

**Espinoza v Minus5 HH NYC, Inc.**

2020 NY Slip Op 31060(U)

April 24, 2020

Supreme Court, New York County

Docket Number: 152581/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM**

*Justice*

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BYRON ESPINOZA,

Plaintiff,

- v -

MINUS5 HH NYC, INC. D/B/A MINUS 5 ICE BAR, THE  
MANLYN DEVELOPMENT GROUP, INC and HILTON  
WORLDWIDE, INC. D/B/A NEW YORK HILTON MIDTOWN  
MANHATTAN,

Defendants.

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INDEX NO. 152581/2017

MOTION DATE N/A

MOTION SEQ. NO. 010

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 279, 280, 281, 282, 283, 286-287

were read on this motion to/for AMEND/MODIFY  
DECISION/ORDER/JUDGMENT.

Motion, brought by order to show cause, by Plaintiff Byron Espinoza (“Plaintiff”) to supplement his bill of particulars, pursuant to CPLR 3025 (b), to reflect his left knee surgery is granted; and it is further ordered that the note of issue is stricken and the action is removed from the trial calendar without prejudice to the action being restored to its current place (if possible) upon the completion of the discovery items outlined herein.

In sum and substance, this is an action for personal injuries that Plaintiff allegedly suffered when a piece of ice and ceiling debris fell on him while he was at a bar (“the bar”) operated by Defendant Minus5 HH NYC, Inc. d/b/a Minus 5 Ice Bar (“Minus5”). The bar was located in a building owned by Defendant Hilton Worldwide, Inc. d/b/a New York Hilton Midtown Manhattan (“Hilton”); and Defendant The Manlyn Development Group, Inc. (“Manlyn”) allegedly performed construction work on the subject ceiling prior to the accident.

Pursuant to a so-ordered stipulation, dated April 3, 2019, Plaintiff was directed to file his note of issue by no later than April 30, 2019. (NYSCEF Doc. No. 172.) Plaintiff complied with this directive by filing his note of issue on April 23, 2020. (NYSCEF Doc. No. 173.) Following two motions for summary judgment and two motions to reargue this Court’s decision on said motions for summary judgment, Hilton has been dismissed from this action, and the remaining parties have appeared for a conference in the Early Settlement Part.

On March 6, 2020, Plaintiff electronically filed the instant motion, by order to show cause, seeking leave to file a supplemental bill of particulars to reflect a left knee surgery that he

underwent on February 26, 2020. This proposed order to show cause was not presented to this Court for signing before its physical courtroom was closed, due to the current COVID-19 pandemic. However, counsel for Minus5 has submitted (via NYSCEF) two letters requesting permission to make a motion to compel certain allegedly outstanding discovery and to strike the note of issue; and Plaintiff's counsel filed a letter in response. (NYSCEF Doc. Nos. 283, 286-287.)

Pursuant to the requests of Plaintiff's and Minus5's counsels and to directives from the Chief Administrative Judge, this Court conducted a teleconference with said attorneys on April 9, 2020 ("the teleconference"), for the purpose of resolving the issues raised in the instant motion and the related letters. (*See* AO/71/20 [strongly discouraging in-person discovery in civil litigation matters]; AO/78/20 [directing that the county clerks and courts not accept any papers for filing in non-essential matters]; AO/85/20 [directing courts to use remote conferencing "to resolve ad hoc discovery disputes and similar matters not requiring the filing of papers"].)

After hearing from all parties during the teleconference, the Court orally ruled that there being no prejudice to Minus5 or Manlyn (collectively, "Defendants"), Plaintiff's request to supplement his bill of particulars in the form submitted as Exhibit 1 to the instant motion – in sum and substance to reflect Plaintiff's recent surgery – is granted.

Further, the Court ruled that Plaintiff must provide the following outstanding discovery to Defendants:

1. Plaintiff is to appear for a scheduled IME with Dr. Kim, a spine specialist, currently scheduled for May 22, 2020;
2. Plaintiff is to appear for a vocational rehabilitation IME with Peter Capotosto, currently scheduled for May 19, 2020;
3. Plaintiff is to appear for an independent neurological examination with Dr. Feuer, with said date to be scheduled by the parties;
4. Plaintiff is to appear for a further IME regarding his recent left knee surgery, with Defendants to designate the examiner and the parties to schedule the date of the examination forthwith;
5. Plaintiff is to appear for a further EBT regarding his recent left knee surgery, with said EBT to be completed on or before May 27, 2020, unless the parties obtain permission from this Court to take said EBT after May 27, 2020 on a jointly agreed upon date;<sup>1</sup> and
6. Further, Plaintiff shall use his best efforts to assist Defendants in obtaining the medical records concerning his recent left knee surgery, including by mailing authorizations for such records if not already having done so.

During the teleconference, the Court further ruled that, in light of the significant discovery that now must be completed—due to medical events that took place after the case was placed on the trial calendar—Minus5's request to strike the action from the trial calendar is granted. However, upon completion of the above discovery, the Court will order that Plaintiff

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<sup>1</sup> Said EBT may be held by remote means or in-person if the current COVID-19 guidelines permit.

may re-file his note of issue without cost and will direct that the matter be placed back on the trial calendar at the place it was when stricken, if possible.

Moreover, although the Court has stricken the note issue, the parties may **NOT** file any new dispositive motions in this action.

Further, the Court is mindful that because of the current COVID-19 pandemic, a party may need to seek adjournments of some of the aforesaid dates. This Court expects that—subject to social-distancing guidelines and government directives—the scheduled discovery will be completed in a timely fashion. However, if there is any unnecessary delay caused by Defendants or their examiners, this Court will, upon application, allow Plaintiff to proceed to trial by filing a new note of issue prior to the completion of the above discovery.

The Court is also mindful, after speaking with all counsel, that much of the outstanding discovery would have been completed but for the current COVID-19 pandemic as well as the new discovery required following Plaintiff's left knee surgery.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion, brought by order to show cause, by Plaintiff Byron Espinoza ("Plaintiff") to supplement his bill of particulars, pursuant to CPLR 3025 (b), in the form annexed to Exhibit 1 of said motion papers, is granted; and it is further

ORDERED that the note of issue is stricken and the clerk is directed to remove the action from the trial calendar without prejudice to the action being restored to its current place upon the calendar (if possible) upon the completion of the discovery items outlined on page 2 of the instant decision and order; and it is further

ORDERED that the parties shall complete the discovery items outlined on page 2 of the instant decision and order within the deadlines set-forth therein; and it is further

ORDERED that the parties shall appear before this Court for a further discovery conference by telephone or in-court at 10:30 AM on May 12, 2020; and it is further

ORDERED that the counsel for Plaintiff Byron Espinoza shall serve upon all parties and the clerk, via NYSCEF, a copy of the instant decision and order with notice of entry within ten (10) days after Governor Cuomo's Executive Order 202.8 or any order modifying it is lifted; and it is further

ORDERED that compliance with this order is subject to the Administrative Orders of the Chief Administrative Judge of the Courts, dated March 20 and 22, 2020 (AO/71/20; AO/78/20).

The foregoing constitutes the decision and order of this Court.

4/24/2020

DATE

  
ROBERT DAVID KALISH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE