SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 26, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13574-
13575 The People of the State of New York,
Respondent,

Ind. 3379/10

-against-

Andre Graham,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J. at jury trial and original sentencing; Marcy L. Kahn, J. at resentencing), rendered July 22, 2011, as amended April 9, 2013, convicting defendant of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, reversed, on the facts, and the indictment dismissed. Appeal from order, same court (Marcy L. Kahn, J.), entered on or about August 9, 2013, which denied defendant's CPL 440.20 motion to set aside the

sentence, dismissed as academic.

On this appeal, defendant does not ask us to reverse his convictions of criminal possession of a weapon in the second and third degrees on the ground that the trial evidence was legally insufficient to support such convictions. Instead, defendant argues that his convictions should be reversed because the jury's verdict was against the weight of the evidence. An appellate court weighing the evidence "must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony'" (*People v Bleakley*, 69 NY2d 490, 495, quoting *People ex rel. MacCracken v Miller*, 291 NY 55, 62 [1943]). "If based on all the credible evidence a different finding would not have been unreasonable" and if the "trier of fact has failed to give the evidence the weight it should be accorded, the appellate court may set aside the verdict" (*id.*). When an appellate court performs weight of the evidence review, it sits, in effect, as a "thirteenth juror" (*Tibbs v Florida*, 457 US 31, 42 [1982]).

We agree with defendant that the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence failed to connect defendant with a

pistol that had been discarded during a shooting incident. It is undisputed that defendant sustained gunshot wounds during this nighttime street incident, at which many persons were present, and at which at least two firearms were discharged. The People's theory was that defendant was not only a victim, but a participant in a gunfight, and that he fired the discarded pistol.

Contrary to the People's principal claim, DNA evidence did not connect defendant with the pistol. The People's expert testified that the codefendant's DNA conclusively matched DNA found on the pistol's trigger. She also testified that, elsewhere on the pistol, there was a mixture of DNA from at least three persons. Her testimony and the forensic testing documents introduced by the People established only that defendant "could" have been a contributor to that mixture. In other words, she could not rule defendant out as a contributor. This was the clear import of her testimony, particularly in light of the contrast between this portion of her testimony and the portion where she described the statistical certainty that the codefendant's DNA was on the trigger.

The dissent, however, contends that the clear import of the medical examiner's testimony should be disregarded because

"elsewhere in her testimony she was conclusive and definitive in identifying defendant's DNA as matching the sample found on the gun's slide." Contrary to the dissent's contentions, the medical examiner never made any "conclusive and definite" statements that defendant's DNA matched the same found on the gun's slide. In fact, the sole basis for the dissent's allegations is the medical examiner's testimony that she found all of defendant's alleles matched those included in the DNA mixture. However, the dissent wishes us to ignore the medical examiner's testimony as to the relevance of this match. Unlike the medical examiner's testimony with regard to the codefendant, where she described the statistical certainty that the codefendant's DNA was on the trigger,[1] with regard to defendant, the medical examiner's assessment of the reliability of the DNA match was that defendant "could" have been a contributor to that mixture. In other words, the medical examiner could not rule out the reasonable possibility that another unrelated individual could match the DNA profile.

[1] Not only did the medical examiner testify that the codefendant (Perry) was a "match," but that "[i]f you took approximately 120 planet Earths each with 6.5 billion people, you would expect to see that DNA profile one time."

If, as the dissent speculates, the medical examiner's testimony was actually intended to be more inculpatory of defendant, the People had ample opportunity to clarify it but failed to do so. The dissent, however, implies that it was defense counsel's responsibility to clarify the medical examiner's equivocal testimony. Of course, this runs counter to the fundamental principles of criminal law that the defendant has no burden to prove that he is not guilty. In any event, on cross examination, defense counsel did provide the medical examiner an opportunity to clarify what she meant by reminding her of the previous statement she made on direct, "That [defendant's] allel[es] were present in the DNA allel[es] detected from that sample." The medical examiner, however, simply answered, "Correct," to defense counsel's followed up question, "Therefore, you stated that he could possibly be a contributor, correct?" Accordingly, the DNA evidence failed to establish that defendant ever touched this pistol, and it failed to establish his guilt, even when combined with the remaining evidence.

The sole testifying eyewitness was unable to identify defendant at any time. This witness admitted that she had impaired vision and was not wearing corrective lenses. She observed a man firing a weapon, but could only provide a

generalized description, limited to height, weight, skin color and body type that fit defendant, but could also have fit many other persons. As noted, the incident occurred on a crowded street, and while defendant was undisputedly present, this witness's testimony failed to establish that defendant was the person she saw with a firearm. Moreover, the description could also have matched another man, who was subsequently arrested in possession of a revolver linked to this incident by way of a comparison with ballistics evidence found at the scene.

No other evidence introduced by the People offers any further support for their claim that defendant ever possessed the discarded pistol. Since there was no proof introduced relating to the bullets that struck defendant, the evidence even leaves open the possibility that the pistol at issue was the weapon that was used to shoot defendant himself.

In light of this disposition, it is unnecessary to reach any other issues.

All concur except Saxe, J. who dissents in a memorandum as follows:

SAXE, J. (dissenting)

In my view, defendant's conviction of criminal possession of a weapon in the second and third degrees was properly supported by the necessary quantum of evidence, and I therefore disagree with the majority's dismissal of the indictment.

The evidence established that gunshots were fired in the area of 111th Street between Fifth Avenue and Lenox Avenue on the evening of July 19, 2009 at around 7:30 or 8:00 p.m. Natasha Fraser was in the street across from the entrance to the apartment building located at 46-50 West 111th Street when she saw someone who appeared to be holding in his hand, and shooting, a flat, black gun. It was night, and she did not have on either her glasses or her contact lenses, and she had been trying to avoid the people fleeing from the gunfire, but she could see that the shooter seemed to be a black man with a "low haircut" and a "big neck," who stood about 5 feet 11 inches, and weighed "[a]nywhere from like 200 maybe to like 240, 230."

At 8:55 p.m., defendant walked into the St. Luke's Hospital Emergency Department with multiple gunshot wounds to his back and neck. At 9:00 p.m., Detective Roy Schmahl arrived at St. Luke's and spoke with defendant, who was conscious and had injuries to his upper torso and neck area. Defendant stood about 6 feet

tall, weighed about 240 pounds, and had "close hair."

Sergeant Gerson Lopez and his partner, Andrew Seewald, arrived at 46-50 West 111th Street at about 10:30 p.m., and recovered four shell casings in close proximity to one another in the street, along with four deformed fragments of bullets, bullet impact marks and bullet holes on parked cars and a shattered back windshield. They also recovered from the bushes in front of 46-50 West 111th Street an operable .40 caliber semiautomatic Hi-Point gun, loaded with two cartridges, one in the chamber and one in the magazine. They swabbed the gun in several places for DNA, and sent the swabs for testing.

Medical Examiner Katey Nori concluded that while DNA found on the trigger/trigger guard of the recovered gun matched another suspect, Howard Perry, there were also small amounts of DNA present on the slide of the gun. She performed tests on that sample and determined that it contained a mixture of DNA from at least three people. From the mixture, Nori was able to form a full DNA profile, with "alleles in every single location," and when she compared the DNA alleles of defendant to the DNA alleles that were produced from the mixture, she found that all defendant's DNA alleles matched those included in the DNA mixture. While at one point in her testimony Nori said that

defendant "*could* be one contributor to the sample" (emphasis added), she subsequently asserted definitively that "[e]very DNA allele in the profile of [defendant] . . . was also present in th[e] sample," and she answered with a definitive "Yes" the question, "And in this case you determined that [defendant] was included in this mixture?"

A challenge to the weight of the evidence requires this Court to "weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (*People v Bleakley*, 69 NY2d 490, 495 [1987] [internal quotation marks omitted]). I submit that the trier of fact gave the appropriate weight to the People's evidence and the inferences to be drawn from it and that the verdict should not be set aside. The evidence fully justified the jury's finding that defendant was a participant in that gunfight and that he fired that pistol.

Natasha Fraser's testimony, combined with the evidence of defendant's presence at St. Luke's Hospital, easily permits the inference that defendant was present at, and a participant in, the shooting at 111th Street. The expert testimony regarding DNA on the gun found at the site of the shooting connected the use of the gun with defendant as well as with Perry.

The majority concludes that the conviction was against the weight of the evidence, because in its view the evidence failed to connect defendant with the pistol that had been used in the shooting incident. However, the majority overstates its case when it asserts that "[Nori's] testimony and the forensic testing documents introduced by the People established only that defendant 'could' have been a contributor to that mixture." Despite the expert's use of the word "could" when acknowledging that defendant "could be one contributor to the sample," elsewhere in her testimony she was conclusive and definitive in identifying defendant's DNA as matching the sample found on the gun's slide, when she answered "yes" to the question "And in this case you determined that [defendant] was included in this mixture?" In sum, there was a permissible inference from the DNA evidence that defendant had used the discarded gun, and that

inference was not eliminated by the fact that the trigger of the gun held only Howard Perry's DNA.

Accordingly, I would affirm the conviction.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14227 The People of the State of New York, Respondent, Ind. 4578/11

-against-

Michael Poole, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Patterson Belknap & Webb Tyler LLP, New York (Susan Millenky of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 15, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of six years, unanimously affirmed.

The verdict was supported by legally sufficient evidence, and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Contrary to defendant's argument, the evidence established that defendant acted with intent to prevent the victim, a police officer, from performing a lawful duty, namely placing defendant in a police vehicle immediately after he had been arrested. The arrest was lawful,

because the officer had probable cause to arrest defendant for harassment in the second degree, disorderly conduct, or both.

With regard to harassment, the injured officer and other officers were investigating defendant's alleged possession of a firearm, as reported in a 911 call, and confirmed through an interview with the caller on the scene. Once the officers detained defendant in a hotel hallway and began to frisk him, he resisted by moving his body around, made violent gestures, said that he would be able to beat up an officer if there were not so many of them around, and stated that he was going to kill a particular officer. Defendant's argument that he merely used harsh language against the police is unavailing, since the circumstances established that a reasonable officer would interpret his statements as genuine threats, based on all the preceding circumstances (*compare People v Baker*, 20 NY3d 354, 362 [2013][abusive, but nonthreatening language]).

As for disorderly conduct, contrary to defendant's argument, there was probable cause with respect to the public harm element, given that defendant's loud and tumultuous conduct occurred in the hallway of a hotel at a time when many guests would presumably be in their rooms (*see People v Weaver*, 16 NY3d 123, 128-129 [2011]). Indeed, defendant's "very vocal and aggressive

confrontation" (*id.* at 129) with the police caused a commotion prompting multiple hotel guests to peer out of their rooms at the incident.

We perceive no basis for reducing the sentence.

We have considered all other claims and find them unavailing.

The Decision and Order of this Court entered herein on February 17, 2015 is hereby recalled and vacated (*see* M-1053 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15120 Javier Vicuna, Index 104830/08
Plaintiff-Respondent-Appellant,

-against-

Empire Today, LLC (a Northlake, Illinois-based company), et al.,
Defendants-Appellants-Respondents,

Shomar A. Dwyer,
Defendant.

