Reyes v New York City Tr. Auth.
2022 NY Slip Op 30818(U)
March 11, 2022
Supreme Court, New York County
Docket Number: Index No. 153721/12
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Raul C. Reyes

INDEX NO. 153721/12

MOT. DATE

- v -

MOT. SEQ. NO. 10-13

New York City Transit Authority, et al

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s).____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s).____
Replying Affidavits	ECFS DOC No(s).____

By order dated November 24, 2021, the Honorable Deborah Kaplan assigned this action for trial on January 13, 2022 before this Court. At a pre-trial conference on December 7, 2021, the court directed the parties to file any motions in limine on or before December 21, 2021. On January 4, 2022, the court heard oral argument on the four (4) motions and adjourned the trial, in agreement with counsel, to March 15, 2022 due to a spike in covid cases.

In motion sequence 10, plaintiff seeks an order allowing him to introduce records of leaking water in the areas adjacent to and above the location of the accident as proof of knowledge of leaks in these portions of the station by defendant New York City Transit Authority ("NYCTA" or "Transit"), that there was an obligation to examine other portions of the station for water leaks arising from the same source, and to determine what was ascertainable with the exercise of reasonable care.

In motion sequence 11, plaintiff seeks an order precluding Defendant New York City Transit Authority ("NYCTA") and Third-Party Defendant The City of New York (the "City") from mentioning disability regarding Plaintiff's prior back and left leg conditions on the grounds that it is irrelevant hearsay and, to the extent it is a collateral source pursuant to CPLR §4545, that it should properly be assessed post-trial.

In motion sequence 12, plaintiff moves pursuant to CPLR §3101(d)(1)(i) for an order precluding Defendant NYCTA from belatedly substituting its proposed additional orthopedic medical expert with Dr. Yong H. Kim and proposed additional radiologic medical expert with Jonathan S. Luchs, M.D. and/or preclude these experts from testifying in the trial of this matter.

Dated: 3.11.22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

Finally, in motion sequence 13, defendant NYCTA moves for an order to preclude plaintiff from presenting records following the date of the alleged incident, December 13, 2011, to preclude the opinion of Andrew Yarmus based upon hearsay and an inspection that took place over three years after the alleged incident; to preclude the opinion of Stanley Fein, to preclude the opinions of both Dr. Ali Guy and Michael Gerling, and to preclude plaintiff from offering evidence of the rules and regulations of the Transit Authority.

Plaintiff opposes NYCTA motion sequence 13 and NYCTA opposes plaintiff's motions in sequences 10, 11 and 12, respectively. The City submits partial opposition and partial support of NYCTA's motion in limine motion, sequence 13. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

MOTION SEQUENCE 10

Plaintiff argues that he should be permitted to introduce records of leaking water in areas adjacent to and above the area of the accident as knowledge of these leaks in the station imposed an obligation on NYCTA to examine other areas of the station for leaks from the same source. Plaintiff also seeks to introduce NYCTA's business records that were exchanged during discovery to demonstrate persistent and intrusive water leaks in areas of the station, above and adjacent to ML-2A months leading up to the accident. Plaintiff further contends that "NYCTA's knowledge of the dangerous condition of leaking water in not only one portion of the station, but in multiple portions above and adjacent to the ML-2A staircase, thus imposed upon NYCTA an "obligation to examine" other portions of the station, including the ML-2A staircase for leaking water arising from the same source of the water that was entering the station from the numerous surrounding areas.

NYCTA opposes the motion and argues that from the beginning, plaintiff has "claimed that water was leaking from above the ML-2A staircase onto the stairs of that same staircase", that plaintiff will have to establish that there was a leak above the ML-2A staircase and that since plaintiff cannot prove his case, plaintiff now seeks to "utilize inuendo" in order to meet his burden and "discuss unrelated water infiltration at an adjacent location and other locations within the Canal Street subway station". NYCTA further argues that the deposition testimony of William Burgos, NYCTA's leak inspector, relates to a leak adjacent to the stairs and not over them and that in the Supervisory Log Inspection reports, there is one reference to a potential overhead leak at the ML-2A staircase. Finally, defendant contends that Norman Marcus's affidavit does not reveal any water infiltration in the area above the ML-2A staircase, but rather states that the leak issue affected the stairway, passage and EDR/EFR rooms. Defendant also argues that plaintiff needs to prove notice of the condition above the stairs and that there actually was a condition above the stairs. Finally, defendant contends that it would be inflammatory and prejudicial to allow evidence of water infiltration "in the massive structure that is the Canal Street Station".

In Reply, plaintiff argues that counsel's statements are completely contrary to the evidence in the case which clearly demonstrates that the EDR is above the ML-2A staircase, that the EFR is adjacent to the ML-2A staircase, and that the source of the water on the ML-2A staircase which caused Plaintiff's accident was the same source of water infiltrating the station in the EDR (electrical distribution room) and EFR (employees facilities room).

First, plaintiff's request to introduce evidence of leaking water adjacent to and above the accident location the ML-2A staircase is granted. It is undisputed that Transit maintained and controlled the Canal Street Subway station and that it had a duty to maintain the station. Plaintiff has the burden to show that Transit breached its duty to plaintiff because there was water on the stair where he slipped and fell and that NYCTA knew or should have known about this condition. It is of no moment that the water came from a pipe or a crack in the wall or a pothole on the street. Moreover, the court disagrees with

NYCTA that it would be prejudicial to allow evidence of water infiltration for the entire Canal Street subway station. Plaintiff has never made such a request but seeks to introduce evidence for the area and adjacent surroundings of the ML-2A staircase. Plaintiff points to Burgos' deposition and defendant's own expert Mr. Marcus who acknowledged that "...the leaks affecting the stairway, passage, and EDR/EFR originated from the same source based upon his opinion that the leaks first reported on October 4, 2021 affected all of those areas." Marcus further opined within a reasonable degree of engineering certainty that "subway roof is generally 6 to more than 8 inches below the street surface, such that the mere fact of street water entering from a pothole into the subway is, in my opinion within a reasonable degree of engineering certainty, clear evidence of a faulted substructure below the asphalt paved roadway."

