

1 SUPREME COURT OF THE STATE OF NEW YORK  
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  
IBEX CONSTRUCTION, LLC,  
7 Defendants.  
-----X

8 IBEX CONSTRUCTION, LLC,  
9 Third-Party Plaintiff,  
-against-

10 MARBLE TECHNIQUES, INC.,  
11 Third-Party Defendant.  
-----X

12 Supreme Courthouse  
88-11 Sutphin Boulevard  
13 Jamaica, New York 11435  
July 8, 2013

14 B E F O R E:

15 THE HONORABLE DUANE A. HART,  
16 Supreme Court Justice

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

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

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

24 (APPEARANCES CONTINUED ON THE NEXT PAGE.)

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3 Long Island City, New York

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6 BY: STEVEN SILVERMAN, ESQ.

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2 Rector Street  
9 New York, New York 10006  
BY: EMER FORDE, ESQ.

10  
11 LONDON FISHER, LLP  
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12 59 Maiden Lane  
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14 ANDREA G. SAWYERS, ESQ.  
15 Attorney for Ibex Construction  
3 Huntington Quadrangle  
16 Melville, New York 11747  
BY: MICHAEL REILLY, ESQ.

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18 ANN ODELSON, ESQ.  
Attorney for Defendant in DJ Action  
19 570 Lexington Avenue  
New York, New York 10016  
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21 KERN, AUGUSTINE, CONROY & SCHOPPMANN, LLP  
Attorneys for Dr. Michael Katz  
22 865 Merrick Avenue  
Westbury, New York  
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 Mendelsohn 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. ODELSON: Ann Odelson, 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: Firstly, I made a prior ruling that is.  
6 Agreed to by at least one defendant that Dr. Katz lied on the  
7 stand. Again, the tape of the IME is part of the record. It  
8 has been explored ad nauseam. I don't have to go into the  
9 ruling or the findings again but pursuant to that, defendants  
10 Amsterdam and 76th and Ibex Construction have asked for a new  
11 IME because of the fact that the expert that they had retained  
12 was found to have lied on the stand. That application is  
13 denied. You retained him. You are stuck with him. Also, and  
14 counsel step up for the doctor. I want your appearance on the  
15 record.

16 MR. VOZZA: David Vozza, from the law office of Kern,  
17 Augustine, Conroy & Scoppman, 865 Merrick Avenue Westbury, New  
18 York.

19 THE COURT: You represent Dr. Katz?

20 MR. VOZZA: Yes, your Honor.

21 THE COURT: Dr. Katz has already testified in this  
22 action. He has no further right to claim the 5th Amendment.  
23 If he is subpoenaed in here by any party, he must come or else  
24 he will be subject to contempt of this Court; is that understood  
25 counsel?

1           MR. VOZZA: I understand, your Honor. Someone is going  
2 to subpoenas him I understand.

3           THE COURT: If they do, he must come in. I don't.  
4 Want any games. I am telling you right now, no games. If he is  
5 subpoenaed, he will come in. But pursuant to that, I am denying  
6 as I said I am denying a new IME for any of the defendants. You  
7 called him. He lied. You are stuck with him.

8           MR. REILLY: Your Honor, may I be heard briefly?

9           THE COURT: Yes.

10          MR. REILLY: Just regarding the Order to Show Cause  
11 papers that I submitted for your Honor, under the circumstances  
12 we have a situation where your Honor has made a determination  
13 regarding Dr. Katz which either I or my client is aware. That  
14 is your Honor's determination. He won't come in voluntarily. I  
15 am not subpoenaing him. There is an adverse situation regarding  
16 that.

17          THE COURT: It is not adverse. He lied. He lied. I  
18 would imagine to help either your case or his carrier. I don't  
19 know which one.

20          MR. REILLY: It is adverse. I can't have the gentleman  
21 come in. Quite frankly under your Honor's holding, were I to  
22 subpoena him, I could be exposed to a problem and so could my  
23 firm and so could my client.

24          THE COURT: I caused him to commit perjury by forcing  
25 him to tell the truth. All I want to do is have him tell the

1 truth.

