SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 25, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11348 In re Empire State Realty Trust, Inc. Investor Litigation — Index 650607/12

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Leon Meyers, et al.,
Plaintiffs-Respondents,

-against-

Mary Jane Fales, et al.,
Intervenor Plaintiffs-Appellants,

Malkin Holdings L.L.C., et al.,
Defendants-Respondents.

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Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Lawrence P. Kolker of counsel), for Leon Meyers, Laurence Reinlieb, Susan Bandler, Joseph Weiss and Steven Keenholtz, respondents.

Dewey Pegano & Kramarsky LLP, New York (Thomas E.L. Dewey of counsel), for the Malkin respondents.

Ronald S. Rolfe, New York, for the Estate of Leona M. Helmsley, respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 30, 2013, which denied appellants' application for a judicial declaration that a contractual buyout provision violates New York's Limited Liability Company Law, unanimously

affirmed, without costs.

In this action relating to participation agreements entered into by the partners of Empire State Building Associates (ESBA) pursuant to which they each syndicated their beneficial interests in ESBA into 1,100 "Participation Interests," which were sold to more than 3,000 passive investors, appellants, who are ESBA participants with a fractional ownership interest in an ESBA membership interest, maintain that the buyout provisions contained in the participation agreements are invalid and unenforceable under Limited Liability Company Law § 1002 because they deprive dissenting investors of their statutorily guaranteed right to the "fair value" of their interests. The motion court properly denied appellants' application for a declaration that the buyout provisions violate the Limited Liability Company Law since appellants are not "members" in the limited liability company who are entitled to the fair value appraisal protections

set forth in § 1002(f).

We have considered the parties' additional arguments and find them unavailing.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10948 TBA Global, LLC, Index 651171/12
Plaintiff-Appellant,

-against-

Proscenium Events, LLC, et al.,
Defendants-Respondents.

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Crowell & Moring LLP, New York (Jeffrey W. Pagano of counsel), for appellant.

Kaiser Saurborn & Mair, P.C., New York (David N. Mair of counsel), for Proscenium Events, LLC, Mark Shearon, Chuck Santoro and James Cavanaugh, respondents.

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Michael H. Masri of counsel), for Trade Show Fabrications, Inc. and Ronald Suissa, respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about April 9, 2013, which, to the extent appealed from as limited by the briefs, granted a motion by defendants Mark Shearon, Chuck Santoro and James Cavanaugh for partial summary judgment to the extent of finding that certain restrictive covenants consisting of postemployment nonsolicitation agreements between plaintiff and each of the moving defendants are unenforceable, and denied plaintiff's motion to compel discovery, unanimously modified, on the law, the motion for partial summary judgment denied, and otherwise affirmed, without costs.

Shearon's nonsolicitation agreement with plaintiff provided that for a period of two years after the termination of his employment with plaintiff he was not to "directly or indirectly, communicate with clients or customers of [plaintiff] or pursue business relationships developed while employed by [plaintiff]" except for exclusions that are not relevant to this appeal. The nonsolicitation agreements entered into by Santoro and Cavenaugh provided that during their one-year postemployment nonsolicitation periods neither respective employee was to "directly or indirectly communicate with the clients or prospective clients of [plaintiff] that" each "had personal contact with while employed by [plaintiff]." Defendants moved for partial summary judgment to the extent of a determination that the subject nonsolicitation agreements are overbroad and unenforceable. By their own terms, all of the nonsolicitation agreements were to be governed by and construed in accordance with Delaware law. Nonetheless, the parties differ as to whether New York law or Delaware law should be applied.

In light of the parties' disagreement as to which state's law should apply, our first step is to determine whether there is an actual conflict between the laws of the jurisdictions involved (*see Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). For an actual conflict to exist,

"the laws in question must provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant *possible* effect on the outcome of the trial'" (*Elmaliach v Bank of China, Ltd.*, 110 AD3d 192, 200 [1st Dept 2013]). Under New York law, an employee's noncompetition agreement is reasonable and, therefore, enforceable "only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]). The parties' briefs disclose no conflict of laws that would have a "'significant possible effect on the outcome of the trial'" (*see Elmaliach*, 110 AD3d at 200). To be sure, the moving defendants argued before the motion court that "Delaware law does not differ significantly from New York law as to the test for enforceability" and that applying New York law "should not make a material difference to the outcome" of the case. Thus, we apply the law of New York, the forum state (*see Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd* 3 NY3d 577 [2004]).