The court agrees that plaintiff is allowed to introduce NYCTA's business records that were exchanged during discovery which show persistent water leaking in the area above and adjacent to the ML-2A staircase where the accident occurred. Moreover, the court found in an order by the Hon. Michael Stallman dated September 6, 2016 that "The 'Service Call and Production Form' is reasonably calculated to lead to admissible evidence as corroborating the existence of the reported leaks and as to whether those leaks were recurring conditions." Plaintiff is entitled to present to the jury NYCTA's records evidencing persistent water leaks in the area around the ML-2A staircase so that the jury may determine whether NYCTA had notice of the specific condition which caused plaintiff's accident. In turn, NYCTA is free to argue that these records do not demonstrate notice of the dangerous condition at issue in this case.

The court next considers plaintiff's argument that NYCTA's attorney's statement in open court (NYSCEF No. 279) that the EDR was above the stairway constitutes a formal judicial admission. Statements made by an attorney in the context of a judicial proceeding may constitute judicial admissions which can be formal or informal concessions of fact (*see In Matter of Liquidation of Union Indemnity Ins. Co.*, 89 NY2d 94, 103 [1996]). A formal judicial admission takes the place of evidence and is conclusive of the facts admitted whereas an informal judicial admission is a declaration made by a party in the course of a judicial proceeding which is inconsistent with the position that party now assumes (*People v. Brown*, 98 NY2d 226, n2 [2002]). Attorney Chang stated in open court, based upon Burgos' deposition, that the EDR is above the staircase. Statements made in a deposition are informal judicial admissions (*see GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 934 NYS2d 697 [1st Dept 2011] Richter, J., concurring, at pgs. 626-627]). Attorney Chang's reliance on a statement made during a deposition testimony does not transform an informal judicial admission into a formal one. Thus, this branch of plaintiff's motion is denied.

Based on the forgoing, plaintiff's motion is granted to the extent that 1) plaintiff is permitted to introduce evidence of leaking water adjacent to and above the accident location the ML-2A staircase; 2) plaintiff is allowed to introduce Transit's business records that were exchanged during discovery which show persistent water leaking in the area above and adjacent to the ML-2A staircase; and 3) the balance of the motion is denied.

MOTION SEQUENCE 11

Plaintiff argues that he is moving to preclude defendants from offering a medical conclusion or opinion as to plaintiff's disability because it is hearsay, but that it is acceptable for defendants to ask about plaintiff's "functional status". Plaintiff further argues that without any records in evidence or any of those records reviewed by defendants' medical experts, they should be precluded from offering the opinion at trial that his prior back injury or disability "affected the injury he sustained in this accident". The court and plaintiff's counsel had the following exchange:

THE COURT: So, is your client denying he's in fact on disability?
MR. MARC SUBIN: No, your Honor.
THE COURT: Could he testify that he is disabled because of his back and leg?
MR. MARC SUBIN: I don't really see the relevance there, your Honor, without someone to explain. What the disability was. I think it would be confusing.

However, plaintiff's counsel concedes that he is not moving to preclude the reference to plaintiff's prior back injury. Finally, plaintiff argues that to the extent plaintiff's disability is considered a collateral source pursuant to CPLR §4545, it is not proper to introduce evidence of a collateral source during the trial, but rather such evidence may be admitted post-trial during a collateral source hearing.

NYCTA opposes the motion and argues that plaintiff's disability argument based on hearsay should be rejected. NYCTA further argues that plaintiff admitted he was on disability, that there was testimony regarding what plaintiff could and couldn't do before his accident from which this action arises, any limitations he experiences and if he's collecting disability because of the leg and back injury. Therefore, NYCTA maintains that it should be able to explore that line of questioning of plaintiff. Counsel further contends that if the plaintiff has a disability regarding both his foot or his leg and his back, that he's receiving disability before, how he ambulates, how he walks up and downstairs is an issue that needs to be in front of the jury. Defense counsel stated that while he will not introduce evidence of collateral sources of payment at trial, he should be allowed to ask about plaintiff's disability because plaintiff himself affirmatively claimed it.

Plaintiff's motion to preclude is denied to the extent that plaintiff's physical condition pre- and post-accident is relevant as it goes to the issue of damages. By plaintiff's own admission in his deposition dated April 9, 2013, he admits that he had a medical issue with his left leg since birth, that he injured his lower back at work and that he is receiving money for those injuries he suffered to his lower back. Plaintiff further testified that he hasn't worked since 1996 due to his injuries as well as the activities he was able to do pre- and post-accident.

Plaintiff's notice of claim indicates that he suffered "[m]ultiple injuries to head, neck, arms, body, back and legs." On this record, the court finds that it would be improper to preclude defendants from asking plaintiff about those injuries, and his activities of daily living before and after his December 13, 2011 accident. However, the court reserves decision on plaintiff's request to preclude defendants' medical experts from offering their opinion at trial as to plaintiff's prior back injury or disability until the conclusion of plaintiff's testimony. Finally, plaintiff's motion is granted to the extent that defendants are precluded from asking plaintiff the monetary amounts received for disability as that testimony is more appropriate for a collateral source hearing post-verdict.

MOTION SEQUENCE 12

Plaintiff moves to preclude NYCTA from substituting and/or adding to its medical experts Drs. Mann and Katzman, who were disclosed more than five years ago, with medical experts Dr. Kim and Dr. Luchs without proffering a legitimate reason/excuse. Plaintiff further argues that he has spent years preparing for cross-examination of both Drs. Mann and Katzman and that the additional medical experts' testimony would be cumulative. Plaintiff further contends that Dr. Kim sets forth a new defense theory without good cause that would severely prejudice plaintiff.

Defendant opposes the motion and argues that Dr Mann, if called to testify, would testify about knees and shoulders and that Dr. Kim, a spine specialist, will testify as to the spine, that their respective testimony would in no way be cumulative and that Dr. Kim will testify about plaintiff's condition before this incident and his findings go toward the weight to which the jury should give plaintiff's testimony.

As to Drs. Katzman and Luchs, defendant argues that they are under no obligation to call Dr. Katzman, a radiologist, that Katzman never examined plaintiff, that defendant only exchanged Katzman because "they had a done a radiological review and it was exchanged previously" and they are under no obligation to call a radiologist. And finally, counsel argues that the fact that they exchanged another radiological expert which parrots several opinions that were provided by Katzman does not change the situation.

This case has been on the trial calendar since December 2016. The court conducted a pre-trial conference on December 7, 2021 and set a trial date for January 13, 2022. At no time did defendant disclose that it planned to call new medical experts. Clearly, defendant knew the existence of both Drs. Luchs and Kim when the court conducted its pre-trial conference on December 7, 2021. Dr. Kim's medical report is dated November 25, 2021 and the 3101d is dated December 13, 2021 and Dr. Luchs report is dated December 11, 2021 and the 3101d is dated December 13, 2021. Plaintiff relied on NYCTA's expert exchange that it would be calling Mann and Katzman for years. This fact alone demonstrates prejudice to plaintiff. Further, and more importantly, defendant has failed to provide any reason for the substitution of experts to show good cause at this juncture. *Lissak v. Cerabona*, 10 AD3d 308 Rather defendant incorrectly shifts the burden to plaintiff. Defendant's argument that Drs. Mann and Kim would testify about different body parts and therefore the testimony would not be cumulative does not warrant a different result.

The court also agrees with plaintiff that Dr. Kim offers a new theory. Specifically, plaintiff contends that Dr. Mann found positive findings and evidence of disability from an orthopedic standpoint and Dr. Mann did not opine that the surgeries were related to any degenerative conditions whereas Dr. Kim opines that the injuries to the cervical spine "were done to address preexisting degenerative/developmental conditions and were not causally-related to the subject accident. Here, plaintiff relied on Dr. Mann's finding of orthopedic disability for more than 4 years. The court agrees with plaintiff that this is a new theory advanced by defendant. Clearly, the prejudice to plaintiff lies not only with the disclosure on the eve of trial but also with Dr. Kim's conclusion/findings regarding plaintiff's spine, which the court finds is a new theory advanced by defendant. Thus, the court precludes NYCTA from calling Dr. Kim.

While the court agrees with defense counsel that he is under no obligation to call Dr. Katzman, defendant failed to offer any explanation why, on the eve of trial, he intends to call a different radiologist. It is of no moment that he may or may not call Katzman. It is however prejudicial to the plaintiff who has relied on defendant's expert disclosure for years to prepare for a different radiologist. Defendant offers no reason for the substitution such as unavailability or death of its expert to justify calling a different medical expert.

Based on the foregoing, plaintiff's motion to preclude NYCTA from calling Drs. Kim and Katzman is granted.

MOTION SEQUENCE 13

First, at oral argument on the motion, plaintiff indicated that he would not be calling Stanley Fein as an expert at the trial, therefore this portion of defendant's motion is moot.

NYCTA moves to preclude plaintiff from introducing any records or testimony related to the Canal Street subway station that post-date the date of the accident because evidence of subsequent alterations of remedial measures are not admissible unless there's an issue of maintenance or control, which is not the case here.

The City opposes the part of NYCTA's motion which seeks to preclude all evidence of pervasive leaks/water incursion through the Canal Street station and contends that there is an issue of "control" over the water incursion/intrusion condition in question and that photographs, NYCTA maintenance and repair records, and expert observation during the 2015 inspection make clear that the Canal Street station is and has been effectively plagued by recurring water incursion problems throughout the structure and to allow NYCTA to only focus on a singular water dripping/water condition that's allegedly connected to the alleged street surface condition would be an improper curtailment of the "relevant" evidence that the jury must consider in contemplation of the NYCTA's theory of liability against the City.

Next, NYC opposes NYCTA argument that appears to be a blanket preclusion of all post-incident evidence as the City does intend to use photos of the station interior solely for the purposes of establishing the general layout of the station, stairs, chambers, passages, etc. which are at issue in this case, or to demonstrate the hollow nature of the NYCTA's arguments concerning the role of the City in this action.

Plaintiff opposes the motion and argues that he should be permitted to introduce records that post-date the accident as they demonstrate that repairs were feasible prior to the accident and that the condition was not repaired on the date of the accident as claimed by NYCTA.

In Reply to the City's argument, NYCTA contends that it will continue to object to the introduction of any photos to discuss any alleged remedies about the leaks in the station and that neither plaintiff nor the City have shown that leaks in other areas of the station are relevant to the leak above the staircase and therefore, evidence of other water intrusion within the subway station should be precluded.

In Reply to the plaintiff, NYCTA argues that plaintiff has failed to provide a basis for allowing post-accident records, more specifically, the insertion of a drain at the bottom of a staircase, as it is irrelevant to the happening of the alleged incident.

It is well established that evidence of subsequent alterations or remedial measures is not admissible in a negligence action unless there is an issue of maintenance or control (*Niemann v. Lucca*, 214 A.D.2d 658 [1995]; *see also, DeRoche v. Methodist Hospital*, 249 A.D.2d 438 [1998]; *Klatz v. Armor Elevator Co., Inc_.*, 93 A.D.2d 633 [1983]). Evidence of post-accident repairs and alterations with respect to the structure or instrumentality claimed to have caused the injury, has been deemed admissible, in limited circumstances, to demonstrate the condition at the time of the accident, to identify the cause of the injury, for rebuttal or impeachment, or to show the feasibility of precautionary measures (*Caprara v. Chrysler*, 52 N.Y.2d 114, 122-123 [1981]; *DePasquale v. Morbark Inductris, Inc.*, 221 AD2d 409, 410[1995]; *see also, Yates v. City of New York*, A.D.3d 458 [2007]).