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Mauro Lilling Naparty, Woodbury (Kathryn M. Beer of counsel), for appellants-respondents.

Greenberg & Young, P.C./James Greenberg & Associates, PLLC, New York (James Kenneth Greenberg of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 10, 2014, which, to the extent appealed from, granted the motion of defendants Empire Today, LLC (a Northlake, Illinois-based company) and Empire Today, LLC (a New York-based company) (collectively, Empire) for summary judgment dismissing the claim pursuant to respondeat superior, and denied their motion for summary judgment dismissing the negligent retention and supervision claim, unanimously modified, on the law, to grant Empire summary judgment dismissing the negligent retention and supervision claim, and otherwise affirmed, without costs. The

Clerk is directed to enter judgment dismissing the complaint as against Empire.

The action is premised on an altercation that occurred in 2007 between Empire's employee, defendant Shomar Dwyer, and plaintiff, a carpet installer who was seeking work assignments at Empire's warehouse. Plaintiff alleges that, during a dispute over work assignments, Dwyer struck him in the face. In support of its motion for summary judgment dismissing the negligent hiring and retention claim, Empire submitted evidence that it had no notice of any propensity by Dwyer to commit such acts (*see White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243 [1st Dept 2006]). In response, plaintiff submitted Dwyer's personnel file, containing reports that Empire had admonished Dwyer for being short-tempered and verbally inappropriate in dealing with coworkers on several occasions. While plaintiff correctly maintains that the personnel file is admissible because it is offered, not for the truth of the matters asserted therein, but as evidence of Empire's notice of Dwyer's behavioral disposition (*see DeSario v SL Green Mgt. LLC*, 105 AD3d 421 [1st Dept 2013]; *Splawn v Lextaj Corp.*, 197 AD2d 479 [1st Dept 1993], *lv denied* 83 NY2d 753 [1994]), Empire is nonetheless entitled to summary judgment dismissing this claim because the record contains no

evidence that Empire had notice that Dwyer had engaged in physically violent behavior or had made verbal threats, much less that he had a propensity to do so.

With respect to plaintiff's respondeat superior claim against Empire, the motion court correctly found that Empire cannot be held vicariously liable for the alleged assault by its employee because it "was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer" (*Milosevic v O'Donnell*, 89 AD3d 628, 629 [1st Dept 2011] [internal quotation marks omitted]; *White*, 35 AD3d at 244).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Kapnick, JJ.

15192-
15193 Index 104446/10

Julio German, et al.,
Plaintiffs-Appellants,

-against-

Antonio Development, LLC, et al.,
Defendants-Respondents.

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Antonio Development, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Spieler & Ricca Electrical Co., Inc.,
Third-Party Defendant-Respondent.

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[And A Second Third-Party Action]

- - - - -

MCP SO Strategic 56, LP, et al.,
Third Third-Party Plaintiffs-
Respondents,

-against-

Cross Country Construction LLC, et al.,
Third Third-Party Defendant-
Appellant,

Paramount Plumbing Co. of New York,
Inc., et al.,
Third Third-Party Defendants.

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Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz (D. Allen Zachary of counsel), for Julio German and Edit Fordesi, appellants.

Baxter Smith & Shapiro, P.C., Hicksville (Sim R. Shapiro of counsel), for Cross County Construction, LLC, appellant.

Gallo Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for MCP SO Strategic 56, LP, Antonio Development, LLC, Stillman Development International, LLC, MCP 56, LLC and MCP 56 Properties, LLC, respondents.

O'Connor, O'Connor, Hintz & Deveney, Melville (Eileen M. Baumgartner of counsel), for Spieler & Ricca Electrical Co, Inc., respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about January 10, 2014, which, to the extent appealed from, granted that portion of defendants Antonio Development, LLC, Stillman Development International, LLC, MCP S0 Strategic 56, LP (MCP S0), MCP 56, LLC and MCP 56 Properties, LLC (collectively MCP defendants) and third-party defendant Spieler & Ricca Electrical Co., Inc.'s motions for summary judgment seeking dismissal of the causes of action related to plaintiff's second accident, and denied third third-party defendant Cross Country Construction LLC's cross motion for summary judgment dismissing the MCP defendants' third third-party complaint as against it, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about June 12, 2014, which granted plaintiffs' motion to reargue the January 10, 2014 order, and, upon reargument, adhered to its prior determination, unanimously dismissed, without costs, as academic.

The motion court properly granted the portion of the MCP defendants' motion for summary judgment seeking dismissal of plaintiff's Labor Law § 240(1) claim since plaintiff's task in lifting a steel grate on the ground-level just enough to slide a copper wire underneath it did not present the sort of elevation-related risk envisioned by the statute (*see Toefer v Long Is. R.R.*, 4 NY3d 399, 406-409 [2005]; *Brooks v City of New York*, 212 AD2d 435, 435-436 [1st Dept 1995]). Plaintiff was not struck by any object, elevated or otherwise; rather, he slipped on a wet steel grate, and thus, the impetus for his fall was his slipping, not the direct consequence of gravity (*see Ghany v BC Tile Contrs., Inc.,* 95 AD3d 768, 769 [1st Dept 2012]).

Industrial Code section 23-1.7(d) is inapplicable to plaintiff's Labor Law § 241(6) claim since the record establishes that plaintiff's second accident did not occur on a floor, passageway, walkway, scaffold or other elevated working surface, but in an open courtyard (*see Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]; *Bannister v LPCiminelli Inc.*, 93 AD3d 1294, 1295-1296 [4th Dept 2012]).

With respect to plaintiff's Labor Law § 200 claim, he alleges that he slipped and fell due to the existence of snow on the courtyard grates, a dangerous and defective condition on the

job site. The motion court properly dismissed this claim as against the MCP defendants with respect to plaintiff's second accident since the record does not support the conclusion that they had actual or constructive notice of the allegedly dangerous condition (*see Raffa*, 100 AD3d at 558).

Cross Country's cross motion for summary judgment on the MCP defendants' third third-party claims for common law indemnification and contribution and contractual indemnification was properly denied since there are issues of fact regarding Cross Country's negligence. Further, plaintiff's Labor Law § 241(6) claim predicated on Industrial Code § 23-1.7(b)(1) remains outstanding (*see Robbins v Goldman Sachs Headquarters, LLC*, 102 AD3d 414 [1st Dept 2013]).

Cross Country is not entitled to dismissal of the MCP defendants' third third-party claim against it for failure to

procure insurance since it failed to establish that it had procured the required insurance for the owner's benefit.

We have considered the parties' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15199-
15200 The People of the State of New York
Respondent,

-against-

Steven Carter,
Defendant-Appellant.

Ind. 3266/11

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Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at suppression hearing; Bonnie G. Wittner, J. at jury trial and sentencing), rendered July 30, 2012, convicting defendant of two counts of murder in the second degree, and sentencing him to concurrent terms of 25 years to life; and order, same court (Bonnie G. Wittner, J.), entered on or about February 28, 2013, which denied defendant's CPL 440.10 and 440.30(1-a) motions, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the People established defendant's guilt of intentional and felony murder beyond a reasonable doubt. There is no merit to defendant's argument that the evidence failed to exclude a reasonable possibility that the presence of his DNA resulted from a hypothetical, consensual sex act with the victim, after which she was killed by someone else (*see e.g. People v Steele*, 287 AD2d 321, 322 [1st Dept 2001], *lv denied* 97 NY2d 682 [2001] [unsupported hypothetical explanation for presence of defendant's print did not undermine sufficiency or weight of evidence]). Skin containing defendant's DNA was found under the victim's fingernail, and this circumstance was strongly indicative of a struggle. Semen containing defendant's DNA was found on the victim's partially removed clothing, in a location that strongly indicated it had been deposited during the particular struggle that ended in the victim's death. Defendant's alternative theory was far-fetched and incompatible with the physical evidence, as well as with his statements and behavior during a police interview, which displayed a consciousness of guilt.

The court properly exercised its discretion in precluding defendant from introducing the hearsay statement of an unavailable witness, indicating that the victim was a prostitute.

There was no violation of defendant's constitutional right to present a defense, because defendant did not make an adequate showing that the hearsay evidence was reliable (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Burns*, 6 NY3d 793 [2006]; *People v Robinson*, 89 NY2d 648, 654 [1997]). We note the complete lack of evidence that the victim had any arrests or convictions for prostitution. In any event, any error, constitutional or otherwise, in excluding this evidence was harmless.

The hearing court properly denied defendant's motion to suppress statements he made to police while incarcerated on an unrelated conviction, even though the initial statements were made without *Miranda* warnings. Based on the totality of the surrounding circumstances, we conclude that the questioning of defendant in a prison interview room did not require warnings, regardless of whether the police told defendant explicitly that he could terminate the questioning and return to his cell (*see Howes v Fields*, 565 US __, 132 S Ct 1181 [2012]; *People v Alls*, 83 NY2d 94 [1993], *cert denied* 511 US 1090 [1994]; *People v Machicote*, 23 AD3d 264, 265 [1st Dept 2005], *lv denied* 6 NY3d 777 [2006]).

The trial court properly declined to impose the drastic sanction of dismissal based on the People's belated disclosure of a statement by the victim's sister that was discoverable under *Brady v Maryland* (373 US 83 [1963]). Although the witness, who may have been able to provide testimony helpful to the defense, died during the six-month period between defendant's *Brady* request and the People's pretrial disclosure of her statement, the court received the detailed statement in evidence, and the People lost any opportunity for cross-examination. We find no reasonable possibility that earlier disclosure would have affected the outcome of the case, given the remedy fashioned by the court and the strength of the People's case (*see People v Carusso*, 94 AD3d 529 [1st Dept 2012]; *People v Jackson*, 264 AD2d 683, 684 [1st Dept 1999], *lv denied* 94 NY2d 881 [2000]).

We have considered and rejected defendant's arguments that preindictment delay deprived him of his constitutional right to a speedy trial, and that the court should have delivered adverse inference instructions with regard to missing or destroyed

evidence. Defendant's arguments concerning his postconviction motions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15201 In re Loretta Hobbs, Index 401954/13
Petitioner,

-against-

New York City Housing
Authority, et al.,
Respondents.

_____

MFY Legal Services, Inc., New York (Sandra Gresl of counsel), for petitioner.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondents.

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Determination by respondents, dated August 7, 2013, terminating petitioner's tenancy on the grounds of undesirability and violation of provisions of the lease and rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered April 25, 2014) dismissed, without costs.

The agency's determination that, among other things, petitioner caused a fire in her apartment by lighting a candle in a closet containing clothing, is supported by substantial evidence (*see Matter of Forman v New York City Hous. Auth.*, 66 NY2d 899 [1985], *revg on dissent below*, 110 AD2d 516, 516-20 [1st

Dept 1985] *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). The record also shows that petitioner had a prior fire in her apartment and that she kept 2 unregistered pitbull terrier dogs in her apartment. Respondents' refusal to accommodate petitioner by continuing her tenancy subject to the agency's continued monitoring of her mental health and fire safety compliance did not violate the Americans with Disabilities Act or the Fair Housing Amendments Act of 1988 (*see* 42 USC § 3604[f][2], [3][B], [9]; 42 USC § 12132; *Matter of Canales v Hernandez*, 13 AD3d 263, 264 [1st Dept 2004]).