2 MR. REILLY: You weren't told that by myself, your  
3 Honor.

4 THE COURT: No.

5 MR. REILLY: My client through no fault of its own and  
6 I maintain to you and I will maintain it, the mistrial was  
7 proximately caused by the undisclosed tape, but the problem here  
8 is that my client is not with an expert on the orthopedic  
9 specialty. It is a situation where essentially it is an  
10 analogous situation where a physician has passed away.

11 THE COURT: All he has to do is tell the truth.

12 MR. REILLY: Well, your Honor doesn't want him in here.

13 THE COURT: No. I don't want him to testify in the  
14 the future in any other trials. I am stuck with him.

15 MR. REILLY: I just wanted to make my position and the  
16 record, your Honor.

17 THE COURT: If he comes and tells the truth, which  
18 means he would say instead of the exam taking 10, 20 minutes, it  
19 took 1 minute and 56 seconds. His finding might have been shall  
20 we say exaggerated. The amount of the tests that he did might  
21 have been somewhat exaggerated. Of course, he might be  
22 cross-examined.

23 MR. REILLY: At this point your Honor --

24 THE COURT: This might help a settlement of some sort,  
25 but, hey, that might be my opinion.

1           MR. REILLY: At this point your Honor, we are past that  
2 point. I have the record that I made. I have the record that I  
3 made on the Order to Show Cause. At this point your Honor, I  
4 would except to your Honor's ruling. I would ask your Honor to  
5 issue a stay pending the determination of the Appellate  
6 Division.

7           THE COURT: The stay is denied. If you want a stay,  
8 you can get a copy of the transcript and serve it upon the  
9 Appellate Division. I would suggest that you have to get the  
10 entire transcript, not just this particular event. You have to  
11 get the entire trial transcript so the Appellate Division is  
12 fully apprised of what went on during this trial.

13           MR. REILLY: I have the transcript.

14           THE COURT: This gentleman that was called to the  
15 stand, he was asked several times about his tests. When  
16 confronted with a film, it didn't necessarily match up with his  
17 testimony.

18           MR. REILLY: I remain in my position what caused it and  
19 the film that was not exchanged. But toward that your Honor, I  
20 will except the bulk of your Honor's ruling. I have prepared an  
21 order for your Honor to sign.

22           THE COURT: Give it to the clerk of the Court.

23           MR. REILLY: Thank you.

24           THE COURT: Mr. Mendelsohn, I believe that you join in  
25 the application.

1           MR. MENDELSON: I do, your Honor. I would also like  
2 to state at this point in time it is my understanding that Dr.  
3 Katz has basically become adverse to us. Based upon an --

4           THE COURT: How has he become adverse to you when all  
5 I am requiring is that he tell the truth?

6           MR. MENDELSON: It is my understanding that he stated  
7 and I have not had direct discussions with counsel, but counsel  
8 said he will not come in and testify in this matter.

9           THE COURT: We just cured that situation. Do you want  
10 to subpoena him?

11          MR. HACKETT: I am considering it, your Honor.

12          MR. REILLY: That is going to be hard, your Honor.  
13 That is completely off the chart, but we will handle it another  
14 day.           THE COURT: Why?

15          MR. REILLY: How does that have any relevance in this  
16 circumstance? That is simply duplicative. Beyond collateral to  
17 the defendant's case. I have to do the research on that, your  
18 Honor.

19          THE COURT: That it shows that he can't bend his arm  
20 as much as Dr. Katz really said that he could or they might want  
21 to bring Dr. Katz in to verify the chief complaint of the film.

22          MR. REILLY: Better yet, I will stand by Dr.  
23 Touliopolous' testimony.

24          THE COURT: Off the record.

25          (Whereupon, an off the record discussion was held at



1 this time and the following ensued:)

2 MR. REILLY: That is the story with that, your Honor.

3 MR. CONSTANDINITIS: Getting better and 5% loss of  
4 range of motion is two different things.

5 MR. REILLY: That is for us to argue.

6 THE COURT: I am going to grant your application.  
7 This trial will not start until September 3rd. I don't want any  
8 vacations to get in the way. I don't want any other trials to  
9 get in the way. It is what it is. Everybody will have a chance  
10 to appeal it. Mr. Hackett, you have an exception because of the  
11 delay. I am booked solid.