The court disagrees with defendant NYCTA. Plaintiff's expert, Andrew Yarmus, in his report found "The extensive water intrusion staining, damage, and deterioration noted along the walls, ceilings, and floors of the subway station certainly should have brought the issue of intrusion to the attention of the New York City Transit Authority, and the "above grade" pothole, settlement and ponding conditions noted and known to the Transit Authority Leaking Detection Unit are further indicative of the substantial subsurface water flow conditions which exist at this area. New York City Transit Authority's installation of some drains and drainage channels at the subject subway station further indicates that they were aware of these intrusion conditions." Based on NYCTA third-party complaint against the City, it alleges that the City maintained and controlled the streets, curb, sidewalk areas at the intersection of Lafayette and Canal Streets. Plaintiff correctly argues that post-accident repairs may be admissible on the issue of feasibility of precautionary measures and to be permitted to introduce these records after the date of the incident to both impeach NYCTA's witness regarding when the repair of the subject leaks was completed as well as to show that the repair of the leak was in fact feasible prior to the subject accident. Here, the Service Call Ticket received on October 4, 2011 shows a complaint of water leaks at "SW M-2 SW

ML2A, S/W ML 1 Various SB Areas" and Completed: 12/9/2011 and under Status: Repaired. However, NYCTA's Service Call Forms dated in 2012 show that the leak in the staircase was not repaired as per the 12/9/2011 Service Call Ticket, which indicated "Repaired" on the ticket. Based on the foregoing, plaintiff may be permitted to introduce evidence on subsequent remedial measures based.

Next, defendant argues that the photographs taken in 2014 and 2015 by plaintiff's experts should be precluded given the length of time that has passed since the inspection and the date the photos were taken, the changes that may have happened to the station as a result of time and that the photos need to be authenticated prior to being admitted into evidence.

The City agrees with defendant NYCTA that the photos depicting the streets and sidewalks in 2015 should be excluded as they cannot be reasonably said to depict the location as it existed in 2011. The City further agrees with NYCTA that the 2015 incident photographs cannot be admitted to evidence for the street and station conditions on the day of plaintiff's accident and/or allowed to be a predicate for expert testimony by any party.

Plaintiff disagrees and argues that that the photographs taken by Andrew Yarmus should be admissible to show the jury that the EFR and EDR are not accessible to customers and plaintiff and to illustrate the location of these rooms to properly explain his opinions.

First, the subject photographs were not annexed to the motion papers and therefore, the court reserves decision on the admissibility of the photographs. However, the court rejects plaintiff's argument that the photos should come into evidence because the plaintiff and the public do not have access to the EFR and EDR. Because the public does not have access to these areas is not only irrelevant but also does not meet the criteria for the admissibility of photographs. The criteria for the use of photographs to show a defect, that they be taken reasonably close to the time of the accident and that the condition at the time of the accident be substantially as shown in the photographs. (*compare, Davis v. County of* Nassau, 166 AD2d 498, 560 N.Y.S.2d 696; *Karten v. City of New York*, 109 AD2d 126, 490 N.Y.S.2d 503). Based on the foregoing, the court reserves decision on this portion of defendant NYCTA's motion.

Next, NYCTA argues that the opinion of plaintiff's expert Andrew Yarmus should be precluded from testifying at trial because his opinion is not only based on hearsay, but also, he inspected the subway station more than three years after the accident.

The City argues that it would be prejudicial and improper to allow Mr. Yarmus to testify before the jury in this matter and provide his clearly improper opinion because he failed to offer any opinion as to how events like time and Hurricane Sandy could have impacted the condition of the Canal Street station and contributed to the staining conditions observed and photographed during the 2015 inspection.

Finally, NYC argues that TA employees who met with Mr. Yarmus on the date of his inspection were present, not merely to provide access, but to initially steer and immediately direct Mr. Yarmus's attention to the presence of a defective street condition, existing in 2015, which the TA now improperly seeks to connect to the 2011 station stairwell water leak/intrusion and that these statements of TA employees concerning "water service valve located over the staircase" at issue, the apparent fact of "routine water intrusion" at the station, and the "presence of underground streams in the subway station area that...contribute to the [water] conditions" in the station, all constitute admissions by the TA of facts at odds with the allegations constituting TA's third-party action, and, as such, should be admissible at trial.

Plaintiff opposes Transit's motion and argues that Yarmus should be allowed to testify and offer his opinion at the time of trial.

The court rejects NYCTA and the City's argument that because Yarmus failed to reference Hurricane Sandy in 2012 in his report and that because of the storm completely changed the condition of the subway is a red herring and is rejected by the court. This accident happened over 10 years ago in a very busy subway station and of course one would expect changes to occur to a subway station over a period. To expect otherwise would be insulting to any New Yorker in this City. However, the court agrees with NYCTA and the City that Yarmus cannot base his expert opinion about the alleged underground streams in the area that contribute to water infiltration into the subway based on the discussions with transit authority personnel on the date of his inspection as those statements constitute hearsay. Assuming Mr. Yarmus formulated his opinion on other facts in the record and/or observations, he would be allowed to offer his opinion.

NYCTA next argues that plaintiff should be precluded from calling both Drs. Michael Gerling and Ali Guy, regarding the alleged injuries to plaintiff's knees, shoulders, pelvis, and deep vein thrombosis as neither doctor treated plaintiff for these alleged injuries.

Plaintiff opposes the motion and argues that that Dr. Guy should be able to testify as to plaintiff's injuries to his right knee, shoulders, pelvis, and deep vein thrombosis as Dr. Guy is plaintiff's treating physician.

In Reply to the plaintiff, NYCTA argues that Dr. Guy did not treat plaintiff for injuries to his right knee, shoulders, pelvis, or deep vein thrombosis and cannot offer any testimony related to same. NYCTA contends that it is not disputing that "Dr. Guy has treated plaintiff for his neck and back and such is not being disputed and, as a result, Dr. Guy should be allowed to testify as to the care and treatment with regard to same. However, about the Plaintiff's other alleged ailments, as described above, under prevailing case law, which is Dr. Guy is limited in such testimony to his examination."

First, plaintiff's argument that Dr. Guy, as plaintiff's treating physician, diagnosed plaintiff with deep vein thrombosis on September 30, 2018 and therefore can testify on this issue is outright rejected. As NYCTA correctly its out, plaintiff went to the emergency room in August 2019 and that Dr. Guy made a notation in his medical notes about DVT on September 28, 2019. Plaintiff's argument is not only misleading but a complete untruth. In plaintiff's opposition, he refers to his Exhibit F, pg. 2. Other than a notation that plaintiff is taking Xarelto, nowhere in any of Dr. Guy's medical records does he diagnosis or treat plaintiff for DVT. There is nothing in the medical records/notes to show any treatment by Dr. Guy for DVT. Based on the foregoing, Dr. Guy is not permitted to testify as to his "diagnosis" of DVT or that in some way that this injury/illness/diagnosis is causally related to the accident in 2011.