The motion court erred in granting partial summary judgment based on its finding that the nonsolicitation covenants are unenforceable. Contrary to the motion court's determination, the

restrictions imposed are no greater than required to protect TBA's legitimate interests which include the protection of client relationships (*see BDO Seidman*, 93 NY2d at 388; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307-308 [1976]; *Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 264 [1st Dept 2004]). The purported preexisting relationship between Santoro and T-Mobile, one of the customers allegedly improperly solicited by defendants, does not establish that such a relationship existed between any of the moving defendants and the other TBA clients alleged to have been improperly solicited. Thus, summary judgment was improperly granted since TBA is not precluded from seeking to enforce the nonsolicitation covenants for the purpose of protecting its customer relationships and goodwill.

Further, the motion court incorrectly found that there is no evidence that defendants misappropriated or used plaintiff's customer lists or trade secrets. To the contrary, plaintiff has proffered evidence that the moving defendants, who had intimate knowledge of TBA's intellectual property and financial information, misappropriated and misused TBA's trade secrets and intellectual property in connection with their solicitation of clients. The record contains evidence that Shearon regularly forwarded to his personal email account confidential and proprietary TBA pricing and customer information, including

internal TBA reports detailing comprehensive information about TBA customers such as revenue figures, project pricing and the status of projects, and also took proprietary documents pertaining to TBA's work on Walmart, including proposal and pitch materials. Thus, at a minimum, there are issues of fact with respect to whether the moving defendants breached the restrictive covenants (*see Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 102 [1st Dept 2008], *mod on other grounds* 14 NY3d 774 [2010]).

With respect to the denial of TBA's motion to compel discovery, the court did not abuse its discretion in concluding that TBA must provide further disclosure to defendants concerning its customers and damages before obtaining the relief requested.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11287 James Gumbs, et al., Index 303510/10
Plaintiffs-Respondents,

-against-

Flushing Town Center III, L.P., et al.,
Defendants-Appellants,

Advanced Ready Mix Corporation,
Defendant.

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McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for appellants.

Fortunato & Fortunato, PLLC, Brooklyn (Annamarie Fortunato of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered on or about February 1, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion pursuant to CPLR 3126 to strike the complaint upon plaintiffs' failure to provide requested HIPAA-compliant authorizations for the release of medical records, affirmed, without costs.

This action was brought to recover damages for a torn rotator cuff, a fractured ankle and other orthopedic injuries sustained by plaintiff James Gumbs. This appeal involves defendants' discovery notice for the production of authorizations for the release of the records of Gumbs's cardiologist as well as his primary care physician. Defendants moved for an order

striking the complaint upon plaintiffs' refusal to provide the authorizations. Counsel's affirmation was accompanied by copies of the pleadings, bills of particulars, defendants' discovery notice and plaintiffs' response. The motion was made solely on the bare-bones assertion that "[p]laintiff certainly has placed his medical condition in issue and has also placed his ability to work in the future at issue as well as his life expectancy." Plaintiffs opposed the motion on grounds that included the physician-patient privilege. The court below denied the motion, finding that defendants have not shown that the records they seek are related to the claimed injuries. We affirm.

Discovery determinations rest with the sound discretion of the motion court (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). This Court is nonetheless vested with a corresponding power to substitute its own discretion for that of the motion court (*id.*). Notwithstanding our own discretion, "deference is afforded to the trial court's discretionary determinations regarding disclosure" (*Don Buchwald & Assoc. v Marber-Rich*, 305 AD2d 338, 338 [1st Dept 2003][internal quotation marks omitted]). Unlike the dissent, we find no abuse of the court's discretion given the paucity of support for the motion in the first instance. Specifically, defendants' argument regarding the relevance of Gumbs's medical history as set forth in his

deposition was improperly made for the first time in their reply papers (*see e.g. Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]). The purpose of reply papers "is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion" (*id.* [internal quotation marks omitted]). This impropriety deprived plaintiffs of an opportunity to respond to the argument. Accordingly, the denial of defendants' motion was reasonable and supported by law.