Under the circumstances, the penalty of termination is not shockingly disproportionate to the offense (*see Matter of Pell v Board of Educ.*, 34 NY2d 222, 233 [1974]).

We have considered petitioner's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15202-
15203 In re Omarion T., and Others,

Children Under the Age
of Eighteen Years, etc.,

Isha M.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael S. Legge of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the children.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 25, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about October 16, 2013, which found that respondent mother had neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The findings of neglect and derivative neglect are supported by a preponderance of the evidence, including evidence of the mother's misuse of drugs (*see* Family Court Act § 1012[f][i][B]). The youngest child tested positive for marijuana at birth, and the mother admitted that she had used marijuana once during her pregnancy with that child, and that she had failed to obtain any prenatal care or to plan for that child's future (*see Matter of Jocelyn S.*, 30 AD3d 273 [1st Dept 2006]). The court's findings of neglect are also supported by evidence of the mother's failure to ensure that her rent was paid (*see Matter of Dileina M.F. [Rosa F.]*, 88 AD3d 998, 999 [2d Dept 2011], *lv denied* 18 NY3d 804 [2012]). There are no grounds for disturbing the court's credibility determinations (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15204 In re Mildred Mendez, Index 103995/09
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor and Emma Grunberg of counsel), for appellant.

Wolf & Wolf, LLP, Bronx (Jason M. Wolf of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered October 2, 2013, among other things, granting the petition to the extent of directing respondent New York City Department of Education (DOE) to reinstate petitioner to her teaching position with back pay and all other economic benefits of employment from August 28, 2008, and referring the issue of the amount due to petitioner to a special referee, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding, brought pursuant to CPLR article 78, dismissed.

The petition is time-barred because it was filed more than four months after petitioner's receipt of DOE's letter notifying her that she was taken off the payroll as a result of her

resignation (*see* CPLR 217[1]; *see also Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). The court failed to distinguish the regulations applicable to employee requests to "rescind" a resignation, which are made before the effective date of the resignation, and requests to "withdraw" a resignation, which are made after the effective date of the resignation. Because petitioner sought to rescind her resignation before it was effective, under Chancellor's Regulation C-205(26), the resignation was deemed final upon submission, and the Chancellor had no obligation to specifically notify petitioner that her request to rescind was denied. The record reflects that DOE notified petitioner on August 26, 2008 that she was being taken off the payroll based on her resignation. Further action by DOE was not required. Petitioner's letters to DOE after that date did not extend the statute of limitations (*see Matter of Lubin v Board of Educ. of City of N.Y.*, 60 NY2d 974, 976 [1983], *cert denied* 469 US 823 [1984]).

Moreover, petitioner failed to exhaust her administrative remedies. Although petitioner's union declined to pursue her grievance to Step II, it notified her that she could appeal that determination, and she failed to do so (*see Matter of Cantres v*

Board of Educ. of City of N.Y., 145 AD2d 359, 360 [1st Dept 1988]). Petitioner failed to show that pursuing her grievance would have been futile (*see Matter of Toro v Evans*, 95 AD3d 1573 [3d Dept 2012]).

In any event, there was a rational basis for DOE's determination terminating her employment based on her resignation in the face of disciplinary charges, and the determination was not arbitrary and capricious, made in bad faith, or made in violation of lawful procedure (*see* CPLR 7803[3]; *see also Matter of Hughes v Doherty*, 5 NY3d 100, 105, 107 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15205 DS-Concept Trade Invest LLC, Index 152312/14
Plaintiff-Respondent,

-against-

Wear First Sportswear, Inc.,
Defendant-Appellant.

_____

John H. Snyder, PLLC, New York (John H. Snyder of counsel), for appellant.

Platzer, Swergold, Levine, Goldberg Katz & Jaslow, LLP, New York (Stan L. Goldberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered November 21, 2014, which, inter alia, denied defendant's motion to stay or dismiss this action pending arbitration, unanimously reversed, on the law, with costs, and the motion for a stay granted.

In this action to recover accounts receivable allegedly owed to plaintiff as a result of a factoring agreement it entered into with nonparty Deqing County Meili Garment Co., Ltd. (Meili), plaintiff, suing as Meili's assignee, has assumed the assignor's contractual obligation to arbitrate (*see Tanbro Fabrics Corp. v Deering Milliken,* 35 AD2d 469, 471 [1st Dept 1971], *affd* 29 NY2d 690 [1971]; *see also Matter of Kaufman [Iselin & Co.],* 272 App Div 578, 581-582 [1st Dept 1947] [if factor took affirmative

action to enforce contract, it would assume its assignor's obligation to arbitrate]). We note that to the extent *Rosenthal & Rosenthal v John Kunstandt, Inc.* (106 AD2d 277 [1st Dept 1984], *appeal dismissed* 64 NY2d 1129 [1985]), relied on by plaintiff, failed to heed this portion of *Kaufman*, we decline to follow it (*see e.g. GMAC Commercial Credit LLC v Spring Indus.*, 171 F Supp 2d 209, 217 [SD NY 2001]).

Contrary to plaintiff's argument, the broad arbitration clause in the contracts between Meili and defendant which provides that all disputes arising in connection with the contract shall be settled through arbitration, is applicable to the instant dispute (*see e.g. State of New York v Phillip Morris Inc.*, 30 AD3d 26, 31 [1st Dept 2006], *affd* 8 NY3d 574 [2007]; *Matter of Exercycle Corp. [Maratta]*, 9 NY2d 329, 333 [1961]). Further, there is "a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract," requiring arbitration of this matter (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 96 [1975]; *Remco Maintenance, LLC v CC Mgt. & Consulting, Inc.*, 85 AD3d 477, 479-480 [1st Dept 2011]). A more detailed examination of this dispute is for the arbitrator (*see id.*).

We are staying this action instead of dismissing it so that the parties may make a motion in this action to confirm or vacate any eventual arbitral award instead of having to commence a new action.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15207-
15208 The People of the State of New York,
Respondent,

-against-

Cheolsoon Ko,
Defendant-Appellant.

Ind. 1825/13

_____

Han & Associates, P.C., New York (Jin Han of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 12, 2014, as amended April 7, 2014, convicting defendant, after a jury trial, of burglary in the second degree as a sexually motivated felony (two counts), burglary in the second degree (two counts), sexual abuse in the first degree and attempted sexual abuse in the first degree, and sentencing him to an aggregate term of four years, unanimously affirmed.

Although defendant's allegation that the prosecution failed to declare readiness within the statutorily prescribed time period was sufficient to meet his initial burden on his CPL 30.30 motion, defendant's speedy trial arguments are unpreserved (*see*

People v Beasley, 16 NY3d 289, 292 [2011]), and we decline to review them in the interest of justice.

As an alternative holding, after considering all of defendant's submissions, including his reply, whether timely or otherwise, we find no violation of defendant's right to a speedy trial. The June 25, 2013 adjournment was excludable as a reasonable period of delay resulting from pretrial motions (*see* CPL 30.30[4][a]), the November 15, 2013 adjournment was excludable because the People filed a valid certificate of readiness followed by an in-court declaration of readiness, and neither exclusion was affected by the People's brief delay in submitting grand jury minutes. We have considered and rejected defendant's remaining arguments relating to the speedy trial motion.

The court responded meaningfully to the deliberating jury's inquiry concerning the voluntariness of his confession (*see People v Almodovar*, 61 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982]). The court properly exercised its discretion in reading pertinent portions of the Criminal Jury Instructions clearly stating that, in order to consider defendant's confession, the jury was required to find from all

the evidence that he understood the rights he was waiving. This was sufficient to address the concern expressed in the jury's note.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15209-
15210 Nusyn Ehrlich, etc., et al., Index 652672/12
Plaintiffs-Appellants,

-against-

American International Group, et al.,
Defendants-Respondents.

_____

Ambrecht & Maloney, PLLC, New York (Brian G. Maloney of counsel), for appellants.

Robinson & Cole LLP, New York (Stephen E. Goldman of counsel), for American International Group and New Hampshire Insurance Co., respondents.

Budd Larner, P.C., New York (Joseph J. Schiavone of counsel), for Everest Reinsurance Company, respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 19, 2014, dismissing the complaint with prejudice, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about November 14, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly found that the complaint fails to state a cause of action. Having received the full value of their claim under the insurance policy, plaintiffs are not entitled to any of the proceeds of the settlement of the insurer's

subrogation action against the third-party tortfeasor to recover their uninsured losses, i.e. their deductible and the loss due to depreciation (*see Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577 [1995]; *see also Fasso v Doerr*, 12 NY3d 80 [2009]). Plaintiffs failed to allege that they commenced an action directly against the tortfeasor and that the tortfeasor lacked the funds to compensate them for these uninsured losses.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15211 DSA Realty Services, LLC, Index 153355/12
Plaintiff-Respondent,

-against-

Marcus & Millichap Real Estate Investment Services of New York, Inc., etc.,
Defendant-Appellant.

_____

Treff & Lowy PLLC, Brooklyn (Michael Paneth of counsel), for appellant.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Laura Gillen of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered February 21, 2014, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, without costs, and the motion to dismiss granted pursuant to CPLR 3211(a)(1). The Clerk is directed to enter judgment accordingly.

In this action to recover a real estate broker commission fee, plaintiff, a licensed real estate brokerage firm, alleges that it referred a purchaser to defendant, and that, pursuant to an oral agreement between it and defendant, it is entitled to half of the brokerage commission earned by defendant on the sale of a building to that purchaser. In support of its motion to

dismiss on the basis of documentary evidence, defendant submitted an affidavit from its investment associate, to which a letter from plaintiff's chairman and officer, Ari Lifshitz, was annexed. The letter requested confirmation from defendant that a "referral fee" would be owed upon the closing of the sale of the building, because "[a]ll parties concerned are in agreement that I introduced you to [the purchaser] and thus earned my fee." Defendant also submitted documentary evidence that Lifshitz is not licensed to act as a real estate broker or salesman in New York, which plaintiff does not dispute.

The motion to dismiss should have been granted. Plaintiff cannot recover a real estate commission or fee, because Lifshitz, the person who provided the alleged broker services on its behalf, is not duly licensed as required by Real Property Law § 442-d (*Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC*, 93 AD3d 490, 491 [1st Dept 2012]; *Stanzoni Realty Corp. v Landmark Properties of Suffolk, Ltd.*). Although the factual assertions in the associate's affidavit do not constitute documentary evidence (*see Flowers v 73rd Townhouse LLC*, 99 AD3d 431, 431 [1st Dept 2012]), the annexed letter from Lifshitz may be considered as documentary evidence since there is no dispute as to its genuineness, and its content is "essentially

undeniable" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]).

Plaintiff's argument that it is entitled to the commission because Lifshitz was working in a clerical fashion at the direction of its president, Jesse Rhinier, a licensed broker who oversees all of the brokerage services performed by plaintiff, is unavailing. A licensed broker is barred from recovering a commission when the individual who actually performed the brokerage services is not licensed (*see Good Life Realty, Inc.*, 93 AD3d at 491; *City Ctr. Real Estate, Inc. v Berger*, 39 AD3d 267 [1st Dept 2007], *lv denied* 9 NY3d 814 [2007]).

Plaintiff did not preserve its argument that the Lifshitz letter is inadmissible because it includes a settlement offer. In any event, the portion of the letter relied on by defendant is not an offer of settlement, but an admission of fact (*Central Petroleum Corp. v Kyriakoudes*, 121 AD2d 165, 165 [1st Dept 1986], *lv dismissed* 68 NY2d 807 [1986]).

The evidence that Lifshitz was unlicensed and was the only

person who communicated with defendant on behalf of plaintiff also establishes that plaintiff's claim to recover based on an oral commission agreement is barred by the statute of frauds (*see* General Obligations Law §5-701[a][10]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15213 Eastern European Trading, Corp., Index 100176/12
Plaintiff-Respondent,

-against-

Christian Knaust,
Defendant,

LCEL Collectibles, Inc.,
Defendant-Appellant.

_____

Schlacter & Accociates, New York (Jed R. Schlacter of counsel), for appellant.

Gutman Weiss, P.C., Brooklyn (Alan Weiss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 27, 2014, which, to the extent appealed from, granted plaintiff's motion for summary judgment dismissing defendant's first, second, third, fourth, fifth, and seventh affirmative defenses, unanimously affirmed, with costs.

Plaintiff commenced this action asserting claims for breach of contract, account stated, and quantum meruit to recover monies that defendant owed it under an agreement "for consulting services and commissions." Defendant denies that plaintiff ever performed any services for defendant.

The court properly dismissed defendant's affirmative defenses. Although there is no written agreement between the parties, the email communications in which defendant acknowledged owing money for "the Corte introduction" and "consulting business," and defendant's partial payment of $10,000 without objection to the $50,000 invoice for "Introcution[sic]/Commission to Elcorte Ingles," supports a claim alleging the existence of a binding agreement between the parties (*Kolchins v Evolution Mkts., Inc.*, __ AD3d __, 2015 NY Slip Op 02863 [1st Dept 2015]; *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011]), as well as breach of the agreement by defendant. Such evidence also states a claim for an account stated (*see Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993]), and for quantum meruit (*see Farina v Bastianich*, 116 AD3d 546 [1st Dept 2014]).

As to the second affirmative defense, claiming fraud, waiver, estoppel, and unclean hands, the record does not show that defendant was induced to enter into the agreement due to misrepresentations by plaintiff (*see GoSmile, Inc. v Levine*, 81 AD3d 77 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]); that plaintiff had intentionally relinquished its right to collect on the remaining $40,000 (*Nassau Trust Co. v Montrose Concrete*

Prods. Corp., 56 NY2d 175, 184 [1982]; *Silverman v Silverman*, 304 AD2d 41, 46 [1st Dept 2003]); that plaintiff had misled defendant into a change of position to its detriment (*Nassau Trust Co.*, 56 NY2d at 184); or that plaintiff entered into the transaction with unclean hands (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]).

The emails showing defendant's acknowledgment that it owed money for services, along with absence of evidence showing any objection to the invoice, demonstrates consideration (*see Roffe v Weil*, 161 AD2d 509, 510 [1st Dept 1990]), warranting dismissal of the third affirmative defense.

That the invoice reflected plaintiff as the issuer, and that defendant had in fact issued the check for partial payment to plaintiff as the payee, undermines the fourth affirmative defense which claims that plaintiff was not a proper plaintiff in this action and lacked standing to sue (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]). We also note that the emails demonstrate the involvement of plaintiff’s principal in the discussions concerning business opportunities with El Corte Ingles.

The record clearly negates defendant's fifth affirmative defense of full payment.

The above mentioned evidence also satisfies the Statute of Frauds (*see* General Obligations Law § 5-701[b][3][d], [b][4]; *Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 54 [1953]; *Newmark & Co. Real Estate Inc.*, 80 AD3d at 477), thus defeating the seventh affirmative defense.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15214 In re Amador Roman, Index 101122/13
Petitioner-Appellant,

-against-

The New York City Department
of Education,
Respondent-Respondent.

_____

Glass Krakower LLP, New York (John Hogrogian of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael S. Legge of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered March 7, 2014, to the extent appealed from as limited by the briefs, confirming an arbitral award, dated July 25, 2013, which terminated petitioner's employment, unanimously affirmed, without costs.

The termination of petitioner's employment does not shock our sense of fairness (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 569 [1st Dept 2008]). Petitioner's conduct may be described as verbal and physical abuse of students, and verbal abuse of one student's parent; it continued for a period of three academic years, even after several letters were placed in petitioner's file memorializing

the complaints, one of which warned that further incidents could lead to termination (*compare Matter of Camacho v City of New York*, 106 AD3d 574 [1st Dept 2013] [after settling prior disciplinary charges, petitioner entered into stipulation agreeing that if she were to be found guilty after a hearing of verbally abusing students she would be terminated]). Petitioner has taken no responsibility for his actions, repeatedly denying most of the incidents despite corroborating evidence, and has shown no remorse. After considering petitioner's long, otherwise satisfactory tenure and the principle of progressive discipline, the hearing officer properly found that petitioner's repeated misconduct and the several occasions on which he was warned about it to no avail rendered termination appropriate (*compare Matter of Weinstein v Department of Educ. of City of N.Y.*, 19 AD3d 165 [1st Dept 2005] [penalty for single incident of improper use of

physical force shocking to conscience where petitioner was carrying out assigned duty of denying access to locker room to all but gym class students], *lv denied* 6 NY3d 706 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15215- SCI 2444/13
15215A The People of the State of New York, 603/14
Respondent,

-against-

Dandre Toole,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lauren Springer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

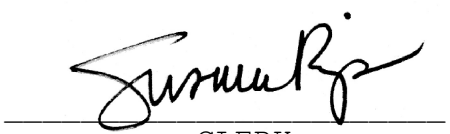
_____

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J. at plea and sentencing), rendered on or about November 1, 2013, and a judgment of the Supreme Court, New York County (Larry Stephen, J. at plea; Robert Mandelbaum, J. at sentencing), rendered on or about March 17, 2014,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentences not excessive,

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed.

ENTERED: MAY 26, 2015



CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15216 Douglas Schottenstein, M.D., Index 158186/13
Plaintiff-Appellant,

-against-

Warren Silverman, M.D.,
Defendant-Respondent.

_____

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, Lake Success (Keith J. Singer of counsel), for appellant.

Furman Kornfeld & Brennan, LLP, New York (Tracy S. Katz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered November 5, 2014, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the cause of action for libel per se, and otherwise affirmed, without costs.

Plaintiff, a physician who treated a workers' compensation claimant, alleges that he was defamed in his profession by a report prepared by defendant, a consultant hired by the workers' compensation insurer to determine whether certain medications and treatment prescribed the claimant were indicated. Plaintiff alleges that defendant exceeded the scope of his assigned task by reporting that the medical records he reviewed indicated possible fraudulent billing and unnecessary treatment rendered, and

recommending that the matter be referred to the Office of Professional Misconduct and the Attorney General's Office.

Defendant's communications are not cloaked with absolute immunity since there is no showing that he was engaged in a public function when he published the report (*see* Workers' Compensation Law § 20; *Toker v Pollak*, 44 NY2d 211, 219 [1978]). There were no adversarial proceedings at the time of the report's publication (*see Okoli v Paul Hastings LLP*, 117 AD3d 539 [1st Dept 2014]; *Nineteen Eighty-Nine, LLC v Icahn Enters. L.P.*, 99 AD3d 546 [1st Dept 2012], *lv denied* 20 NY3d 863 [2013]). Nor are defendant's communications subject to qualified immunity since plaintiff's detailed allegations, accepted as true for purposes of this motion, are "sufficient to potentially establish actual malice" (*see Weiss v Lowenberg*, 95 AD3d 405, 406 [1st Dept 2012] [internal quotation marks omitted]; *Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [1st Dept 2004]).

The complaint fails to state a cause of action for intentional infliction of emotional distress, since defendant's report fails "to go beyond all possible bounds of decency, and to

be regarded as atrocious, and utterly intolerable in a civilized community'" (*see Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15217 US Bank National Association, as Trustee for CASB Mortgage-Backed Pass-Through Certificates, etc., Plaintiff-Appellant, -against- Anthony Ezugwu, Defendant-Respondent, New York City Env. Control Board, et al., Defendants. Index 382221/10

Hogan Lovells US LLP, New York (Chava Brandriss of counsel), for appellant.

Petroff Law Firm, P.C., Brooklyn (Serge F. Petroff of counsel), for respondent.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered June 11, 2014, which, to the extent appealed from, denied plaintiff's motion for summary judgment against defendant Anthony Ezugwu, without prejudice to renewal upon proper papers, unanimously affirmed, with costs.

Plaintiff failed to establish prima facie that it received defendant's mortgage and note by "a proper assignment" (*see Midfirst Bank v Agho*, 121 AD3d 343, 347-348 [2nd Dept 2014]). The Pooling and Servicing Agreement (PSA) provides: "The

[nonparty] Depositor hereby sells, transfers, assigns, delivers, sets over and otherwise conveys to the Trustee [plaintiff] in trust for the benefit of the Certificateholders [sic] and the Certificate Insurer, without recourse, the Depositor's right, title and interest in and to [inter alia] the Mortgage Loans listed in the Mortgage Loan Schedule." However, plaintiff submitted neither the referenced loan schedule nor any other evidence to demonstrate that the subject mortgage and note were included in the assignment.

The affidavit by plaintiff's officer, which states that she personally "reviewed the books and records created, maintained and utilized by Wells Fargo in the ordinary course of its business as Master Servicer and Custodian for the Trust," does not avail plaintiff, since the affidavit refers to the PSA only.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.p., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15218 Soldiers', Sailors', Marines' and Airmen's Club, Inc., Plaintiff-Respondent, Index 600813/07 601554/08 590181/09

-against-

The Carlton Regency Corp., Defendant-Appellant-Respondent.

- - - - -

The Carlton Regency Corp., Third-Party Plaintiff-Appellant-Respondent,

-against-

James Conforti, III, et al., Third-Party Defendants and Counterclaim Plaintiff-Respondents-Appellants,

-against-

The Commingled Pension Trust Fund (Mortgage Private Placement) of JP Morgan Chase Bank, N.A. Counterclaim Defendant.

[And Other Actions]

_____

Gallet Dreyer & Berkey, LLP, New York (David L. Berkey of counsel), for appellant-respondent.

Windel Marx Lane & Mittendorf LLP, New York (Mark A. Slama of counsel), for respondents-appellants

Richard L. Farren, New York, for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 23, 2013, which, to the extent appealed

from as limited by the briefs, denied defendant/third-party plaintiff Carlton Regency Corp.'s (the Cooperative) motion for summary judgment dismissing the counterclaims asserted by third-party defendants James Conforti and Dean Stephen Lyras that are based on a 2006 agreement between the Cooperative and Conforti, and denied Conforti and Lyras's motion to vacate a ruling staying eviction proceedings against plaintiff, Soldiers', Sailors', Marines' and Airmen's Club, Inc. (the Club), unanimously modified, on the law, the matter remanded to determine the amount of the undertaking to be posted, and otherwise affirmed, without costs.

In this action concerning a 1972 lease and sublease, a 1980 Agreement of Purchase of Air Rights Parcel, and several subsequent and related agreements, the parties dispute, among other things, their rights and obligations concerning the building at 281-283 Lexington Avenue, which is currently occupied by the Club, a charitable organization providing, among other things, housing for current and former military servicemen and women and their families who are passing through New York. On appeal, the Cooperative limits its argument in support of partial summary judgment dismissing Conforti and Lyras's counterclaims for declaratory relief, breach of contract, promissory estoppel,

and breach of the implied warranty of good faith and fair dealing to its contention that Conforti breached the 2006 Agreement by failing to reimburse rent payments after February 2008.

The motion court correctly concluded that there are questions of fact as to whether Conforti was in breach and, if so, whether the breach was material (*see Smolev v Carole Hochman Design Group, Inc.*, 79 AD3d 540, 541 [1st Dept 2010]). Similarly, there are issues of fact as to whether the Cooperative anticipatorily breached the 2006 agreement, as well as agreements entered into in 2003, by communicating its intention to forgo its obligations under those agreements and taking actions contrary to its obligations under those agreements (*see Soldiers', Sailors', Marines' and Airmen's Club, Inc. v The Carlton Regency Corp.*, 95 AD3d 687, 690 [1st Dept 2012]).

Contrary to Conforti and Lyras's contention, the procedure for issuance of a stay of commencement of eviction proceedings against the Club did not violate their due process rights or any provision of the CPLR. The court did not improvidently exercise its discretion in issuing the stay pending resolution of this litigation concerning the parties' rights under the various agreements, in light of the irreparable harm that eviction proceedings, and certainly eviction, would cause the Club and the

uncertainty of the parties' rights (*Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24-27 [1st Dept 2011]). However, the court did not address their request that a bond be posted to protect their interest in income from the property following expiration of the sublease in March 2013. It was an abuse of discretion to grant the injunction without requiring any undertaking, even a nominal one (*see Franco v 172 E Holdings LLC*, 110 AD3d 636 [1st Dept 2013]*; Matter of G Bldrs. IV, LLC v Madison Park Owner, LLC*, 84 AD3d 694, 695 [1st Dept 2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15219-
15220-
15221 The People of the State of New York,
Respondent,

-against-

Jose Salgado,
Defendant-Appellant.

Ind. 3105/94

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Harriett Galvin of counsel), for respondent.

Order, Supreme Court, New York County (Patricia Nunez, J.), entered on or about August 4, 2011, which denied defendant's CPL 440.10 motion to vacate a May 17, 1994 judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Defendant's motion is procedurally defective under CPL 440.10(2)(c) and 440.30(4)(d). In any event, it is without merit.

Defendant contends that the building he was accused of burglarizing was not a dwelling under the Penal Law, that his counsel rendered ineffective assistance by failing to ascertain the building's true status and make use of this information in

his plea bargaining strategy, and that his guilty plea to attempted second-degree burglary (requiring the premises to be a dwelling) was invalid or inadvisable. However, the People claim that the educational building at issue contained an occupied superintendent's apartment in its basement that rendered the entire building a dwelling under the principles set forth in *People v McCray* (23 NY3d 621 [2014]). Defendant's sole attempt to refute that contention is based on irrelevant documents suggesting that the basement apartment might not have complied with the certificate of occupancy in effect for the building at the time of the burglary. "Dwelling" is defined simply as "a building which is usually occupied by a person lodging therein at night" (Penal Law § 140.00[3]). There is nothing in the Penal Law to suggest an additional requirement of compliance with certificates of occupancy, building codes and the like (*see People v Santospago*, 198 AD2d 313 [2d Dept 1993], *lv denied* 82 NY2d 930 [1994] [dwelling status not affected by lack of C of O]; *see also People v Abarrategui*, 306 AD2d 20, 21 [1st Dept 2003],

lv denied 100 NY2d 617 [2003] [same result; emergency access restrictions]; *People v Mullally*, 38 Misc 3d 1002, 1009 [Sup Ct, Queens County 2013] [same result; City's vacate order]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15222 Tamara Holmes, Index 305387/08
Plaintiff-Appellant,

-against-

Bronx-Lebanon Hospital Center,
Defendant-Respondent.

_____

Sanocki Newman & Turret, LLP, New York (David B. Turret of counsel), for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edgar Walker, J.), entered January 14, 2014, dismissing the complaint, unanimously affirmed, without costs.

At trial, plaintiff failed to establish that defendant (Bronx-Lebanon) deviated or departed from accepted practice and that that departure was a proximate cause of her injury (*see Foster-Sturrup v Long*, 95 AD3d 726 [1st Dept 2012]). Liability was not established by plaintiff's expert's conclusory assertion that the appropriate diagnostic testing, if performed by Bronx-Lebanon during a January 6, 2008 emergency room visit, would have revealed "inflammation and swelling around the cecum and appendix," prompted an emergency appendectomy, and obviated the need for plaintiff to undergo more extensive surgery later (*see*

e.g. Rodriguez v Montefiore Med. Ctr., 28 AD3d 357, 357-358 [1st Dept 2006]). The expert failed to identify the evidentiary basis for his conclusion that diagnostic testing on January 6 would have revealed inflammation. To the contrary, based upon an operative report of the surgery performed at another hospital on January 8, the expert opined that the inflammatory process in plaintiff's abdomen would have existed for, at most, 36 hours before that surgery. That is, the inflammatory process would not have begun until well after plaintiff had been discharged from Bronx-Lebanon. In addition, the expert failed to explain how the failure to perform an appendectomy could have caused or contributed to the cecal perforation with which plaintiff was later diagnosed.

The court's finding on defendant's motion for summary judgment that plaintiff made out her prima facie case does not

preclude dismissal of the complaint after the presentation of plaintiff's case at trial (*see e.g. Rodriguez v Ford Motor Co.*, 106 AD3d 525 [1st Dept 2013]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15223 The People of the State of New York, Ind. 1289/10
Respondent,

-against-

Keymani Jones,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J.), rendered on or about April 10, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 26, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Acosta, Renwick, Manzanet-Daniels, Feinman, JJ.

15224N Ife-Marilyn O'Berry, Index 300936/12
Plaintiff-Respondent,

-against-

Gelco Corp., et al.,
Defendants-Appellants.

_____

Winget, Spadafora & Schwartzberg, LLP, New York (Harris B. Katz of counsel), for appellants.

Fein & Jakab, New York (Peter Jakab of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 22, 2014, which, to the extent appealed from, denied defendants' motion to vacate the note of issue and compel certain discovery, unanimously affirmed, without costs.

The denial of defendants' motion to compel the deposition testimony of defendant Abdou, thereby effectively precluding him from testifying at trial, was a provident exercise of the motion court's discretion. Defendants failed to give a reasonable excuse for their disobedience of two compliance conference orders warning the parties that failure to comply would result in preclusion (*see S.R. Garden City, LLC v Magnacare, LLC*, 114 AD3d 925, 926 [2d Dept 2014]; *see also Jones v Green*, 34 AD3d 260, 261 [1st Dept 2006]).

The motion court providently exercised its discretion in declining to vacate the note of issue, even though discovery remained outstanding (*see e.g. May v American Red Cross*, 282 AD2d 285 [1st Dept 2001]).

Because the appellate record does not include a bill of particulars purportedly alleging neurological injuries, this Court cannot meaningfully review defendants' contention that the motion court erred in refusing to compel plaintiff to submit to a neurological IME (*see UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575, 579 [1st Dept 2010], *lv denied* 17 NY3d 706 [2011]).

We have considered defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15225 The People of the State of New York, Ind. 121/11
Respondent,

-against-

Rahmel Craft,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Seth Steed of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles S. Solomon, J.), rendered on or about April 3, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 26, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15226 In re Nicole R.S.,
Petitioner-Appellant,

-against-

Troy Kenneth Brian L.,
Respondent-Respondent.

_____

Michael F. Dailey, Bronx, for appellant.

George E. Reed, Jr., White Plains, for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about April 16, 2013, which, after a fact-finding hearing, dismissed the petition for an order of protection, unanimously affirmed, without costs.

Given the court's finding that respondent's testimony was more credible than that of petitioner and her witness, petitioner's allegations that respondent committed acts that would constitute family offenses are not supported by a preponderance of the evidence (*see* Family Court Act § 832). There is no basis for disturbing the court's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

Petitioner failed to preserve for appellate review her contention that the court was biased against her (*see Matter of Maureen H. v Samuel G.*, 104 AD3d 470 [1st Dept 2013]). In any event, petitioner failed to identify an actual ruling that demonstrates bias (*see Lupe Dev. Partners, LLC v Pacific Flats I, LLC*, 118 AD3d 645 [1st Dept 2014], *lv dismissed* 24 NY3d 998 [2014]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15227 In re Betty Rasnick, Index 400295/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Betty Rasnick, petitioner pro se.

David I. Farber, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated January 30, 2013, which, after a hearing, terminated petitioner's tenancy on the grounds of nondesirability, violation of an order of exclusion, and violation of probation, unanimously modified, on the law and the facts, to vacate the determination as to Charge 1, finding nondesirability based on the events of February 11, 2011, and to dismiss that charge, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Tanya R. Kennedy, J.], entered December 6, 2013), otherwise disposed of by confirming the remainder of the determination, without costs.

In the hearing transcript examined by this Court, the police detective who described executing a search warrant on February

11, 2011 and discovering marijuana did not specify the apartment in which the warrant was executed and the drugs discovered. Thus, based on the record before this Court, there is no substantial evidence to support Charge 1, alleging nondesirability based on the discovery of marijuana in petitioner's apartment on that date.

Charges 2-5 were supported by substantial evidence. We note that with regard to Charges 3 and 4, alleging violation of the permanent exclusion and violation of probation, respectively, arising from the presence of petitioner's son Kirk Rasnick in her apartment on February 11, 2011, the hearing officer improperly relied on Detective Lahens's testimony, which was stricken from the record, that "Kirk" was the first name of the older Rasnick gentleman with a beard who was present. Nevertheless, petitioner acknowledged that her son Kirk, who was the subject of the exclusion order, was present in the apartment on February 11, 2011.