Next, NYCTA does not dispute that Dr. Guy treated plaintiff for his neck and back for several years. The issue in dispute is whether Dr. Guy is plaintiff's treating physician for his right knee and shoulders. NYCTA annexes Dr. Guy's medical notes for treatment to plaintiff's neck and back pain from 2018 through 2020. Further, Dr. Guy's report dated March 22, 2019 contains a patient history and findings from a physical examination he performed on plaintiff's neck and back and the right and left shoulder. Then on September 30, 2019, Dr. Guy makes notations as to BL shoulder pain and right knee pain. However, a review of Dr. Guy's rehabilitation records for plaintiff don't contain any notes that plaintiff was in fact treated for the pelvis, right knee pain or bilateral shoulder pain. Therefore, Dr. Guy, as plaintiff's treating physician, is precluded from testifying as to injuries to plaintiff's pelvis, bilateral shoulder issues and right knee.

NYCTA contends that Dr. Michael Gerling should be precluded from testifying at the trial because he offered no treatment to plaintiff's knees, shoulders, pelvis or DVT. Plaintiff doesn't oppose this portion of defendant's motion. Therefore, Dr. Gerling is precluded from testifying in this matter.

Lastly, NYCTA argues that plaintiff should be precluded from offering NYCTA documents, specifically Station Environment & Operations Supervisory Policy and Procedures Manual, because these rules are not only inadmissible but may also impose a higher standard of care on NYCTA. Plaintiff opposes and argues that he will argue that the water leaks should have been categorized as Priority "A" as water on the stairs constitutes a dangerous condition, Priority "A" does not require more than what is required under the common-law standard of reasonable care under the circumstances. Priority "A" defects are to be made safe or repaired within 24 hours. (See NYCTA's Exhibit "3", Section 4-38 of "Station Environment and Operations Supervisory Policy and Procedures Manual").

The court agrees with NYCTA that to allow the Policy and Procedure Manual, more specifically Priority A defects and its description, would impose a higher standard of care on NYCTA. If the court were to accept plaintiff's argument that the water on the stairs is a Priority A, then every water condition in a subway system would require remediation within a 24-hour period. In the Manual Priority A Defects include "any water condition that is affecting or has the potential of affecting train service, customer movement or the collection of revenue". There is no dispute that Transit knew of the leak as early as November 2011 as evidenced by the Service Call Form. However, it is not for plaintiff to categorize what it deems a Priority A defect and repaired within a 24-hour period. Based on the foregoing, plaintiff is precluded from offering the Manual for the purpose of imposing a higher standard of care on NYCTA.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 10 is granted to the extent that plaintiff is: 1) permitted to introduce evidence of leaking water adjacent to and above the accident location the ML-2A staircase; 2) allowed to introduced Transit's business records that were exchanged during discovery which show persistent water leaking in the area above and adjacent to the ML-2A staircase; and it is further

ORDERED that the balance of motion sequence 10 is denied; and it is further

ORDERED that motion sequence 11 is granted to the extent that defendants are precluded from asking plaintiff about the monetary amounts he received for disability and the court reserves decision on plaintiff's argument that defendants' medical experts are precluded from offering their opinion at trial as to plaintiff's prior back injury or disability until the conclusion of plaintiff's testimony; and it is further

ORDERED that motion sequence 11 is otherwise denied; and it is further

ORDERED that motion sequence 12 is granted and defendant NYCTA is precluded from substituting/calling as medical experts Drs. Kim and Luchs; and it is further

ORDERED that motion sequence 13 is granted to the extent that: [1]

; [2] Yarmus cannot base his expert opinion about the alleged underground streams in the area that contribute to water infiltration into the subway based on the discussions with transit authority personnel on the date of his inspection as those statements constitute hearsay. Assuming Mr. Yarmus formulated his opinion on other facts in the record and/or observations, he would be allowed to offer his opinion; [3] Dr. Guy is precluded from testifying as to injuries to plaintiff's pelvis, bilateral shoulder issues and right knee; [4] Dr. Gerling is precluded from testifying at trial; and [5] plaintiff is precluded from offering the Station Environment & Operations Supervisory Policy and Procedures Manual for the purpose of imposing a higher standard of care on NYCTA; and it is further

ORDERED that motion sequence 13 is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3.11.22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

RAUL REYES,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

----------X

NEW YORK CITY TRANSIT AUTHORITY,

Third-Party Plaintiff,

-against

CITY OF NEW YORK,

Third-Party Defendant.

----------X

NOTICE OF MOTION

Index No.153721/2012

PLEASE TAKE NOTICE, that upon the annexed affirmation of Mark Taustine, Esq., duly affirmed the 21st day of December, 2021, upon the exhibits annexed hereto, and upon all of the pleadings and proceedings heretofore had herein, the Defendant will move this Court before the IAS Justice presiding, the HON. LYNN R. KOTLER, in the Motion Submissions Part located at 60 Centre Street, Room 130, New York, New York 10007 on the 6th day of January, 2022 at 9:30 a.m. or as soon thereafter as counsel can be heard for an Order 1) precluding Plaintiff from presenting records following the date of the alleged incident, December 13, 2011; 2) Precluding the opinion of Andrew Yarmus as such is based upon hearsay and an Inspection that took place over three years after the alleged incident; 3) Precluding the opinion of Stanley Fein as such is based upon an Inspection which took place nearly almost three years after the

alleged incident; 4)Precluding the opinions of both Dr. Ali Guy and Michael Gerling as to claims of injury to Plaintiff's knees, shoulders, Pelvis and Deep Vein Thrombosis as neither treated Plaintiff for these alleged injuries; 5) Precluding Plaintiff from offering evidence of the rules and regulations of the Transit Authority; 6) for such other and further relief as to this Court may seem just and proper.

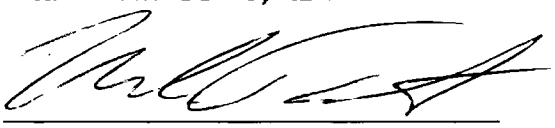
That this is an action to recover damages for serious personal sustained by Plaintiff as a result of Defendant's negligence.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR §2214(b), any and all opposing affirmations and/or affidavits are to be served upon the undersigned no later than seven (7) days prior to the return date of this Motion.

Dated: New York, New York
December 22, 2021

Yours, etc.,

KREZ & FLORES, LLP

By: 

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

RAUL REYES,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

----------X

NEW YORK CITY TRANSIT AUTHORITY,

Third-Party Plaintiff,

-against

CITY OF NEW YORK,

Third-Party Defendant.

----------X

MOTION *IN LIMINE*

Index No.153721/2012

MARK A. TAUSTINE, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the truth of the following under the penalties of perjury and pursuant to CPLR 2106:

1. The within action is one commenced by the Plaintiff for personal injuries that the Plaintiff sustained on December 13, 2011.

2. The within motion will deal with a number of issues related to the upcoming trial of this matter, which is scheduled to commence with jury selection on January 13, 2022.

PLAINTIFF CANNOT PRESENT ANY RECORDS TO THE JURY WHICH ARE DATED AFTER THE ALLEGED INCIDENT

3. A number of records were exchanged during discovery of this matter. Furthermore, some of the records exchanged post-date the happening of the incident. Additionally, Plaintiff, during depositions, utilized a number of the aforementioned records in questioning witnesses. To the extent that Plaintiff may seek to introduce any records or testimony related to the subway station at Canal Street which post-date the incident, Defendant objects to same and such should be precluded at the time of trial.

4. It is well established that evidence of subsequent alterations or remedial measures is not admissible in a negligence action unless there is an issue of maintenance or control (Niemann v. Lucca, 214 A.D.2d 658 [1995]; see also, DeRoche v. Methodist Hospital, 249 A.D.2d 438 [1998]; Klatz v. Armor Elevator Co., Inc., 93 A.D.2d 633 [1983]). Evidence of post-accident repairs and alterations with respect to the structure or instrumentality claimed to have caused the injury, has been deemed admissible, in limited circumstances, to demonstrate the condition at the time of the accident, to identify the cause of the injury, for rebuttal or impeachment, or to show the feasibility of precautionary measures (Caprara v. Chrysler Corp., 52 N.Y.2d 114, 122-123 [1981;] DePasquale v. Morbark Industries, Inc., 221 A.D.2d 409, 410 [1995]; see also, Yates v. City of New York, A.D.3d 458 [2007]).

5. Clearly, for purposes of the subway station and the work performed by Transit Authority employees within that station, there is no issue regarding control. As

a result, Plaintiff should not be allowed to introduce any evidence at the time of trial which post-dates the happening of the incident, December 13, 2011.

THE PHOTOGRAPHS TAKEN BY PLAINTIFF'S EXPERTS SHOULD BE PRECLUDED AS THEY WERE TAKEN OVER THREE AND FOUR YEARS AFTER THE ALLEGED INCIDENT

6. Plaintiff has exchanged two experts on the issue of liability, Mr. Stanley Fein and Mr. Andrew Yarmus. Mr. Fein visited the incident location on July 9, 2014, almost three years after the incident, and took ten photos of the stairway at issue and the surrounding area. Mr. Yarmus visited the incident location on June 22, 2015, nearly four after the alleged incident, and took approximately seventy-six photos. The photos, which Defendant objects to, are those that depict the Canal Street subway station, adjacent rooms and the stairs at issue in this litigation. All such photos should be precluded given the length of time that has passed prior to the inspection and the photos being taken.

7. It goes without saying that the Canal Street Station is a busy New York City subway station. This particular station houses several train lines and provides access to several more. Given this fact it is impossible to determine how many people traversed the Canal Street Station in the three-to-five year period between when the incident happened and the photos of the experts were taken. Similarly, it seems extremely relevant to point out that Hurricane Sandy, which we all are aware caused major flooding, swept through the metropolitan area in October of 2012. Needless to say, in the time frame between the incident and the inspection by Plaintiff's experts the subway station at issue clearly would have suffered changes as a result of time.

8. Given the potential for changes at the station the photographs taken by the experts should be precluded. In the first instance, Plaintiff will first need to authenticate the photographs. (see, Alberti v New York, Lake Erie & W. R. R. Co., 118 N.Y. 77; People v Corbett, 68 AD2d 772; Kowalski v Loblaws, Inc., 61 AD2d 340; Catanese v Quinn, 29 AD2d 675). As noted above, a number of the photos from Mr. Yarmus are of adjoining areas and rooms from the Canal Street station. Plaintiff was never in these rooms and cannot authenticate the photographs or what the rooms and areas looked like on the date of the alleged incident, December 13, 2011. With regard to the stairs, and what they look like, we have photographs provided by the plaintiff as to the day of the incident which depict the location. There is no reason to go any further or put potentially prejudicial photos in front of the jury. Given the length of time that passed in advance of the photos being taken the photos from both experts should be disregarded and precluded at the time of trial.

THE OPINION OF ANDREW YARMUS SHOULD BE PRECLUDED AS SUCH IS BASED UPON HEARSAY AND IS BASED ON AN INSPECTION WHICH TOOK PLACE OVER THREE YEARS AFTER THE ALLEGED INCIDENT

9. Plaintiff has provided an expert report from Mr. Andrew Yarmus. Mr. Yarmus, as noted above, visited the incident location almost four years after the alleged incident. As already noted above, the Canal Street station has clearly changed given events and regular traffic. These issues should be enough for precluding the testimony of Mr. Yarmus. However, more importantly, the testimony of Mr. Yarmus is based upon hearsay.

10. The report of Mr. Yarmus, dated July 8, 2015, is attached hereto as Exhibit "1". We initially call the courts attention to paragraph two of the opinion on page seven of the nine page report. The paragraph reads as follows:

> "Our review of the Transit Authority logs for the subject area, as well as our inspection of the subject subway station premises, indicate a clear history of regular and routine water intrusion at this area. In fact, a drain was installed at the floor of the adjacent electrical meter room after Raul Reyes slip and fall in order to assist in collecting and diverting some of this water intrusion. Transit Authority personnel were also discussing the presence of underground streams in the area which contribute to these water intrusion conditions during our inspection, and our on-site observations confirmed that such conditions occur at the area on a regular basis."