We, otherwise, find no occasion to substitute our own discretion for that of the motion court. Gumbs's waiver of his physician-patient privilege is limited in scope to "those conditions affirmatively placed in controversy" (*Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]). Gumbs did not place his entire medical condition in controversy by suing to recover damages for orthopedic injuries (*see e.g. Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916, 916-917 [2d Dept 2011]).

All concur except Freedman and Gische, JJ.
who dissent in a memorandum by Gische, J. as
follows:

GISCHE, J. (dissenting)

I respectfully dissent and would reverse the order denying defendants' motion and would direct the production of the requested discovery because plaintiff, by claiming that his enumerated injuries have resulted in his permanent inability to work and permanent or long lasting loss of enjoyment of life, has placed his general health and medical history at issue.

James Gumbs was supervising work at a construction site when the accident occurred. He claims to have sustained a fractured ankle, bilateral shoulder injuries and a knee injury, all requiring surgeries to correct. In his complaint he seeks damages for both past and future loss of earnings. In his various supplemental bills of particulars, plaintiff claims that his injuries are permanent. In addition to compensation for pain, deformity, disability, stiffness, tenderness, tingling sensation, weakness and limitation, he seeks further damages for anxiety, depression and the loss of enjoyment of life, including an inability to enjoy the normal fruits of his "social, economic and educational" activities. His wife has asserted a derivative claim for both past and future loss of services and consortium.

Plaintiff was deposed and testified that he was prescribed Percocet for pain associated with the injuries caused by the accident. Upon further inquiry, he divulged that he was first

prescribed Percocet in 1999 in connection with a gunshot wound he suffered at that time. The wound was to his abdomen. Although he did not lose any organs as a result of wound, he did undergo "multiple surgeries," including surgeries to his small and large intestines. Percocet was prescribed by his personal physician (Dr. Fields) who still treats him and continues to issue refills for that prescription. According to plaintiff, he takes Percocet for pain associated with that old injury as needed, which is approximately once a month.

Plaintiff also testified at his deposition that doctors discovered a heart condition when he went for routine pre-op screening in 2010 to correct the ankle and shoulder injuries that are the subject of this lawsuit. He is not claiming that the heart condition is related to the accident. The condition appears to have been preexisting, but undiagnosed. Plaintiff stated that he sees Dr. Tims, his cardiologist, every four-to-six months to monitor this condition, which plaintiff describes as his having a "blood vessel [that is] weak" or a weak heart muscle. Plaintiff also stated that Dr. Tims prescribed medication to "strengthen up the muscle" and another medicine to lower his cholesterol. Plaintiff did not know the name of the heart strengthening medicine he is taking, how severe this cardiac problem is or whether he also suffers from high blood

pressure.

Plaintiff, now age 60, was asked questions about whether he had any retirement plans. He answered that until he was injured in this accident, he had no intention of retiring and had expected to work until he "[felt] like quitting" because he was "very active". Before this supervisory position, plaintiff had worked as a laborer. He had held this supervisory position for only a few months.

Following the deposition, defendants served a notice on plaintiff to produce, among other things, authorizations for his pharmaceutical/prescription records and authorizations for Dr. Tims', Dr. Fields' and "St. Roosevelt Hospital's" medical records. Although plaintiff provided authorizations for his pharmaceutical records, and he agrees that he waived the physician-patient privilege regarding treatment he received for his ankle and shoulder injuries, he claims that defendants' demands for his cardiologist's records and the records of his primary physician go beyond the scope of permissible discovery because they are totally unrelated to the injuries he sued on. Defendants brought a motion to strike the complaint for failure to provide discovery, attaching copies of plaintiff's verified complaint and bills of particulars dated January 4, 2011, May 31, 2011, August 24, 2011 and December 6, 2011, each of which alleges

permanent physical disabilities as well as his "loss of enjoyment of life" claims.

I disagree that the motion was defective because it did not, at the outset, include a copy of plaintiff's deposition transcript. Defendants' motion squarely put before the court plaintiff's verified complaint and supplemental bills of particulars which expressly specified that plaintiff's demand for monetary damages included loss of future earnings and loss of enjoyment of life based upon the permanency of his injuries. These sworn statements were sufficient to show that plaintiff had put his overall physical condition at issue in this action. The absence of the deposition transcript detailing plaintiff's general physical condition until defendants' reply papers did not warrant denial of defendants' motion.

I also disagree with the majority to the extent it concludes that the medical records sought by defendants are not discoverable because plaintiff claims to have suffered ankle, knee and shoulder injuries and the requested records do not pertain to those specific injuries. I believe the medical records sought by defendants directly relate to plaintiff's sweeping, broad and encompassing claims of permanent disability and loss of enjoyment of life, and it was an abuse of discretion for the trial court to fail to consider these categories of

damages in fashioning the scope of discovery.

CPLR article 31 provides that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Whether something is "material and necessary" under CPLR 3101(a) is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). Where a plaintiff has brought a personal injury action, that person has "affirmatively placed his or her mental or physical condition in issue" *(see Arons v Jutkowitz*, 9 NY3d 393, 409 [2007] [internal citations omitted]).

When a plaintiff seeks future lost earnings, he or she squarely puts his or her prior medical history at issue because his or her overall health directly bears on the question of how many years the plaintiff realistically could have continued to work had no accident occurred (*see Tuitt v Otis El. Co.*, 175 AD2d 72 [1st Dept 1991]; *Barlatier v Rollins Leasing Corp.*, 292 AD2d 480 [2d Dept 2002]). Although plaintiff, who was 55 when the accident occurred, claims he had no plans to retire before the accident happened, his prior medical history is relevant to the issue of how long he could have actually worked, had there been

no accident (*see Goetchius v Spavento*, 84 AD3d 1712 [4th Dept 2011]). The heart condition and injury to plaintiff's internal organs as a result of his gunshot wound are not so obviously remote to his life/work-life expectancy to warrant their non-disclosure (*compare Tomaino v 209 E. 84 St. Corp.*, 68 AD3d 527 [1st Dept 2009] [pre-accident finger fracture records sought on the grounds they could shed light on the plaintiff's heart condition]).

Likewise, when a plaintiff also seeks damages for the permanent loss of his or her ability to enjoy life, the jury must take into consideration the period of time that the plaintiff can be expected to live (PJI 2:281). Although statistical life expectancy tables are useful, juries are routinely instructed that the tables are not binding and they may also consider evidence of a plaintiff's actual health condition, habits and activities in making this evaluation (PJI 2:281). Consequently, such evidence should be discoverable. Plaintiff's medical records shed light on whether he suffered from other conditions, having nothing to do with this accident, which may have impacted upon his ability to enjoy life and/or life expectancy (*see Deleon v Keystone Frgt. Corp.*, 104 AD3d 541 [1st Dept 2013]; *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d 768, 769 [2d Dept 2007]; *see also Weber v Ryder TRS, Inc.*, 49 AD3d 865 [2d Dept 2008]).

Plaintiff's argument, which the motion court accepted and this Court now affirms, that the requested medical records must be relevant and directly correlate to a specific physical condition he has put at issue, meaning his ankle, knee and shoulder injuries, is too narrow an interpretation of this case where plaintiff is seeking broad categories of damages.

Plaintiff contends that his use of the phrase "loss of enjoyment of life" is little more than boilerplate language which he will withdraw, if this Court decides that defendants are entitled to discovery of his medical records. Although plaintiff is free to withdraw this element of damages, he has not yet done so. In any event, in my opinion, the information would still be discoverable in connection with his claims of permanency.

The cases relied upon by plaintiff are distinguishable because the discovery was sought on matters not directly at issue in those actions. In *Felix v Lawrence Hosp. Ctr.* (100 AD3d 470 [1st Dept 2012]), we denied discovery because the defendants sought the subsequent obstetrical records of a plaintiff whose only subsequent claim for damages related to emotional and psychological, not physical, injuries. *Elmore v 2720 Concourse Assoc., L.P.* (50 AD3d 493 [1st Dept 2008]), involved discovery demands for a mother's records regarding her psychiatric history, although she had not put that history at issue in the action. In

Rahman v Pollari (107 AD3d 452 [1st Dept 2013]), we denied discovery regarding the plaintiff's HIV status because of the statutory prohibition against the disclosure of such medical records, absent the showing of a "compelling need" for them which cannot be established by simply showing the information is "material and necessary" within the purview of CPLR 3101(a) (*id.* at 454-455).

Here, plaintiff has directly put his general health condition at issue by claiming he suffers a number of physical, emotional and psychological injuries caused by defendants' negligence. There is no statutory prohibition preventing the production of his medical records, and he has otherwise waived any physician-patient privilege regarding the record of Dr. Fields, Dr. Tims and "St. Roosevelt Hospital" based upon the sweeping nature of the damages sought.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11413 In re Amiyna Rock, Petitioner, Index 401354/12

-against-

John B. Rhea, etc., Respondent.

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Freshfields Bruckhaus Deringer US LLP, New York (Julia Lisztwan of counsel), for petitioner.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

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Determination of respondent New York City Housing Authority (NYCHA), dated January 17, 2012, which terminated petitioner's public housing tenancy on the ground of nondesirability, unanimously modified, on the law, the penalty of termination vacated, the matter remanded to respondents for imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered December 20, 2012), otherwise disposed of by confirming the remainder of the determination, without costs.

On October 13, 2009, petitioner visited the management office for Marble Hill Houses, the public housing complex where she resides and which is managed by NYCHA. Petitioner came to the office to seek a rent adjustment, which she believed was

warranted by the recent termination of disability assistance that had been granted her after a difficult pregnancy. Petitioner spoke with Celinette Severiano, a resident services associate, and presented some documentation which petitioner maintained established the loss of benefits. Severiano pointed out to petitioner that the documentation was inconclusive on the issue of whether the disability assistance had in fact been terminated. Severiano advised petitioner that the documentation was insufficient and that she would need to come back with more paperwork.

According to Severiano's testimony at the administrative hearing, petitioner began to yell and curse at her. Describing the atmosphere in her office as "hostile," Severiano decided to leave for the reception area, where her assistant manager was. To do so, she was required to move petitioner's baby stroller (holding petitioner's youngest daughter) out of the way, since it was blocking the door. Petitioner followed Severiano to the reception area, accusing Severiano of pushing her stroller in disregard of her child's safety. According to Severiano, she was concerned enough about petitioner's behavior to call the police. However, before she could dial 911, petitioner grabbed the telephone that Severiano intended to use and threw it towards her. Severiano moved and was not struck. Petitioner was then

removed from the reception area by several other NYCHA workers, including the office manager, Simon Mukkatt. Petitioner was placed in an office, and the entrance to the reception area was locked so petitioner could not re-enter it. According to Severiano, petitioner eventually left the premises, making a threatening remark. Severiano called the police and filed a police report, but petitioner was not arrested. Severiano was eventually transferred to a different office for what her superiors advised her was her "own safety and protection."

By notice dated October 15, 2009, NYCHA informed petitioner that it was considering termination of her lease based on the incident of October 13, 2009. The notice stated that before any action was taken she would have an opportunity to discuss the incident at a meeting in the management office on October 23, 2009, or another time more convenient to petitioner. It is unclear from the record whether the notice was mailed to petitioner or personally delivered to her at her apartment. However, on October 16, according to Mukkatt, petitioner returned to the management office, "because we filed a termination notice [against] her." Mukkatt testified that petitioner came to the office with further information concerning her income, but that when he brought up the possibility of termination, she became outraged and began cursing at him. Before she left she

disparaged what she perceived to be his country of origin.

NYCHA initiated charges which sought to terminate petitioner's tenancy based on nondesirability as a result of, inter alia, the October 13, 2009 and October 16, 2009 incidents, and for breaching NYCHA's rules and regulations. A hearing comprised of five separate sessions took place over the course of approximately one and one-half years. Petitioner did not testify; however, her counsel argued in a closing statement that termination of petitioner's tenancy was not an appropriate penalty inasmuch as petitioner is a single mother with a disabled child, a victim of domestic violence, and a lifelong public housing tenant. Counsel further maintained that while petitioner's conduct was not "fully excusable," it was "understandable" given petitioner's contention that Severiano allegedly "jarred her baby carriage or pushed it on the way out of the room."

The Hearing Officer upheld the charges at issue and imposed termination as a penalty, stating that while she had considered the mitigating circumstances, they were "insufficient to overcome the risk the tenant poses to the safety of NYCHA employees." Petitioner commenced this article 78 proceeding seeking to annul NYCHA's determination. Supreme Court, pursuant to CPLR 7804(g), transferred this matter to this Court to determine whether

NYCHA's determination is supported by substantial evidence.

"In CPLR article 78 proceedings to review determinations of administrative tribunals, the standard of review for the Appellate Divisions ... is whether there was substantial evidence to support the [administrative determination]" (*Matter of Wilson v City of White Plains*, 95 NY2d 783, 784-785 [2000]). Substantial evidence is less than a preponderance of the evidence, and "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" by "its solid nature and ability to inspire confidence, [which] does not rise from bare surmise, conjecture, speculation or rumor" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]).

Pursuant to this standard, the evidence supporting the charges was substantial, considering that petitioner's lease expressly prohibited her from engaging in violent activity on and off the development, and required her to do everything necessary to permit NYCHA to comply with applicable regulations. Further, the testimony of Severiano, Mukkatt and another NYCHA employee who witnessed petitioner's first outburst, was uncontested and accepted as credible by the Hearing Officer, a finding we are without power to disturb (*see Matter of Wooten v Finkle*, 285 AD2d 407, 408 [1st Dept 2001] ["the decision by an Administrative

Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts"] [internal quotation marks omitted]).

We further reject petitioner's argument that the administrative determination should be vacated because NYCHA violated its own procedures. Petitioner argues that NYCHA failed to follow its Management Manual because (1) before even considering termination it did not attempt to address with her the underlying problem; (2) it did not seek to pursue an alternative solution other than termination; (3) it did not adhere to the requirement that, when termination of tenancy is being considered, NYCHA "must first interview the tenant in order to discuss the problem(s) which may lead to termination of tenancy, seek to ascertain the facts involved and, when appropriate, try to assist the tenant by securing outside help"; (4) it did not fully document all of these steps in petitioner's file; and (5) the Hearing Officer did not consider mitigating circumstances in imposing a penalty.

The first two arguments overlook the specific nature of the offending activity here. The two incidents on October 13 and October 16, 2009 demonstrated that petitioner has a volatile temper which has the potential to escalate rapidly from verbal abuse to physical confrontation. This is not the type of

condition which is readily amenable to solutions that would ensure the safety of those who might find themselves at odds with petitioner. In any event, when Mukkatt discussed termination with petitioner on October 16, 2009, her outburst made clear that she had no interest in curing or resolving the offensive behavior. Certainly NYCHA is not required to engage in intervention efforts that are highly likely to be futile.

As for petitioner's contention that she was not afforded an interview before formal termination proceedings were initiated, she failed to raise this specific objection before the Hearing Officer, making review inappropriate (*see Matter of Payano v Berlin*, 95 AD3d 767 [1st Dept 2012]). Indeed, petitioner presented no evidence regarding when she received the October 15 notice, leaving uncontested Mukkatt's testimony that she came in on October 16 in response to it. Contradicting petitioner's assertion that NYCHA failed to document the pre-termination steps it took, the record includes notes taken by NYCHA managers contemporaneously with the two incidents at issue, describing in detail the encounters with petitioner. Finally, there is no question that the Hearing Officer discussed mitigation in her decision.

Notwithstanding the foregoing, we find that termination of petitioner's tenancy, is, based on the reviewable facts in this

record, a penalty that is shocking to the conscience and that must be vacated. We have found this to be so in similar cases of tenants engaging in fits of rage targeted at NYCHA employees, where the conduct was isolated or specifically related to circumstances that gave some explanation for the behavior. For example, in *Matter of Winn v Brown* (226 AD2d 191 [1st Dept 1996]), this Court found that, while NYCHA's determination of nondesirability was supported by substantial evidence of the petitioner's actions, which "[included] screaming profanities, racial epithets and making threats to respondent's employees," the termination of the petitioner's tenancy was shocking to the conscience given that the incidents in question occurred when the tenant was having difficulty securing a transfer despite threats being made against the life of her son. In *Matter of Spand v Franco* (242 AD2d 210 [1st Dept 1997], *lv denied* 92 NY2d 802 [1998]), this Court remanded to NYCHA for imposition of a lesser penalty where the tenant engaged in conduct that was "serious" and "appropriately condemned," but eviction was disproportionate because the incident was isolated, the tenant was the mother of three small children and there was no evidence of other problems which posed a risk to other people or property. Even where a tenant "accosted" a NYCHA representative, termination was considered too harsh because the incident was isolated and

because, like here, the target of the tenant's wrath was not seriously injured (*Matter of Peoples v New York City Hous. A*uth., 281 AD2d 259, 260 [1st Dept 2001]).

