to be reported. I don't know what other recording I have to do on that.

Frankly, I believe monetarily we have been hit hard on this, your Honor. We spent $40,000.00 on experts and we will do it again. We don't get paid hourly as defense counsel. We spent our time.

THE COURT: I agree. But the sanction on your firm is not going to be just like in the real world I have no doubt that

if there is a payment it will not come from these firms. It will come from the carrier. It should come from the carrier. In fact, you should almost sue Dr. Katz for causing this problem. I would suggest you do that but still I read the terms in the PC orders, photographs not conjunctively, I read it dysjunctively.

If I am wrong, I am wrong. But I have a photograph that might have saved I believe weeks of trial. Might have saved the state weeks of expenses, not to mention the fact that I got jurors that gave up their time for $40.00 a day. That if I had notice of this, I might have been able to settle the case. That is one thing. But you could have told me in camera.

MR. HACKETT: Judge, if --

THE COURT: I was as surprised as anybody else. During the third week of trial, after spending I don't know $5,000 a week per case per trial that the state has to and everybody doesn't like it. All right. We will declare a mistrial.

MR. HACKETT: I would just ask your Honor again for the consideration.

THE COURT: I realize that you have to call your doctors back.

MR. HACKETT: And our economist.

THE COURT: Yes. You have put your case in. It is going to cost you between 20 and 30 or $40,000.00 to retry this

thing. For that I am sanctioning your firm $250.00. I want you to appeal.

MR. MENDELSOHN: Your Honor, can I be heard?

THE COURT: Yes.

MR. MENDELSOHN: First of all, the recording requirements, the marks against Mr. Hackett, those are remarks that go against Mr. Reilly and myself as well. We didn't even do these acts and we are having the mark against us.

THE COURT: Then what else do I do?

MR. MENDELSOHN: Well first of all, your Honor --

THE COURT: How do I stop carriers from putting people like Dr. Katz on the stand and causing the state to spend thousands and thousands of dollars trying a case and putting a lying witness on the stand? How do people like me, people in this building, people that wear black robes send a message to them that they cannot condone perjury.

MR. MENDELSOHN: You are making us the scapegoat. You are making myself and Mr. Reilly, we are the Scarlet letter what happened with Dr. Katz. We only hired him to do a job. He didn't do that job. If my firm sues him and collects the $10,000.00, I have a mark against me that will follow me for the rest of my career. It will follow me through my firm. It will affect me in my firm. It is a mark against me. I didn't hire Dr. Katz.

I didn't tell him to go ahead and lie on the stand. I

went and said we are joining in the report because we presumed that Dr. Katz did what Dr. Katz said he would do. I would recommend to my firm that we do sue Dr. Katz because he had become adverse to me personally at this point. This is an effect on my career as Mr. Hackett is saying. It is an effect on his career. The problem is Mr. Hackett had an intentional act.

THE COURT: You can stop. You are right. I am particularly sensitive because it was done to me. You three guys are right. I don't know how else to do it.

MR. MENDELSOHN: We can take it from there, your Honor. We will see where your Honor goes. I have another point.

THE COURT: What is Plan B that you guys can come up with?

MR. MENDELSOHN: Plan B is out there what Dr. Katz did. You have unsealed the record. He will not be able to testify ever again in Court once the record is unsealed.

THE COURT: I understand from sources that he has IME's from State Farm scheduled in the future.

MR. MENDELSOHN: They are sticking their neck on the line. It is out there. This was not out there previously for us to have to handle. This is now going to be a public record what Dr. Katz did, what your Honor's finding with regard to his testimony was. That is out there. Dr. Katz, if somebody wants to go and hire Dr. Katz right now, they are going to be subject

to an open record saying this is what this guy does.

THE COURT: I tell you what. Will you agree that Dr. Katz lied on the record, yes or no?

MR. MENDELSOHN: I can't say that he lied on the record. From what he said, he agreed it would take 10, 20 minutes. The tape says otherwise. I wasn't there. From the facts that are before the Court--

THE COURT: Step up. Off the record.

(Whereupon, an off the record discussion was held at this time and the following ensued:)

THE COURT: Mr. Mendelsohn, do you have any objection to my finding that Dr. Katz lied on the record?

MR. MENDELSOHN: If that is the Court's determination, I have no objection based upon the facts before the Court.

THE COURT: Mr. Reilly, do you have any objection to my findings that Dr. Katz lied on the record?

MR. REILLY: I don't have that standing, your Honor.

THE COURT: You are a person in this trial. Do you object? If you don't object for whatever reason, do you object yes or no?

MR. REILLY: I can't say I am in a position that I object, your Honor. Your Honor is characterizing it. That is your Honor's finding. I cannot be in a position where I am there to argue. I don't represent Dr. Katz.

THE COURT: Even if you don't have the standing?

MR. REILLY: If that is your Honor's determination, that is your Honor's determination. End of story, your Honor. Whatever happens, happens. I cannot say anything further on that. I don't know what the consequences would be or anything else. I don't represent the man, but your Honor made a finding.

THE COURT: Notwithstanding my and I am moved by what Mr. Mendelsohn, Mr. Reilly and Mr. Hackett all said that it will follow him like a scarlet letter. Again, I will reiterate on the record, I don't think you did anything wrong except you gentlemen for the defendants, except for calling Dr. Katz. Mr. Hackett, what he did was wrong, but I have seen worse. I disagree, we can disagree but I understand Mr. Reilly's argument of lack of standing, as long as there is no determination of Dr. Katz lied on the record, led him complain to me on the record. By the way it is noted that he is not here or his attorney. They were ordered to be here, correct?

MR. REILLY: That's correct, your Honor.

MR. SILVERMAN: The only thing last time you said two o'clock, didn't you?

THE COURT: All right. Then come back at two o'clock.

MR. CONSTANTINIDS: We were told to be here for jury selection in the morning.

THE COURT: Come back at two o'clock. We will see if Dr. Katz and his attorney show up.

MR. REILLY: Your Honor, I just want to say one thing

on the record. Mr. Mendelsohn spoke about his personal situation. I also second that. I didn't do anything intentionally.

THE COURT: I don't know the extent to which you gentlemen would be held personally liable. I am still not thrilled. I still don't condone the fact that excuse me, I still don't condone the fact that you called a witness as they say in my part of Queens lied his whatever off. But, the punishment should fit the crime. If you gentlemen and Mr. Hackett are going to carry around a scarlet letter, it is not worth it to me. It really isn't.

MR. MENDELSOHN: I appreciate that, your Honor.

MR. REILLY: Same here, your Honor.

MR. HACKETT: Thank you, your Honor.

THE COURT: I will vacate the sanctions. I am vacating the fines. I am not finished with Dr. Katz. I am still not finished with Dr. Katz. Make sure that he and his attorney can find their way here. Because I have to see what I am going to do with him. I would suggest that your carriers reinforce their efforts to never use him again.

MR. CONNOLLY: Your Honor, if we may, are you going to be addressing the other issues this afternoon or will you take care of that now?

THE COURT: I will address the other issues this afternoon with Dr. Katz and his attorney.

MR. CONNOLLY: I am talking about the issues with respect to the surveillance and subpoenas that they have moved to quash.

THE COURT: Well, we also have Mr. Mendelsohn and Mr. Reilly who will want a new IME, which I don't think is going to happen.

MS. KULL: Your Honor, I have an application to dismiss Mr. Mendelsohn's action against his client.

THE COURT: Who is your client?

MS. KULL: Equinox Holdings, Inc., Equinox 76 Street, Equinox Eclipse Development. We were the tenants. The action was commenced against us.

THE COURT: Well why would I dismiss it now?

MS. KULL: Your Honor, the time was certainly not granted to extend past the trial of this matter.

THE COURT: It was a mistrial.

MS. KULL: I understand your Honor, but --

THE COURT: When is the proper time?

MS. KULL: First PC order was 60 days post EBT.

THE COURT: All right. What does section 2004 of the CPLR say?

MS. KULL: I don't know.

THE COURT: For good cause shown, limiting that which could be extended. Good cause shown would be new testimony. Your application is most respectfully denied.

MS. KULL: Your Honor, if I may, the action against us is based on contractual indemnity based on the lease that was entered in 2008. Mr. Mendelsohn had full knowledge of our claims and full knowledge of any potential claims against us.

THE COURT: Did the statute of limitation pass?

MS. KULL: Yes.

THE COURT: When did the accident occur?

MS. KULL: December of 2008.

THE COURT: 2008 plus 6 is what?

MS. KULL: 2014.

THE COURT: Did we have a New Year's celebration that I didn't know about?

MS. KULL: Your Honor, with due respect --

THE COURT: He can bring the action now without permission of the Court.

MS. KULL: All right. Well, if this action was to proceed against us, we would ask that the action be severed for several issues.

THE COURT: Counsel, there is so much going on with this case that is the least of my problems. That is truly the least of my problems.

MS. KULL: I understand your Honor but however, if we are compelled to move forward with the trial of this matter we would seek to address the issue.

THE COURT: There are so many matters even with the

batch of sanctions and even though I vacated the sanctions, did I get my message across?

MR. HACKETT: Yes.

MR. MENDELSOHN: Yes.

MR. REILLY: Yes.

THE COURT: There are still other things like the new IME that London and Fischer will not get most likely.

MR. REILLY: My office as well on that, your Honor.

THE COURT: Yes. Andrea Sawyers because they are stuck with Dr. Katz as the IME doc. There will be so much going on. That in and of itself and I realize, by the way will get my point across when you give that record to the Appellate Division as to why you want an IME doc. Your application A is premature because he has a right to go after you as per contract. The statute has not even begun to run yet. So, on that alone, the action, your application is denied. It is not six years yet.

MS. KULL: Application to have the matter severed from the underlying action.

THE COURT: Again counsel, you have so much time. Even though the case is scheduled for trial, A: I am on trial. B: I don't think the two primary defendants want to try the case without the doctor. I don't think they want to try the case with the doctor that they have. I don't think they want to try the case without a doctor. So, whatever I do, whatever my ruling, they are going to appeal it. If I allow him to get a

new doctor, the plaintiffs will appeal me. You have got time. Two o'clock.

(Whereupon, a recess was taken and the following ensued:)

MR. VOZZA: David Vozza from the law firm of Kern, Augustine, Conroy & Schoppmann, PC, 865 Merrick Avenue, Westbury, New York. I represent Dr. Michael Katz.

THE COURT: Counsel, so that you know, I made a determination with Dr. Katz. The plaintiff's attorneys agreed that Dr. Katz lied. At least one of the defense attorneys agreed that Dr. Katz lied. It is not my guess that Dr. Katz lied. There is a difference between 1 minute 56 which was the recorded time of the IME that Dr. Katz performed and the 10, 20 minutes that Dr. Katz testified to.

MR. VOZZA: I have to take a look at the transcript of the last proceeding about two, three weeks ago. My colleagues had a conversation regarding your assessment. I want to note my continuing objection, characterization.

THE COURT: How do you confuse a minute 56 with ten minutes?

MR. VOZZA: Well from reading the transcript and I wasn't here for the trial in April, your Honor, had asked Dr. Katz.

THE COURT: By the way, your colleague who was here and again probably the dumbest thing I ever heard is that he

said I cost Dr. Katz to perjure himself because I demanded that he tell the truth.

MR. VOZZA: He is not with the firm anymore.

THE COURT: I am surprised. I made him tell the truth. I forced a witness to perjure himself. In all the years I have been on the bench, all the statements not in the Courtroom but in life that takes a new place. Sir you have got to tell the truth. That is forcing him to lie. I didn't know that.

MR. VOZZA: I have a little different take on it regarding the time element. Your Honor, thought falsely requested that Dr. Katz give you a concrete time of the IME. Dr. Katz did state a couple of times that he did not recall how long it was. When pressed by your Honor, he estimated the normal course or duration of an IME I think his words were 10, 20 minutes.

THE COURT: All the tests that he did which weren't necessarily born out in the film, was it?

MR. HACKETT: No, your Honor.

MR. VOZZA: Just to make one point, your Honor. The 10, 20 minute time range was not specifically for a specific--

THE COURT: No. You see this is the part that you are missing. I am not making a big thing of 10, 20 minutes. Witnesses confuse time all the time but he didn't do the tests that he said he did in the minute 56 seconds. That is the

problem.

MR. HACKETT: The results that he claimed occurred didn't occur. He said there was full range of motion. When you look at the film and I ask you please do, your Honor --

THE COURT: Mr. Hackett, I don't need help.

MR. VOZZA: I don't know why counsel is saying--

THE COURT: That is the problem. He didn't do the tests that he said he did. How do you screw that one up? You either do the test or you don't do the test.

MR. VOZZA: Your Honor is assuming that the examination lasted 1 minute and 56 seconds.

THE COURT: I am talking about what is on the film.

MR. VOZZA: The film is different. It doesn't take into account the different things that Dr. Katz needs to perform in performing IME's other than having actual physical contact with the plaintiff. There are records to review and conversations that he must have had with Dr. Katz.

What we are doing is dissecting to the actual time that he is actually touching the patient. If that time is 1 minute 56 seconds and I have not seen it since counsel supplied it to me. That appears to be the physical exam. It ends and starts abruptly. There are portions that we don't know what actually occurred in the examination.

THE COURT: The several witnesses and the films are wrong and Dr. Katz is right.

MR. VOZZA: What witness?

THE COURT: Mr. Hackett, his paralegal and I would assume the plaintiff about what tests were done, the film. At least 3 witnesses and a film that says one thing and Dr. Katz saying something else.

MR. VOZZA: I am more focused on the duration of the IME.

