At an IAS Term, the Jury Coordination Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of August, 2013.

P R E S E N T:

HON. KENNETH P. SHERMAN,
Justice.

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CARMEN DIAZ-RIVERA,
Plaintiff,

- against -

Olayide A. Akindele and Taiwo Akindele,
Defendants.

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Olayide A. Akindele and Taiwo Akindele,
Third-Party Plaintiffs

-against-

Alfonso Rivera,
Third-Party Defendant.

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**DECISION AND ORDER**

Index No. 14660/11

| The following papers numbered 1 to 4 read herein: | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2 |
| Opposing Affidavits (Affirmations) | 3 |
| Decision/Order in *Moran v. EMR Mechanical Corp., et. al.*, Sup Ct, Kings County, August 5, 2013, Sherman, J., index No. 23213/10) | 4 |

Upon the foregoing papers, defendants/third party plaintiffs move by order to show cause seeking an order to compel plaintiff to appear for a new physical examination with a new orthopedist to be designated by defendants several months after the filing of the note of issue. For the reasons stated below, the order to show cause is denied in its entirety.

In this personal injury action, Dr. Robert Israel, M.D. ("Dr. Israel"), a board-certified orthopedist, conducted the initial independent medical examination ("IME")of plaintiff and prepared a written IME report on June 27, 2012. (*See* O.S.C., Aff. In Support, Ex. I). Thereafter, on July 24, 2012, defendants

served copy of their expert witness disclosure pursuant to CPLR § 3101 (d) designating Dr. Israel as their sole medical expert at trial. (*See* O.S.C., Ex. J). Plaintiff filed the note of issue and certificate of readiness in July 25, 2012 and the matter was placed on the trial calendar.

Several months after the filing of the note of issue, on May 30, 2013, the New York State Board for Professional Medical Conduct ("the Medical Board") proffered a Statement of Charges alleging professional misconduct against Dr. Israel. Additionally on May 30, 2013 the Medical Board and Dr. Israel entered into a Consent Agreement and Order ("the consent order"), whereby Dr. Israel agrees to accept the following conditions in full satisfaction of the aforementioned alleged disciplinary charges:

> "Pursuant to N.Y. Pub. Health Law§ 230-a (9) [Dr. Israel] shall placed on probation for a period of three (3) years subject to the terms set forth in the attached 'Exhibit B'[; and] Pursuant to N.Y. Pub. Health Law§ 230-a (3), [Dr. Israel's] license to practice medicine in New York State shall be limited to preclude [him] from engaging in any practice as an Independent Medical Examiner, and [Dr. Israel has] voluntarily stopped practicing as an Independent Medical Examiner as of March, 2013. [Dr. Israel] shall not contract or agree to perform, nor perform any Independent Medical Examinations."
> (*See* O.S.C., Ex. L, *see also* Aff. In Opp., Ex. A).

The conditions of the consent order became effective on June 7, 2013. (*Id.*) Thereafter, on June 27, 2013, Defendants made the instant application by order to show cause to compel plaintiff to undergo a second IME by another orthopedist of their choice.

The question presented by the instant order to show cause , whether the terms of the consent order render the defense sole expert witness ( Dr. Israel) unavailable as a trial witness thereby entitling the defense to retain another medical expert and have the newly retained medical expert conduct a IME of plaintiff, have been recently address by this court in *Moran v. EMR Mechanical Corp., et.,* Sup. Ct. Kings County, August 5, 2013, Sherman, J., index No.:23212/10. Here the relief sought by the defendants/third party plaintiffs in the instant order to show cause is identical and has been sought for the same reasons as the defendants in *Moran, supra.*

As noted by this court, *Moran, supra.*, the Second Department precedent establishes clearly that disciplinary action taken against an expert witness, which restricts this witness' medical license, does not automatically render the expert unavailable as a matter of law and trigger entitlement to another IME after the note of issue has been filed by a different expert. (*See Futersak v Brinen*, 265 AD2d 452 [1999]; *Schissler v Brookdale Hosp. Ctr.*, 289 AD2d 469 [2001]; and most recently in *Carrington v Truck-Rite Dist. Sys. Corp.*, 103 AD3d 606 [2013] and *Giordano v Wei Xian Zhen*, 103 AD3d 774 [2013]). The fact that Dr. Israel's testimony may be less compelling than defendant had hoped, is an insufficient basis to order plaintiff to undergo yet another medical examination by a physician chosen by defendants. Here, defendants/third party plaintiffs failed to establish that defense's expert witness is unavailable to testify at the time of trial; pursuant to the case law in the Second Department and for the reasons set forth by this court recently in *Moran, supra.* defendants' order to show cause to compel plaintiff to appear for a second IME is denied.

This constitutes the decision and order of the Court.

August 14, 2013

E N T E R,

Kenneth P. Sherman
J. S. C.