12 I will give the courtesy to everyone for their  
13 children doing special things or having vacations and your  
14 doctors or whatever. No more excuses. Excuse me. I will make  
15 it as per the Court rule. I won't even do it September 3rd. I  
16 will make it September 9th. By Court rules, that is more than a  
17 60 day adjournment. No excuses of unreadiness will be tolerated  
18 as per Section 125 of the Court rules.

19 MR. HACKETT: Judge, the only thing in that regard is  
20 we have not had an opportunity to speak to our doctors.

21 THE COURT: They will be here.

22 MR. HACKETT: We don't know if they are physically  
23 going to be here.

24 THE COURT: They will be here. You have two months.  
25 They will be here. They will be here. All the doctors will be

1 here. You have got to pay them a premium. They will be here.

2 MR. HACKETT: We have done that for July. We had been  
3 told that was going to go July 12th.

4 THE COURT: Well, now it is September 9th. That is a  
5 drop dead day. It will be tried. If you have to pick a jury,  
6 if I am on trial and that jury has to stick around and wait  
7 until I am finished with the trial, they will come back every  
8 day. This case is going to be tried, no excuses, September 9th.  
9 The doctor, if any party subpoenas him, he will come in. If he  
10 doesn't come in, you are on notice. I will help him get in.  
11 Help means appropriate sheriff.

12 MR. VOZZA: We will comply with any subpoenas.

13 THE COURT: I am also sending as I said a copy of the  
14 doctor's testimony to ADA James Neander. I will give a copy of  
15 the transcript to the Administrative Judge of this county, Judge  
16 Weinstein. Do you have enough time to appeal whatever I said?

17 MR. MENDELSON: Yes.

18 THE COURT: I am severing the second and third party  
19 actions for trial. I am granting your application. Anything  
20 else that is unready?

21 MS. ODELSON: There is a second Order to Show Cause by  
22 Ibex's counsel which is the same as the first Order to Show  
23 Cause which you consolidated the DJ action with the Labor Law  
24 action. We have already entered that.

25 THE COURT: I will deal with that then. I would not

1 worry about the DJ action. Anything else?

2 MR. HACKETT: We made an application for part of the  
3 application, before the Court were subpoenas that we had served  
4 on Dr. Katz, and on Dr. Touliopoulos for both their income tax  
5 records and also for doctor --

6 THE COURT: What do you need Dr. Katz's income tax  
7 records for?

8 MR. HACKETT: Because he testified how much money he  
9 was earning from the insurance companies. There was a  
10 deceitfulness of what he testified to here and testimony on a  
11 prior trial.

12 THE COURT: Do we know the meaning of the word  
13 tangent? That is what you are surfing on.

14 MR. HACKETT: The other part of the subpoenas, we were  
15 asking for --

16 THE COURT: Dr. Katz has no more credibility probably  
17 anywhere.

18 MR. GUS: We are looking for his diary.

19 THE COURT: There is a difference between the language  
20 and no one is angrier at Dr. Katz than I am. There are limits.  
21 The man is basically out of the business of testifying. Every  
22 attorney in the well of this Court gets 3, 4, 5 requests a day  
23 for the transcript with regards to Dr. Katz. He is through with  
24 testifying. \$500,000.00 to a million dollar income that he got  
25 doing IME's and the like, that is over. As soon as the State

1 finds out about it, he is not going to do any Worker's Comp  
2 exams. I don't need his tax returns. I don't need Dr.  
3 Touliopolous' tax returns either. Anything else?

4 MS. FORDE: Yes, your Honor. Are the matters going to  
5 be severed for trial purposes?

6 THE COURT: Yes. We will consider that in September.  
7 As I say, see me in September.

8 MR. REILLY: One more thing, your Honor. I have a  
9 judgment prepared regarding a settlement of default against  
10 Marble.