THE COURT: All right. Let's say that Dr. Katz was preparing this thing for eight minutes and did everything else in eight minutes. What did he do for the other eight minutes? Or it might be 18 minutes, he said 10, 20 minutes. Now, you might confuse two minutes with ten minutes in a manner of speech but how do you confuse two minutes with 20 minutes?

MR. VOZZA: I don't think there was confusion, Judge.

THE COURT: I don't think there was confusion either. I think he lied.

MR. VOZZA: I would like to note my objection.

THE COURT: You have an objection. Again, I will refer this, unless I don't think Dr. Katz, you know, we have enough problems doing trials. It is a strain on the system, but unless I get some sort of representation from you on behalf of Dr. Katz that he is out of the medical/legal business, I am going to refer this to the Administrative Judge and the District Attorney of Queens county so they can do whatever they want to do. Perjury is a D felony.

MR. VOZZA: Can I talk to Dr. Katz?

THE COURT: I would strongly suggest that you talk to Dr. Katz. As it is, and I can say this because it has already been said on the record. He will not be doing business with Travelers or AIG anymore. I have a feeling that any attorney or adjustor within earshot or who read this transcript will not be dealing with Dr. Katz much anymore. It might be an easy way for him to bow out gracefully from harm's way. I would imagine that his number is not going to be called too much in the foreseeable future. It might be a nice way out. Second call.

(Whereupon, a recess was taken and the following ensued:)

THE COURT: Let the record reflect that I gave Dr. Katz the option of and I would institute a special proceeding to retire from the medical/legal business. Retire at the time and he has declined. What I am now going to do, I am going to order a full transcript of everything, the trial and the subsequent proceedings. I will present that to both the administrative judge of Queens county and the District Attorney. I would recommend to the District Attorney that they explore prosecuting Dr. Katz for perjury.

Again counsel, it is not the time so much if the doctor thinks that he can explain the time. It is not the time problem. It is that there are tests that he testified to that he didn't do. That is the perjury. You might want to speak to

your client again. You can interpret the entire thing however many ways you want. He testified to things that didn't happen. That is the problem. They call that perjury. Again, I am making it very clear on this record, the insurance companies here are not going to go near him.

I unsealed the record. Everybody from now on when he testifies as to the tests that he performed, it is always going to be questioned from now on. After about a month or two, nobody is going to go near him anyway. So he is not giving up much. What he is giving up is me referring it to the District Attorney and to the Administrative Judge. I would think that he wants to consider it again. Nobody is going to go near him.

MR. VOZZA: Judge, I ask you respectfully if we can have some time--

THE COURT: No. Months.

MR. VOZZA: Judge, you are talking about criminal implications.

THE COURT: Yes, I am.

MR. VOZZA: I would ask for an opportunity to consult with our criminal department in our firm.

THE COURT: Sir, you have five minutes to do whatever you are going to do. This part of the matter has been going on a month. In the meantime is Dr. Katz still doing IME's?

DR. KATZ: Yes.

THE COURT: That is the problem. He is still doing

IME's. Dr. Katz, your name and your Queens address.

DR. KATZ: Michael J. Katz, 146-73 Delaware Avenue, Flushing, New York, 11355.

THE COURT: This is still part of the trial. So you are still under oath, Dr. Katz. That is the problem. He is still doing IME's. Now, if counsel --

MR. VOZZA: I understand, your Honor.

THE COURT: It is like a wound that is festering. Every time he does another IME. When is it going to stop? He is making 7 figures a year doing IME's. Then he comes to my part and lies. I will give you five more minutes. Trust me, I will go to the Administrative Judge, not that the administrative judge or the acting administrative judge doesn't already know about it, but I will go to the district attorney. It is not the time.

It is that the tape shows that he didn't do the tests that he spent a considerable period of time talking about that he did. That is the perjury. Yes, didn't do the tests. It is not just me saying it. It is not just the plaintiff saying it. The defendants are saying it too. Does your client really think if the insurance industry or some of the insurance companies that hired him before when they find out that he lied, do you really think they are going near him?

As they distribute the transcript, certainly this morning's transcript, certainly the last transcript, certainly

the transcript where his own attorney admitted that he perjured himself, but he only perjured himself because I told him to tell the truth. Imagine his own attorney said: Yes, he perjured himself. But he only perjured himself because I forced him to tell the truth. Counsel, you have five minutes to talk to your client.

MR. VOZZA: Thank you, your Honor.

(Whereupon, the proceeding was adjourned to July 2, 2013 at 2:00 p.m.)

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CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE STENOGRAPHIC NOTES TAKEN AT THIS PROCEEDING.

Audrey Keiser
Official Court Reporter