Even with dismissal of the first charge, termination of petitioner's tenancy due to her failure to exclude her adult son in violation of the exclusion order and her probation, and her failure to prevent her guests from engaging in illegal drug activities and illegal activity that threatened the health,

safety and right of peaceful enjoyment by other residents and respondent's employees, does not shock our sense of fairness (see Matter of Santiago v New York City Hous. Auth., 122 AD3d 433 [1st Dept 2014]; *Matter of Grant v New York City Hous. Auth.*, 116 AD3d 531 [1st Dept 2014]; *Matter of Santana v New York City Hous. Auth.*, 106 AD3d 449 [1st Dept 2013]; *Matter of Coleman v Rhea*, 104 AD3d 535 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15228 In re Isaac Widerman, Index 400884/13
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Isaac Widerman, appellant pro se.

David I. Farber, New York (Seth E. Kramer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered January 31, 2014, denying the petition seeking, among other things, to annul a determination of respondent New York City Housing Authority, dated February 6, 2013, which, after a hearing, denied petitioner's grievance seeking a retroactive rent credit from January 2003 to January 2006; to obtain advancement in priority on a waiting list for transfer to a different NYCHA building; and to disclose certain documents and remove certain documents from his tenant folder, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent had a rational basis for denying petitioner's grievance seeking a rent credit pertaining to the period from

January 2003 to January 2006. Notwithstanding that petitioner succeeded to his deceased mother's tenancy as a remaining family member, substantial evidence showed that he did not sign the lease until December 2010. Thus, petitioner was a licensee rather than a tenant during the prior time period at issue (*see Matter of Abdil v Martinez*, 307 AD2d 238, 242 [1st Dept 2003]), and was not entitled to a rent credit for the prior period (*see Matter of Garcia v Franco*, 248 AD2d 263 [1st Dept 1998], *lv denied* 92 NY2d 813 [1998]).

The court properly found that petitioner's claim that his request for a transfer to a different building was belatedly granted, resulting in an improperly low priority on the waiting list, was time-barred. Petitioner's claim could not have accrued any later than January 2011, when respondent granted the request. Thus, the four-month statute of limitations (CPLR 217[1]) expired by May 2011 at the latest (*see Matter of Barry v Mulrain*, 4 AD2d 628, 630 [1st Dept 1957], *affd* 5 NY2d 906 [1959]). Petitioner commenced this proceeding more than two years later, in June 2013. We have considered and rejected petitioner's contention that respondent should have informed him of the statute of limitations.

Respondent has satisfied its statutory obligations in responding to petitioner's FOIL request for his tenant folder by disclosing the folder and certifying that a diligent search had failed to locate any further responsive records (*see Matter of Lopez v New York City Police Dept. Records Access Appeals Officer*, 126 AD3d 637 [1st Dept 2015]). Respondent indicated that the materials at issue were more than six years old, and were purged from the folder pursuant to its document-retention policy. The court also properly denied petitioner's application for a writ of mandamus to compel respondent to remove certain materials from the tenant folder, since petitioner failed to establish a clear legal right to the relief sought (*see Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]). Notwithstanding petitioner's arguments that those materials were objectionable, any decision as to whether to remove them would be discretionary rather than ministerial (*see id.*).

The court properly found that the relief sought by petitioner pertaining to exhaust fans in the building is unavailable in an article 78 proceeding.

We have reviewed petitioner's remaining arguments for affirmative relief and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15229 Board of Managers of Hester Gardens, Index 111148/11
Plaintiff, 590195/13

-against-

Well-Come Holdings LLC, et al.,
Defendants.

- - - - -

Well-Come Holdings LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Peter F. Poon Architect, P.C., et al.,
Third-Party Defendants-Respondents,

Flintlock Construction Services, LLC,
Third-Party Defendant.

_____

Rich, Intelisano & Katz, LLP, New York (Victor Rivera Jr. of counsel), for appellants.

Donovan Hatem LLP, New York (Scott K. Winikow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered November 20, 2013, which, insofar as appealed from as limited by the briefs, granted the motion of defendant/third-party defendant Peter F. Poon Architect, P.C. (Poon, P.C.) to dismiss so much of defendant/third-party plaintiffs' (Well-Come) first cause of action in the third-party complaint seeking contractual indemnification, unanimously reversed, on the law,

without costs, and the motion denied.

The terms of the contract between Well-Come and Poon, P.C., provide for indemnity for sums due to the negligent or intentional acts, errors, and omissions of Poon, P.C., or material breaches of the agreement. Thus, while Well-Come cannot seek those damages plaintiffs allege to have been caused by failures of construction, or other areas not covered by the contract between Well-Come and Poon, P.C., Well-Come can seek indemnity for those claims based upon negligent design and/or inspection of work.

Contrary to Poon P.C.'s contentions, the clause at issue is not subject to General Obligations Law § 5-322.1, since that statute applies only to claims "against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee." This action is not for either personal injury or property damage, but one for pure economic damages stemming from breach of contract (*see generally Board of Educ. Of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). Nor is this claim barred by the economic-loss rule, which bars claims of common-law contribution, not

contractual indemnification (*see id.* at 29-30; *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318 [1st Dept 2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Corrected Order - June 17, 2015

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15230 The People of the State of New York, Ind. 4640/12
Respondent,

-against-

Phillip Fencerilla,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konvis**e**r, J.), rendered on or about February 7, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 26, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15232 In re Armando Verges, Index 400955/13
Petitioner,

-against-

William Bratton, etc., et al.,
Respondents.

_____

Gibson, Dunn & Crutcher LLP, New York (Akiva Shapiro of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Determination of respondent New York City Police Department, dated February 14, 2013, which, after a hearing, revoked petitioner's premises-residence handgun license, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered on or about March 5, 2014), dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Contrary to petitioner's argument, the determination was not based on one instance of inaccurately reporting a residential address on a renewal application. Rather, the Hearing Officer also found,

inter alia, that petitioner brought his gun to a number of different addresses where he was not authorized to possess it; that, between renewal applications, petitioner failed to report a change of residence, as required, on multiple occasions; and that in 2011, he failed to report his true address, which was his girlfriend's New York City Housing Authority apartment, at least in part because it was unlawful for him to be living there. In light of the high degree of deference to be accorded the agency, the circumstances presented adequately supported the conclusion that petitioner lacks "the essential temperament or character which should be present in one entrusted with a dangerous instrument" (*Matter of Lipton v Ward,* 116 AD2d 474, 477 [1st Dept 1986] [internal quotation marks omitted]).

The penalty of revocation does not shock our sense of fairness (*see e.g. Matter of Rombom v Kelly*, 73 AD3d 508 [1st Dept 2010]; *see also Matter of Rucker v NYC/NYPD License Div.*, 78 AD3d 535 [1st Dept 2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15233 Gary Vogt, Index 110359/11
Plaintiff-Respondent,

-against-

Ivan G. Herstik,
Defendant-Appellant.

_____

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for appellant.

Becker & D'Agostino, P.C., New York (Michael D'Agostino of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered February 28, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff failed to raise a triable issue of fact in opposition to defendant's prima facie showing that he did not deviate or depart from accepted medical practice in his treatment of plaintiff's left foot (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). Plaintiff's expert offered no evidentiary basis for his conclusion that defendant deviated from the standard of care in giving plaintiff two cortisone injections within a one-week period or his opinion that the 8 mg dosage of

cortisone given on each of those occasions was excessive. He merely stated conclusorily that defendant "should have waited a minimum of two weeks before the second injection."

Nor did plaintiff raise an issue of fact whether any such deviation by defendant was the proximate cause of his injury (*see Colwin v Katz*, 122 AD3d 523 [1st Dept]). He failed to address defendant's expert's statement that the rupture of an Achilles tendon by the administration of cortisone injections has never been reported in the medical literature.

In view of the foregoing, plaintiff's claim of lack of informed consent must be dismissed (*see Flores v Flushing Hosp. & Med. Ctr.*, 109 AD2d 198, 201 [1st Dept 1985]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15235 The People of the State of New York SCI 2498/13
Respondent,

-against-

Eddie Rodriguez,
Defendant-Appellant.

_____

The Bronx Defenders, Bronx (V. Marika Meis of counsel), and Chadbourne & Parke LLP, New York (Jessica Staton of counsel), for appellant.

Robert T, Johnson, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John S. Moore, J.), entered on or about November 18, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's upward departure was supported by clear and convincing evidence establishing aggravating factors that were not adequately taken into account by the risk assessment instrument. First, the assessment of points for the victim's age being under 11 did not sufficiently reflect the aggravating factor of the victim being only five years old (*see People v Mantilla*, 70 AD3d 477, 478 [1st Dept 2010], *lv denied* 15 NY3d 706

[2010]). Second, defendant made a strange and disturbing statement in a presentence interview, alleging that the five-year-old child invited defendant's sexual conduct, and implying that defendant was justified in accepting the purported invitation. Such a statement evinces a state of mind that poses a danger to children. This statement was both a proper basis for an assessment of points under the risk factor for failing to accept responsibility (*see People v Yomtov*, 105 AD3d 422, 422 [1st Dept 2013], *lv denied* 21 NY3d 585 [2013]), and a further basis, as cited by the court, for the upward departure because its egregiousness was not adequately taken into account.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15236-
15236A Index 350094/00

Richard N. Djeddah,
Plaintiff,

-against-

Rachel Djeddah,
Defendant.

- - - - -

SJFM, LLC,
Intervenor-Plaintiff-Respondent,

-against-

Richard N. Djeddah, et al.,
Defendants,

Rachel Djeddah,
Defendant-Respondent.

- - - - -

Goldman & Greenbaum, P.C.,
Nonparty Appellant.

_____

Goldman & Greenbaum, P.C., New York (Martin William Goldman of counsel), for appellant.

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for SJFM, LLC, respondent.

Judd Burstein, P.C., New York (Judd Burstein of counsel), for Rachel Djeddah, respondent.

_____

Appeal from orders, Supreme Court, New York County (Matthew F. Cooper, J.), entered March 25, 2013 and April 24, 2013, upon consent, which, inter alia, directed Chicago Title Insurance Company to remit the sum of $275,000 from the proceeds of the

sale of the parties' Scarsdale property to intervenor-plaintiff, directed the receiver to release $221,851.03 to nonparty appellant in full satisfaction of any claims it has against the receiver and in full satisfaction of its charging lien, and denied appellant's cross motion to direct the receiver to release $443,880.58, unanimously dismissed, with costs.

Since the orders were entered upon appellant's consent, appellant is not aggrieved by them.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15238 The People of the State of New York, Ind. 2248/12
Respondent,

-against-

Joanna Romero,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about January 15, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 26, 2015

_____
CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15239 Cole, Schotz, Meisel, Forman & Leonard, P.A.
Plaintiff-Appellant,

-against-

Stanton Crenshaw Communications, LLC, et al.,
Defendants-Respondents.

Index 603167/09

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Jed M. Weiss of counsel), for appellant.

Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered September 5, 2014, which, to the extent appealed from as limited by the briefs and stipulation, denied plaintiff's motion for summary judgment on its claims against defendant Crenshaw Communications (CC), and granted CC's cross motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs. Appeal from the foregoing order as to defendants Stanton Crenshaw Communications, LLC, Stanton Public Relations & Marketing and Alexander Stanton, unanimously withdrawn before argument, without costs, pursuant to the parties' stipulation dated March 24, 2015.