11 THE COURT: All right. I have a judgment, and an  
12 order.

13 MR. REILLY: Order regarding the denial of the IME.

14 THE COURT: You anticipated it.

15 MR. REILLY: Yes, your Honor.

16 MR. MENDELSON: Your Honor, with regard to the  
17 judgement against Marble.

18 THE COURT: You have to serve it on all parties.

19 MR. MENDELSON: We would renew and reargue our  
20 previous argument that pursuant to the contract based upon your  
21 Honor's signing a judgment against Marble, that we would be  
22 included under that. That the contracts involved require that  
23 the owner be indemnified just as Ibex.

24 THE COURT: All right. Settle the order. Let all  
25 sides comment and we will go from there. Anything else?

1           MR. VOZZA: Yes. I just want to reiterate my client's  
2 general objection to your Honor's assessment that he perjured  
3 himself.

4           THE COURT: What did I miss?

5           MR. VOZZA: Your Honor, for the record I need to make a  
6 statement.

7           THE COURT: What did I miss? When by the way your  
8 associate said he perjured himself. He said that I forced him  
9 to perjure himself because I was forcing him to tell the truth.  
10 There is an admission from your firm that he perjured himself.  
11 I forced him because you took an oath. You have to tell the  
12 truth.

13           MR. VOZZA: When I read the transcript, I don't read it  
14 as him actually saying --

15           THE COURT: Is there a direct quote that I forced him  
16 to perjure himself by requiring that he tell the truth.

17           MR. VOZZA: I don't think it is a direct quote.

18           THE COURT: I might have missed something like  
19 crossing a T or dotting an I. Did he say that?

20           MR. VOZZA: I don't remember what he said.

21           THE COURT: Where did the doctor not lie? I am not  
22 going to say perjure himself. Where did he not lie at the  
23 length of the exam that he took. He said 10, 20 minutes. It  
24 took 1 minute and 56 seconds, or on the tests that he did  
25 supposedly in the 10, 20 minutes and he missed a few of the

1 results of the exams that he did where he said that the man had  
2 full range of motion with his arm and he couldn't get it past  
3 his legs. What part did I miss?

4 MR. VOZZA: Your Honor, I have an ethical obligation to  
5 my client. I have been authorized by the Court that he objects  
6 to your Honor's characterization of his testimony.

7 THE COURT: Then let him come in and tell me himself.

8 MR. VOZZA: Well your Honor, like I said if he is  
9 subpoenaed, he will be here.

10 THE COURT: Maybe I will have the contempt hearing  
11 here. He is denying that he lied. He should be happy to  
12 get away with me just saying that he lied. Let it go at  
13 that. Yes, we will have a finding forever more that a  
14 Justice of the Supreme Court of the state of New York said  
15 that he lied because he did it. I would suggest that you let  
16 it go at that. September 9. Anything else?

17 MR. REILLY: Yes, the judgment regarding Marble.

18 MR. MENDELSON: Please circulate it.

19 MR. REILLY: All right. I served it on everybody. You  
20 got it, your Honor.

21 MS. FORDE: Your Honor, with regard to my obligation  
22 for an IME. We are returning in September for trial. I would  
23 request that your Honor review the application.

24 THE COURT: I have a feeling that your trial will cure  
25 your need for an IME. You have no privity with their client, so

1 I am not sure that you are entitled to an IME for I believe we  
2 are in this matter.

3 MS. FORDE: We have commenced a third party action  
4 based upon grave injury statute. I believe that would warrant  
5 an IME.

6 THE COURT: Do you have any direct privity with the  
7 client, plaintiff?

8 MS. FORDE: No.

9 THE COURT: All right. September 9th.

10 MS. FORDE: We note our exception.

11 THE COURT: You have an exception.

12 MS. FORDE: Thank you.

13 THE COURT: Thank you.

14 MR. MENDELSON: Note our exception.

15 THE COURT: All right.

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

19

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21 Audrey Keiser  
22 Official Court Reporter

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