There is much to unpack with this paragraph and all of it inadmissible.

11. Mr. Yarmus initially references significant water intrusion at the subway station. As noted above, there was a significant water intrusion following the incident courtesy of Hurricane Sandy. Furthermore, Mr. Yarmus mentions the addition of a drain following the happening of this incident. As discussed above, subsequent remedial measures are inadmissible as a matter of law. As a result, it goes without saying that changes in the station, such as the addition of a drain as referenced by Mr. Yarmus, are inadmissible for the jury and certainly for the purpose of Mr. Yarmus rendering an opinion. Furthermore, Mr. Yarmus references "[t]ransit authority personnel discussing the presence of underground streams" contributing to water intrusion. Mr. Yarmus subsequently suggests that his on-site observation confirmed such conditions on a regular basis. However, Mr. Yarmus fails to mention in any way

how the alleged "streams", which are below the station, caused this intrusion from above. Instead, it is quite clear that Mr. Yarmus is merely relying on unsupported unsworn alleged statements by personnel that were merely present to provide Mr. Yarmus access to the station.

12. Mr. Yarmus further states that he notes deterioration in the station along the walls and ceilings. Needless to say, Mr. Yarmus offers no opinion as to how events like time and Hurricane Sandy could have impacted the condition of the Canal Street station and contributed to the alleged staining conditions. At a minimum, Mr. Yarmus should have referenced these facts and considered them as part of his opinion. Instead, we are merely left with a paid expert ignoring several important factors out of hundreds which clearly affected his opinion rendered regarding the station. Given the absolute failure of Mr. Yarmus to at least consider the time in between his inspection and the incident or even reference a major event, such as Hurricane Sandy, as well as his consideration of inadmissible evidence, it would be prejudicial and improper to allow Mr. Yarmus to testify before the jury in this matter and provide his clearly improper opinion.

THE OPINION OF STANLEY FEIN SHOULD SIMILARLY BE PRECLUDED FOR THE REASONS ALREADY SET FORTH ABOVE

13. As has already been set forth above, the amount of time that passed as well as significant events which took place during that passage of time have been wholly ignored by Mr. Yarmus. That trend continues with Mr. Fein.

14. It appears, based upon the expert exchange, the report of which is annexed hereto as Exhibit "2", that the only testimony to be offered by Mr. Fein is the alleged measurements of the stairs as well as the coefficient of friction for the steps. It is worth noting that Mr. Fein fails to suggest that there is anything wrong with the steps in terms of measurement or handrails. However, Mr. Fein suggests that the coefficient of friction for the step is improper. Again, this measurement is taken nearly three years after the incident and fails to even discuss the passage of time. There is no way of knowing what the coefficient of friction was on the step three years earlier and before millions of riders and water from outside impacted the steps.

15. Furthermore, and more importantly, Mr. Fein fails to suggest which steps were tested and where on the step the testing took place. It is unclear whether or not Mr. Fein ever actually tested the step where plaintiff had his alleged incident. As a result, Mr. Fein's testimony would be highly prejudicial and is improper for the purpose of this trial and should be precluded.

THE TESTIMONY OF BOTH DR. MICHAEL GERLING AND DR. ALI GUY SHOULD BE PRECLUDED AS TO THEIR FINDINGS REGARDING THE ALLEGED INJURIES TO PLAINTIFF'S KNEES, SHOULDERS, PELVIS AND RELATED TO DEEP VEIN THROMBOSIS AS NEITHER TREATED PLAINTIFF FOR THESE ALLEGED INJURIES

16. Dr. Ali Guy first saw Plaintiff in relation to this matter on July 30, 2018, nearly seven years after the alleged incident. To this end, plaintiff had surgery to his right knee on June 11, 2012, his left shoulder on November 26, 2013, his left shoulder on May 5, 2014 and his left pelvis on February 25, 2013 for a Deep Vein Thrombosis(DVT). All treatment related to these alleged injuries took place before Plaintiff ever saw Dr.

Guy. Furthermore, and more importantly, while Dr. Guy, as part of his records, notes the injuries referenced above, there is no evidence of treatment for any of the injuries alleged above.

17. Similarly, Dr. Michael Gerling first saw Plaintiff on February 3, 2020. Dr. Gerling, who works at "SpineCare NYC", is a spine surgeon and offered no treatment as to Plaintiff's knees, shoulder, pelvis or DVT. Given the above these experts should not be allowed to discuss causation or any alleged connection between the alleged incident and the alleged injuries as such relates to Plaintiff's knees, shoulder, pelvis or DVT.

18. As to Dr. Gerling, it is quite clear that he cannot offer testimony as to anything other than the neck and back in accordance with his alleged treatment of same. The issue with regard to Dr. Guy is a little bit trickier.

19. Dr. Guy makes no findings in his records with regard to Plaintiff's shoulders, knees or related to his DVT. Furthermore, Dr. Guy never ordered a test, such as an X-Ray or MRI, for any of these body parts. Additionally, nowhere in the records of Dr. Guy does he actually causally relate the injuries to Plaintiff's knees, shoulders, or DVT to the incident of December 13, 2011. As a result, Dr. Guy should be precluded from testifying as to these alleged injuries in total.

20. In the event that the court does not agree to preclude Dr. Guy's testimony on the issue of the alleged injuries to his knees, shoulder and the DVT then Dr. Guy's testimony should be limited to his own findings during his examination of the plaintiff. Plaintiff was examined by Dr. Guy, as referenced above, on July 30, 2018, as noted

above nearly seven years after the alleged incident. Plaintiff subsequently exchanged Dr. Guy, as an expert pursuant to CPLR 3101 (d) and he is undisputedly an expert retained for the purposes of testifying at Trial and, based upon his lack of treatment to the Plaintiff for the injuries related to Plaintiff's knees, shoulder and DVT, not a "treating" physician. As such, Dr. Guy should be precluded as to giving any direct testimony as to anything told him by the plaintiff, including the "history" of the accident and his injuries, and any complaints made by the plaintiff. Moreover, although Dr. Guy reviewed various records regarding the plaintiff's treatment following the accident, as a non treating Doctor, he cannot "rely" upon such records as part of his "diagnosis and treatment", as his purpose was not "diagnosis and treatment", but preparing for his expert testimony.

21. It is well settled that a non-treating physician may not testify regarding the history of an accident as related by the plaintiff or concerning the plaintiff's medical complaints; however, the expert may give an opinion based upon the examination of the plaintiff. See Adkins v. Queens Van-Plan, Inc., et al., (293 A.D.2d 503, 740 N.Y.S.2d 389); Nissen v Rubin 121 A.D.2d 320,504 NYS2d 106.

22. Such statements are, in the first instance hearsay. Certain exceptions exist to the hearsay rule, when statements are considered to be inherently reliable, such as those made to treating physicians for the purpose of diagnosis and treatment. See People v. Wlasiuk, 32 A.D.3d 674, 2006 Slip Op. 06345 (3rd Dept., 2006); People v. Wright, 266 A.D.2d 246, 1999 NY Slip Op 09062 (2nd Dept., 1999); See also Brown v. County of Albany, 271 A.D.2d 819, 2000 NY Slip Op 03933 (3rd Dept., 2000), Hambsch v.

New York City Transit Authority, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (Ct. App., 1984). However, when the witness is a non treating expert, notwithstanding the expert's position as a physician, the Courts have held that this inherent reliability does not exist. Indeed, the Court's have viewed such testimony as, not only hearsay, but bolstering. Nissen v Rubin 121 A.D.2d 320,504 NYS2d 106 (First Department 1986) Adkins v Queens Van-Plan 293 A.D.2d 503, 740 N.Y.S.2d 389. (Second Department 2002). Since in this instance he is not a treating physician it would clearly not be allowed.

23. Thus, the Adkins and Nissan Courts concluded that it is reversible error to allow non-treating physicians, retained by a personal injury plaintiff as an expert witness, to testify regarding the plaintiff's medical complaints and to summarize and read statements and findings contained in the reports and records of the plaintiff's treating physicians. See Adkins, supra.

24. In this case, Dr. Guy's testimony should be limited to his examinations of the plaintiff, as such relate to the knees, shoulder and DVT. Dr. Guy should not be allowed to read from any records not properly introduced into evidence and are derived from a "professionally reliable" source. Dr. Guy should also be precluded from relating any history, subjective complaints, or other hearsay/bolstering statements made by the plaintiff.

25. Dr. Guy's testimony should be limited in scope to his examinations of the plaintiff as a non-treating Doctor.

PLAINTIFF SHOULD BE PRECLUDED FROM OFFERING EVIDENCE OF THE RULES AND REGULATIONS OF THE TRANSIT AUTHORITY

26. During the course of discovery Defendant exchanged Transit Authority documents including a "Station Environment & Operations Supervisory Policy and Procedures Manual". (Exhibit "3") The manual provided, for the most part, provides definitions and explanations with regard to terms utilized by the Transit Authority. However, to the extent that Plaintiff may seek to introduce evidence of Supervisory Policy and Procedures in this matter Defendant objects and asks that such be precluded. Any attempt by Plaintiff to incorporate the Rules and regulations of the transit authority into this trial must be rebuffed. Such rules are inadmissible in this matter as such may impose a higher standard than is imposed by the law. As a result, the use of the rules and regulations should be precluded.

27. In Lesser v. MABSTOA, 157 A.D.2d 352, 556 N.Y.S.2d 274 (1st Dept. 1990), the Appellate Division, First Department, faced a similar situation to that facing the court. Specifically, in Lesser, Plaintiff fell while exiting a bus during a snow storm due to a claimed accumulation of snow on the stairs on the bus. The Plaintiff introduced the Bus Operator's Manual into evidence, specifically, that portion that has to do with duties and services of a line manager. A portion of such rules indicated that one duty of the bus driver was to "[W]arn persons boarding and alighting to watch their step ... make every effort to keep front and rear steps clear of accumulated snow.". Id. at 354. Liability was subsequently found against the MABSTOA. In reversing, the court

discussed the use of such rules and regulations. Specifically, the court determined as follows:

28. "While internal operating rules may provide some evidence of whether reasonable care has been taken and thus some evidence of the defendant's negligence or absence thereof, such rules must be excluded, as a matter of law, if they require a standard of care which transcends the area of reasonable care." Id.

29. The court continued to cite several cases related to the importance of precluding such information and, in fact, cited to the matter of Crosland v New York City Tr. Auth. (68 NY2d 165, 168-169 [1986]), where the Court of Appeals determined "that liability for the death of plaintiff's decedent could not be based upon the alleged breach of Transit Authority rule 85 which, by requiring employees to 'take every precaution to prevent ... injuries to persons,' imposed a duty higher than that which the carrier actually owed -- ordinary care commensurate with the existing circumstances. Indeed, the court in Crosland noted that the rule would have been inadmissible at trial for this reason." Id.

30. In addition to the above cases, the cases are legion that the use of such information is improper. We look to the matter of Rivera v. NYCTA, 77 N.Y.2d 322, 569 N.E.2d 432(1991), which is similarly instructive. In Rivera, Plaintiff fell from a platform and was subsequently struck by a moving train and died. Liability was apportioned between the parties with 85% being determined against the Defendant. Among several reasons for reversal of the jury determination the court noted as follows:

31. "Inasmuch as a new trial is required, we note that the trial court should not have admitted into evidence the defendant's entire internal rule book and manual containing irrelevant material which was not relied upon by the parties' experts or which imposed a higher standard of proof on defendant than that imposed by law" Id. at 329.

32. In the case at bar, at present, it is unclear whether or not plaintiff may seek to utilize rules and regulations that are maintained by the New York City Transit Authority. To the extent that Plaintiff may do so, Defendant objects and asks that this court preclude same.

WHEREFORE, Defendant reserves the right to move for further relief at the time of trial. However, it is respectfully requested that the Court grant the instant motion in its entirety and grant such other and further relief as to the Court may seem just, proper, and equitable.

Dated: New York, New York
December 21, 2021

Yours, etc.,

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