Plaintiff seeks to recover rent due on the remainder of a commercial sublease entered into by defendant Stanton Crenshaw Communications, LLC (SCC) in 2006. Defendant CC was created in 2009, after the two principals of SCC, defendants Stanton and Crenshaw, decided to stop working together due to disagreements over the future of the firm, and entered into a buyout agreement. Plaintiff's claim to recover from CC on a theory of successor liability was properly dismissed, since the record establishes that it did not expressly or impliedly assume SCC's contractual liability, there was no consolidation or merger, and it was not a mere continuation of SCC (*Broadway 26 Waterview, LLC v Bainton, McCarthy & Siegel, LLC*, 94 AD3d 506, 507 [1st Dept 2012]; *see Schumacher v Richards Shear Co.*, 59 NY2d 239 [1983]). Nor is there any showing that the buyout transaction between Stanton and Crenshaw was entered into in order to fraudulently escape rent

obligations to plaintiff. The mere fact that some clients and a few employees joined Crenshaw's new firm is insufficient to impose successor liability upon CC (*see Broadway 26*, 94 AD3d at 507; *In re Thelen LLP*, 24 NY3d 16, 28 [2014]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15240 The People of the State of New York, Ind. 2841/96
Respondent,

-against-

Emiliano Adon,
Defendant-Appellant.

_____

Labe M. Richman, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Mary McGowan Davis, J.), rendered April 3, 1997, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and criminal sale of a controlled substance in the second degree, and sentencing him to an aggregate term of three years to life, unanimously affirmed.

Since the record is clear that defendant knew that his guilty plea could result in deportation, his claim that the court misadvised him of the specific immigration consequences of his plea does not come within the narrow exception to the preservation requirement (*see People v Peque*, 22 NY3d 168, 182 [2013], *cert denied sub nom. Thomas v New York*, __ US __, 135 S Ct 90 [2014]), and we decline to review this unpreserved claim in

the interest of justice. As an alternative holding, we reject it on the merits. The record of the plea proceedings establishes that defendant discussed immigration issues with his attorney and that the court appropriately advised him that he could be deported as a result of his plea. To the extent that defendant is claiming that his attorney rendered ineffective assistance, and to the extent the record permits review of that claim, we also reject that claim.

The court properly denied defendant's motion to withdraw his guilty plea, which did not raise any immigration-related issues (*see People v Frederick*, 45 NY2d 520 [1978]. Defendant's claims of coercion and innocence were unsubstantiated, and the linkage of defendant's plea to that of his codefendants satisfied constitutional standards for such an arrangement (*see People v Fiumefreddo*, 82 NY2d 536 [1993]). The record fails to support

defendant's contention that the court misapprehended its discretion to grant the motion.

We have considered and rejected defendant's remaining claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15241N- Index 104675/10
15242N-
15243N-
15244N-
15245N
15246N-
15247N-
15248N DLJ Mortgage Capital, Inc.,
Plaintiff/Petitioner-Respondent,

Thomas Hoey, et al.,
Third-Party Intervenors-Plaintiffs,

-against-

Thomas Kontogiannis, et al.
Defendants/Respondents,

Hahn & Hessen LLP, et al.,
Defendants,

Jeffrey Siegel, et al.,
Respondents-Appellants.

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Massoud & Pashkoff LLP,
Nonparty Appellant.

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Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), and Granger & Associates, LLC, New York (Raymond R. Granger of counsel), for appellants.

Hahn & Hessen, LLP, New York (John P. Amato of counsel), for DLJ Mortgage Capital, Inc., respondent.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered November 7, December 3, December 10, and December 23, 2013 and January 10, February 4, and February 18, 2014,

which, to the extent appealed from as limited by the briefs, denied the motion of respondents Jeffrey Siegel and Richard Siegel (J&R Siegel) to vacate an April 2011 order of attachment in favor of plaintiff DLJ Mortgage Capital, Inc, granted DLJ priority in the assets at issue, ordered sanctions against J&R Siegel and their counsel, nonparty appellants Massoud & Pashkoff LLP, and consolidated J&R Siegel's Queens County actions into the instant action, unanimously affirmed, with costs. Order, same court and Justice, entered on or about October 14, 2014, which denied J&R Siegel's motion to vacate judgments entered on default on October 22, 2012 as modified on December 6, 2012 (the equitable judgments), directing that title to certain real property at issue be transferred to DLJ's judgment debtor, defendant The Axxion Group LLC, for DLJ's benefit, unanimously affirmed, with costs.

The court properly denied J&R Siegel's motion to vacate DLJ's April 2011 order of attachment. The propriety of the orders of attachment had been decided in connection with the court's July 27, 2012 order, which this Court affirmed (*see DLJ Mtge. Capital, Inc. v Kontogiannis*, 110 AD3d 522 [1st Dept 2013]). As to the remainder of this priority dispute not previously decided by the court's July 27, 2012 order, the record

supports the court's determination that DLJ had priority in the remaining properties at issue. The court also properly consolidated proceedings brought by J&R Siegel in Queens County, concerning the same defendants and priority dispute, with the instant action.

The court's imposition of sanctions against J&R Siegel and their attorneys after a hearing was also supported by the record, and there is no basis for recusal or reassignment.

J&R Siegel failed to move to vacate the equitable judgments pursuant to CPLR 5015(a)(3) within a reasonable time (*see Mark v Lenfest*, 80 AD3d 426 [1st Dept 2011]), and, in any event, the judgments were not procured by DLJ's fraud, misrepresentation, or other misconduct.

We have considered J&R Siegel's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK

Acosta, J.P., Andrias, Saxe, Richter, JJ.

14417 In re the City of New York, et al., Index 401425/11
Petitioners-Respondents,

-against-

New York State Nurses Association, et al.,
Respondents-Appellants.

_____

Cohen, Weiss and Simon LLP, New York (Joseph Vitale of counsel), for New York State Nurses Association and Karen A. Ballard, appellants.

Philip L. Maier, New York (Abigail R. Levy of counsel), for the Board of Collective Bargaining of the City of New York and Marlene Gold, appellants.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 18, 2013, reversed, on the law, without costs, the determination reinstated, and the proceeding brought pursuant to CPLR article 78 dismissed.

Opinion by Acosta, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter, JJ.

14417
Index 401425/11

_____x

In re the City of New York, et al.,
Petitioners-Respondents,

-against-

New York State Nurses Association, et al.,
Respondents-Appellants.

_____x

Respondents appeal from a judgment of the Supreme Court, New York County (Carol E. Huff, J.), entered April 18, 2013, annulling the determination of respondent the Board of Collective Bargaining of the City of New York, dated April 28, 2011, which granted an improper practice petition to the extent of compelling petitioners to disclose certain materials requested by respondent New York State Nurses Association in connection with employee disciplinary proceedings.

Cohen, Weiss and Simon LLP, New York (Joseph Vitale and Travis M. Mastroddi of counsel), for New York State Nurses Association and Karen A. Ballard, appellants.

Philip L. Maier, New York (Abigail R. Levy and John F. Wirenius of counsel), for the Board of Collective Bargaining of the City of New York and Marlene Gold, appellants.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon and Francis Caputo of counsel), for respondents.

ACOSTA, J.P.

In this CPLR article 78 proceeding, the question presented to this Court is not whether we agree with the administrative agency's determination that a union was entitled to obtain certain documents relevant to disciplinary proceedings against two of its members, but simply whether the determination was rationally based. Because the agency is entitled to substantial deference, and since it engaged in a thorough analysis of its enabling statute, its own precedent, the underlying collective bargaining agreement, and relevant Appellate Division jurisprudence, we find no basis to annul its determination.

Facts

Respondent New York State Nurses Association (the Union) represents more than 8,000 registered nurses, a small number of whom are employed by petitioner New York City Human Resources Administration (HRA). The Union's members are covered by a collective bargaining agreement among the Union, the City, HRA, and nonparty New York City Health and Hospitals Corporation (the agency that employs the majority of the members).

In October 2009, HRA served disciplinary charges on two Union nurses, alleging that they violated various provisions of HRA's "Code of Conduct" by, among other things, misrepresenting on time sheets and to their supervisors that they had worked on

days when they had not worked.

Along with the charges, HRA sent notices informing both nurses of the steps in the disciplinary process that could ensue.[1] According to the notice, Step I was an informal conference at which the conference holder would recommend an appropriate penalty if the charges were sustained. If either nurse did not accept the recommendation as to her, she could either proceed with a hearing pursuant to Civil Service Law § 75 or elect to follow the grievance procedure outlined in the agreement. Notably, the agreement defines "grievance" to include "[a] claimed wrongful disciplinary action taken against an employee." If the nurse employee elected the agreement procedure, she would be required to attend a "Step II Grievance Hearing" before an HRA hearing officer.[2] The notices requested the nurses to "bring to the [h]earing all relevant documentation in support of your appeal."

In response, the Union sent letters dated December 4, 2009, to HRA on behalf of each of the charged nurses, requesting HRA to

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[1] The multi-step process may vary, depending on the outcome of the initial step and whether the employee thereafter elects to proceed in accordance with Civil Service Law § 75 or the agreement.

[2] The agreement also provides for subsequent steps in the grievance process that are not relevant to the instant appeal.

provide certain information "[i]n order for the [Union] to represent [the nurse]" in the disciplinary proceedings. Generally, the Union requested that HRA provide copies of its Code of Conduct, documentation related to the automated timekeeping on the relevant dates, policies related to timekeeping, policies regarding lunch breaks, records for the treatment of certain patients on certain dates, statements by any witnesses who alleged that the nurse was absent from work on the dates charged, and a written statement explaining "how [the nurse] violated" the Code of Conduct. The Union also requested that HRA produce the supervisor to whom the nurses allegedly made false statements about their absences, as well as certain other witnesses.

HRA failed to provide any of the requested materials. Step I informal conferences were held as to both nurses on or about December 14, 2009. The conference holder subsequently sustained some but not all of the charges against each nurse, and recommended termination of both of them.

In January 2010, both nurses filed statements indicating their refusal to accept the Step I recommendation of termination, requesting to submit the matter to the latter steps of the grievance process set forth in the agreement, and waiving their rights to Civil Service Law §§ 75 and 76 disciplinary procedures.

In February 2010, the Union filed an "improper practice" petition with the Board of Collective Bargaining of the City of New York (the Board), contending that HRA's denial of the Union's disclosure request violated Administrative Code of the City of NY §§ 12-306(a)(1) and (4) (New York City Collective Bargaining Law [NYCCBL]).[3] Section 12-306(a)(1) provides that it is an improper practice for a public employer "to interfere with, restrain or coerce public employees in the exercise of their rights" to form, join, or assist public employee unions (NYCCBL § 12-306[a][1]). Section 12-306(a)(4) provides that it is an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees."

[3] The NYCCBL, which regulates labor relations between the City and its employees, is the City's local analogue statute to the New York State Civil Service Law (CSL), commonly known as the Taylor Law. The Taylor Law is New York's state legislation granting public employees the right to organize and collectively bargain with their employers. CSL § 212 authorizes certain governments, including the City, to enact local labor relations laws, provisions, and procedures, provided they are "substantially equivalent" to the state law (subsection 1). The New York State Public Employment Relations Board (PERB) administers the Taylor Law (*see* CSL § 205), and is the only entity authorized to challenge the substantial equivalency of the NYCCBL in relation to the CSL (CSL § 212[2]). The Board of Collective Bargaining is PERB's city counterpart agency, insofar as it is vested with the power "to prevent and remedy improper public employer . . . practices, as such practices are listed in section 12-306 of [the NYCCBL]" (NYCCBL § 12-309[a][4]).

The NYCCBL defines "good faith bargaining" to include a public employer's duty "to furnish to [a public union], upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining" (NYCCBL § 12-306[c][4]).

By order dated April 28, 2011, the Board determined that the City and HRA's refusal to provide certain information to the Union was an improper practice, and granted the Union's petition to the extent of compelling the City to disclose the requested employee time sheets, any relevant witness statements in the possession, custody, or control of the City or HRA, and the requested patient records. It denied the petition to the extent of finding that the Union was not entitled to written statements explaining how the nurses violated the charged provisions of HRA's Code of Conduct, or to the production of certain witnesses, because those requests fell outside the limited duty imposed by NYCCBL § 12-306(c)(4) to furnish "data normally maintained in the ordinary course of business."

In making its determination, the Board discussed several of its prior orders holding that the duty to furnish information pursuant to § 12-306(c)(4) extends to information "relevant to and reasonably necessary for purposes of collective negotiations

or contract administration," and that it also applies in the context of "processing grievances." Accordingly, the Board determined that, although the agreement "does not explicitly obligate the parties to provide requested information in conjunction with the disciplinary process," the statutory "obligation to provide information reasonably necessary for contract administration applies to requests made in the context of disciplinary grievances, and that failure to provide such materials upon request" constitutes an improper practice.

The Board also cited several PERB decisions that have "upheld the right of a union to seek information for contract administration in the context of disciplinary grievances, a conclusion which has been soundly and repeatedly endorsed by the courts." The Board then rejected the City's reliance on *Matter of Pfau v Public Empl. Relations Bd.* (69 AD3d 1080 [3d Dept 2010]), in which the Third Department annulled a PERB decision granting in part a public employee union's request for documents in connection with a disciplinary proceeding against an employee of the New York State Unified Court System (UCS). The Board explained that *Pfau* concerned "a hybrid disciplinary process -- created by the Rules of the Chief Judge (the 'Rules'), and supplemented by additional procedures agreed upon by the parties." The Board emphasized that "the Third Department did

not preclude UCS from agreeing to more extensive discovery rights in disciplinary cases," but merely found that "the text of the agreement supplementing the Rules did not establish such an agreement." In addition, the Board found support for its decision in other Third Department cases, approvingly cited in *Pfau*, "confirming PERB's decisions holding that the obligation to provide information can extend to information requested in relation to contractually-defined disciplinary procedures."

The City and HRA subsequently brought this proceeding pursuant to CPLR article 78, to annul the Board's determination. The Board and the Union separately moved to dismiss the petition.

By order entered May 8, 2012, Supreme Court denied the motions to dismiss, stating that the Board's determination "for the first time extends the acknowledged right of a union to obtain information relevant to contract interpretation grievances, to include employee disciplinary proceedings." The court relied heavily on *Pfau*, which explained that "there is no general right to disclosure in a disciplinary proceeding" (69 AD3d at 1082) and that there are "starkly disparate roles of contractual grievances and employee disciplinary proceedings" (*id.* at 1083). The court further stated that the Board "altered decades of consistent practice without citing direct precedent, . . . while acknowledging that [the Board] itself has previously

'not had occasion to rule . . . in the context of a disciplinary grievance.'" The court found that the Board's ruling "amounts to a unilateral amendment of the negotiated [Agreement]" and that the Board and the Union failed to demonstrate that the Board's determination was not "affected by an error of law . . . or . . . arbitrary and capricious or an abuse of discretion. CPLR 7803(3)."

The Board and the Union appeal.

Discussion

"In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" *(Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] [internal quotation marks and brackets omitted]). "A court cannot simply substitute its judgment for that of an administrative agency when the agency's determination is reasonable" (*District Council 37, Am. Fedn. of State, County & Mun. Employees, AFL-CIO v City of New York*, 22 AD3d 279, 284 [1st Dept 2005]). Moreover, "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]). "Broad deference must therefore be accorded determinations of the Board, which, pursuant to the

Taylor Law, is the body charged with interpreting and implementing the NYCCBL and determining the rights and duties of labor and management in New York City" (*Matter of City of New York v Plumbers Local Union No. 1 of Brooklyn & Queens*, 204 AD2d 183, 184 [1st Dept 1994], *lv denied* 85 NY2d 803 [1995]).

Given this deferential standard of review, we are compelled to hold that the petition should have been dismissed. The Board's decision had a rational basis and was not arbitrary and capricious. To be sure, the Board engaged in a relatively expansive interpretation of the duty to furnish information embodied in NYCCBL § 12-306(c)(4), when it determined that the duty applies in the context of these disciplinary proceedings instituted pursuant to the Agreement. But its interpretation was based on the holdings of some nine prior decisions and was not irrational (*see Peckham*, 12 NY3d at 431 [agency's determination rationally based where "consistent with its own rules and precedents"]). The Board based its decision on its own precedents and related jurisprudence, and its interpretation of the NYCCBL, a statutory provision within its purview and expertise, was sufficiently reasonable to preclude our "substitut[ing] another interpretation" (*Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 NY2d 398, 404 [1979] [internal quotation marks omitted]).

Significantly, the City and HRA do not dispute the Board's precedent holding that the duty to furnish information already applied to "contract administration" and "grievances" (including potential grievances), terminology not found in NYCCBL § 12-306(c)(4). They dispute the application of that duty to disciplinary proceedings, contending that disciplinary proceedings do not constitute contract administration or other grievances. Critically, the agreement defines "grievance" to include "[a] claimed wrongful disciplinary action taken against an employee." Thus, the Board reasonably found that the underlying disciplinary matters were related to the Union's "contract administration" or, in other words, "subjects within the scope of collective bargaining" for purposes of NYCCBL § 12-306(c)(4), and that petitioners had an obligation pursuant to that provision to disclose certain materials to the Union in connection with the disciplinary proceedings.

The Board further demonstrated reasoned judgment by fashioning a well-balanced remedy. It did not broadly or arbitrarily direct petitioners to grant the Union's request in its entirety. Instead, the Board specifically discussed each of the items requested by the Union, and found that only some of these requests were within the scope of reasonably available and material documents pursuant to NYCCBL § 12-306(c)(4), while

others fell outside the ambit of that provision.

Notably, the dissenting Board members, and subsequently the motion court, failed to address NYCCBL § 12-306(c)(4), the key provision on which the Board relied and had broadly interpreted in previous decisions, albeit in different factual contexts. Instead, the court and the dissenting Board members cited policy concerns (outlined in *Pfau* [69 AD3d at 1080]) that a union's requests for materials relevant to disciplinary proceedings could lead to inordinate delays in removing employees who have engaged in misconduct. These concerns, while not unfounded, are undermined by the Board's qualification that "documents that are . . . burdensome to provide, available elsewhere, confidential, or do not exist . . . fall outside the scope of the duty by the public employer to disclose" (internal quotation marks omitted). Furthermore, petitioners' allusion to the instant case as an example of such delays is misleading. While petitioners note that the disciplinary charges here were served in October 2009, calling this an "unduly protracted" process (quoting *Pfau*, 69 AD3d at 1083), the five-year delay is actually a result of the administrative and judicial proceedings concerning the parties' dispute over disclosure. This does not reflect how long the disciplinary process would have taken if the information requested by the Union – and ultimately ordered by the Board –

had been readily produced in the first place. In any event, the majority of the Board presumably concluded that any concerns as to the efficiency of the disciplinary process were outweighed by the Union's right to obtain the reasonably limited set of data. Thus, even if we believed that the dissenting Board members would have devised a more sensible approach in this regard, it would be improper to "substitute [our] judgment" for that of the majority of the Board (*Dist. Council 37*, 22 AD3d at 284).

Contrary to the motion court's ruling, the Board's decision did not "amount[] to a unilateral amendment of the negotiated [agreement]." Although petitioners are correct that the agreement's disciplinary procedure does not explicitly provide for discovery, the Board reasonably found, based on precedent, that the absence of an express contractual provision did not constitute a waiver of the employees' statutory rights under NYCCBL § 12-306(c)(4) (*see Matter of Chenango Forks Cent. Sch. Dist. v New York State Pub. Empl. Relations Bd.*, 21 NY3d 255, 261 n 2 [2013] [noting that a right under a collective bargaining agreement "that complements the statutory right . . . does not extinguish the statutory right"] [internal quotation marks omitted]).

Furthermore, the Board did not, as the motion court found, "alter[] decades of consistent practice without citing direct

precedent." Rather, the Board engaged in a detailed analysis of its own prior decisions and Third Department precedent, including *Pfau*, which it found distinguishable. While the court and petitioners may disagree with it, the Board's reasoning was hardly irrational. In fact, respondents point out that *Pfau* is factually distinguishable because it involved a PERB interpretation of a provision of the Taylor Law (CSL § 209-a[1][d]) that, unlike the NYCCBL, does not contain an express obligation to furnish any information (in disciplinary proceedings or otherwise).

Moreover, that the motion court found the Board's analysis of *Pfau* "unconvincing" is likewise insufficient to deem the Board's determination irrational. Indeed, the *Pfau* court's determination that "there is no *general* right to disclosure in a disciplinary proceeding" (*Pfau*, 69 AD3d at 1082 [emphasis added]) does not preclude the Board's finding that a *limited* right to certain information arises from the agreement and a related statute. Finally, the Third Department's rationale that "disciplinary proceedings, which involve alleged misconduct by an employee, serve a significantly different function than a grievance" (*id.*) is inapposite here, where the agreement expressly defined a "grievance" to include an allegedly wrongful disciplinary action against an employee.

At bottom, the Board's decision cannot be said to have been "taken without sound basis in reason or regard to the facts" (*Peckham*, 12 NY3d at 431), and this Court should not interfere with the Board's rational determination that its enabling statute, in conjunction with the agreement, grants the Union a right to limited information in the context of disciplinary proceedings. In upholding the Board's decision, we are guided by the fact that the agreement specifically encompasses disciplinary proceedings within its definition of a "grievance." We take no position on whether the Board's decision would be rational if applied to municipal contracts that do not define "grievance" as including disciplinary actions.

Accordingly, the judgment of the Supreme Court, New York County (Carol E. Huff, J.), entered April 18, 2013, annulling the determination of respondent the Board of Collective Bargaining of the City of New York, dated April 28, 2011, which granted an improper practice petition to the extent of compelling petitioners to disclose certain materials requested by respondent New York State Nurses Association in connection with employee

disciplinary proceedings, should be reversed, on the law, without costs, the determination reinstated, and the proceeding brought pursuant to CPLR article 78 dismissed.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 26, 2015

CLERK