

1 SUPREME COURT OF THE STATE OF NEW YORK
 2 COUNTY OF QUEENS: CIVIL TERM: PART 18

2 -----X

3 MANUEL BERMEJO,

4 Plaintiff,

5 -against-

INDEX NO.
 23985/09

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

7 Defendants.

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8 IBEX CONSTRUCTION, LLC,

9 Third-Party Plaintiff,

10 -against-

INDEX NO.

11 MARBLE TECHNIQUES, INC.,

12 Third-Party Defendant.

-----X

13 Supreme Courthouse
 14 88-11 Sutphin Boulevard
 15 Jamaica, New York 11435
 16 July 1, 2013

17 B E F O R E:

18 HONORABLE DUANE A. HART,
 19 Supreme Court Justice

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

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 22 Attorney for Plaintiff
 23 585 Stewart Avenue
 24 Garden City, New York 11530

25 PATRICK HACKETT, ESQ.
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(APPEARANCES CONTINUED ON THE NEXT PAGE.)

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23 BY: DAVID VOZZA, ESQ.

24
25 AUDREY KEISER
OFFICIAL COURT REPORTER

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

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

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

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

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

14 MS. FORDE: Emer Forde, from the law office of Barry,
15 McTiernan & Moore, LLC, 2 Rector Street, New York, New York,
16 10006 for second and third party defendant Equinox Holding,
17 Inc., Equinox 76th Street, Inc., and Eclipse Development
18 Corporation, Inc.

19 MR. MENDELSON: Richard Mendelson from the law office
20 of London Fisher, LLP, 59 Maiden Lane, New York, New York on
21 behalf of the defendant and second third party plaintiff
22 Amsterdam & 76th Associates.

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

1 11747.

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

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

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

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

1 This case is like a microchip, if you will with what is wrong
2 with the PI system in this state. We have, the worst thing is
3 that we have a doctor who clearly lied about the length of time
4 he took to do an IME, clearly. No matter how you slice it, 10,
5 15, 20 minutes. It turns out he took 1 minute and 56 seconds.

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

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

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

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

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

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

13 THE COURT: How long did the second IME take?

14 MR. HACKETT: 1 minute, 56 seconds.

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

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

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

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

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

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

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

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

1 THE COURT: Who hired Dr. Katz?

2 MR. REILLY: My office hired Dr. Katz.

3 THE COURT: I am not finished with you.

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

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

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

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

23 THE COURT: Who called him?

24 MR. MENDELSON: The defendant did.

25 THE COURT: How many times has your firm or your

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

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

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

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

16 THE COURT: I am talking about Dr. Katz.

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

19 THE COURT: How about your firm?

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

23 THE COURT: How about by the carrier, then?

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

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

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

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

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

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

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

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

22 MR. HALES: Yes.

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

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

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

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

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

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

1 permitted to do.

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

5 MR. MENDELSON: And without there being any proof that
6 we were aware of this, I respectfully take exception, your
7 Honor. There is no way that the defendant could have known that
8 when Dr. Katz said he performed an examination, whether it was
9 30 seconds, 30 minutes, 3 minutes, ten minutes. If he says that
10 he does it, we have to take him on his word. I understand what
11 your Honor is saying about his word. We don't have an ability
12 to be at the examinations. We don't have an ability to time
13 what Dr. Katz does.

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

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

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

1 possible.

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

10 MR. REILLY: Yes.

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

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

15 THE COURT: Noted.

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

18 THE COURT: You called him.

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

1 characterized it, Dr. Katz.

2 THE COURT: Did he lie?

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

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

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

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

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

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

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

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

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

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

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

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

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

5 So I am staying enforcement of the penalty for 90 days
6 so that you could have a complete hearing before the Appellate
7 Division. I will sanction the law office of Andrea G. Sawyers
8 \$10,000.00, and the law office of London Fischer \$10,000.00 for
9 staying ninety days. I know that you want to order the record.

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

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

18 THE COURT: Yes.

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

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

1 attack.

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

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

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

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

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

25 How many times does the plaintiff have to try the

1 case? How many times does the plaintiff have to spend
2 \$40,000.00 to get the expert to come in here? This is
3 ridiculous. This is all because of Dr. Katz. Had I known of
4 the truth, none of this would have happened. None. I am sorry
5 for interrupting your Honor. I couldn't wait to get that out.
6 I would also respectfully ask your Honor that you at least take
7 and accept an opportunity to look at the papers that we have
8 submitted.

9 THE COURT: Let me see them.

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

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

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

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

3 MR. HACKETT: May I be heard?

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

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

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

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

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

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

1 the Court of Appeals and Appellate Division.

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

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

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

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

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

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

6 MR. CONNOLLY: Exhibit D, your Honor.

7 MR. HACKETT: Exhibit D which is a treatise written by
8 Steven Kesselman of counsel to the litigation department of
9 Ruskin, Moscower & Valdish. On the second page, it talks about
10 nonparties. Specifically says what about a nonparty? CPLR
11 3101.1, by the terms do not apply to nonparty.

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

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

16 THE COURT: What does it say?

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

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

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

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

3 THE COURT: That is the way I read it.

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

7

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

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

25 THE COURT: I think you would have.

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

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

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

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

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

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

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

13 MR. HACKETT: Judge, if --

14 THE COURT: I was as surprised as anybody else.
15 During the third week of trial, after spending I don't know
16 \$5,000 a week per case per trial that the state has to and
17 everybody doesn't like it. All right. We will declare a
18 mistrial.

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

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

23 MR. HACKETT: And our economist.

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

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

3 MR. MENDELSON: Your Honor, can I be heard?

4 THE COURT: Yes.

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

9 THE COURT: Then what else do I do?

10 MR. MENDELSON: Well first of all, your Honor --

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

17 MR. MENDELSON: You are making us the scapegoat. You
18 are making myself and Mr. Reilly, we are the Scarlet letter what
19 happened with Dr. Katz. We only hired him to do a job. He
20 didn't do that job. If my firm sues him and collects the
21 \$10,000.00, I have a mark against me that will follow me for the
22 rest of my career. It will follow me through my firm. It will
23 affect me in my firm. It is a mark against me. I didn't hire
24 Dr. Katz.

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

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

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

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

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

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

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

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

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

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

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

8 THE COURT: Step up. Off the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. MENDELSON: I appreciate that, your Honor.

13 MR. REILLY: Same here, your Honor.

14 MR. HACKETT: Thank you, your Honor.

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

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

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

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

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

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

9 THE COURT: Who is your client?

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

13 THE COURT: Well why would I dismiss it now?

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

16 THE COURT: It was a mistrial.

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

18 THE COURT: When is the proper time?

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

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

22 MS. KULL: I don't know.

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

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

5 THE COURT: Did the statute of limitation pass?

6 MS. KULL: Yes.

7 THE COURT: When did the accident occur?

8 MS. KULL: December of 2008.

9 THE COURT: 2008 plus 6 is what?

10 MS. KULL: 2014.

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

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

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

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

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

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

25 THE COURT: There are so many matters even with the

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

3 MR. HACKETT: Yes.

4 MR. MENDELSON: Yes.

5 MR. REILLY: Yes.

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

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

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

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

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

1 new doctor, the plaintiffs will appeal me. You have got time.

2 Two o'clock.

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

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

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

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

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

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

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

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

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

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

10 MR. VOZZA: I have a little different take on it
11 regarding the time element. Your Honor, thought falsely
12 requested that Dr. Katz give you a concrete time of the IME.
13 Dr. Katz did state a couple of times that he did not recall how
14 long it was. When pressed by your Honor, he estimated the
15 normal course or duration of an IME I think his words were 10,
16 20 minutes.

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

19 MR. HACKETT: No, your Honor.

20 MR. VOZZA: Just to make one point, your Honor. The
21 10, 20 minute time range was not specifically for a specific--

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

1 problem.

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

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

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

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

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

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

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

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

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

1 MR. VOZZA: What witness?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: No. Months.

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

18 THE COURT: Yes, I am.

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

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

24 DR. KATZ: Yes.

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

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

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

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

7 MR. VOZZA: I understand, your Honor.

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

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

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

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

7 MR. VOZZA: Thank you, your Honor.

8 (Whereupon, the proceeding was adjourned to July 2,
9 2013 at 2:00 p.m.)

10 *****

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

13

14

15 Audrey Keiser
16 Official Court Reporter

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