On the record before us, the behavior described by NYCHA as undesirable can fairly be characterized as isolated. Although there were two separate incidents, they occurred within three days of each other and were both related to petitioner's effort to secure a rent reduction. Further, none of the NYCHA employees who were targeted by petitioner's rage was physically injured. We recognize that one of the charges leveled by NYCHA against petitioner was predicated on a felony conviction for robbery in connection with an incident on or near development grounds in April 2006, in which she apparently physically assaulted another person. However, the Hearing Officer dismissed that charge because, according to NYCHA rules, once five years pass after the completion of a criminal sentence, the conviction cannot form the basis of regulatory charges. Accordingly, it would not be appropriate for us to consider the conviction in determining whether the penalty was appropriate.

Further, the incidents occurred under stressful conditions for petitioner. When the incident occurred, petitioner had recently lost a portion of her income and was having difficulty receiving immediate assurances that her rent would be

commensurately adjusted. In *Peoples*, the tenant's "considerable frustration" with a NYCHA representative's refusal to acknowledge the condition of her apartment was a factor in this Court's decision to vacate her termination (281 AD2d at 260). In addition, the escalation in petitioner's behavior was apparently related to Severiano's pushing petitioner's baby carriage out of the way. While there is no reason to question Severiano's testimony that she merely nudged the carriage out of the doorframe, it would not be surprising under the circumstances if this increased petitioner's stress level.

Finally, we have in the past found a tenant's need to care for children or disabled persons to be a factor mitigating against eviction (*see Matter of Vazquez v New York City Hous. Auth.* [*Robert Fulton Houses*], 57 AD3d 360 [1st Dept 2008]; *Matter of Williams v Franco*, 262 AD2d 45 [1st Dept 1999]). Petitioner is the single mother of two young children, one of whom suffers from a developmental disability and has needed medical attention

since her birth, and has been a victim of domestic violence. Taken together with the isolated nature of the incidents in question and the circumstances surrounding them, this factor certainly militates in favor of a lesser penalty.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11671 71 Clinton St. Apts. LLC, as assignee of People's United Bank, as successor by merger to Bank of Smithtown, Plaintiff-Appellant, -against- 71 Clinton Inc., et al., Defendants-Respondents, Park Avenue Funding, LLC, et al., Defendants. Index 850047/11

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 16, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its complaint and dismissing defendants-respondents' (hereinafter defendants) third, fourth, eleventh, and twelfth affirmative defenses, unanimously reversed, on the law, without costs and the motion granted.

Defendants are judicially estopped from arguing that the merger between nonparties Bank of Smithtown and People's United Bank was not completed before plaintiff brought this foreclosure action (*see e.g. D & L Holdings v Goldman Co.*, 287 AD2d 65, 71 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]). They obtained

dismissal of the Bank of Smithtown's foreclosure action by arguing that the bank had merged into People's United. They may not now turn around and argue that the Bank of Smithtown did *not* merge into People's United. Hence, defendants' fourth affirmative defense should be dismissed.

Plaintiff properly submitted a reply affidavit that responded to defendants' argument that People's United's June 20, 2011 letter cast doubt on whether People's United had really assigned defendant 71 Clinton Inc.'s note and mortgage to plaintiff on June 2, 2011 (*see Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250 [1st Dept 2002]). Furthermore, plaintiff's reply was an adequate explanation for the June 20 letter. Therefore, as the assignee of the mortgage and of the note when the action was commenced, plaintiff has standing (*see e.g. OneWest Bank FSB v Carey*, 104 AD3d 444, 445 [1st Dept 2013]).

The motion court denied plaintiff's motion to dismiss the third and eleventh affirmative defenses (preclusion and right of redemption, respectively), on the ground that plaintiff had failed to address them. However, as can be seen from its opening brief before the motion court, plaintiff addressed those defenses.

Plaintiff established its prima facie right to foreclose by producing the note, mortgage and guaranty, and affidavits

establishing 71 Clinton Inc.'s nonpayment (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). Although defendant Steven Rosenfeld (the president of 71 Clinton Inc.) claimed he never received a notice of default, that does not preclude summary judgment in plaintiff's favor because it fails to raise a *material* issue of fact (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004]). To establish 71 Clinton Inc.'s default, plaintiff was not required to prove that it had sent a notice of default (*see Chemical Bank v Broadway 55-56th St. Assoc.*, 220 AD2d 308 [1st Dept 1995]).

The twelfth affirmative defense based on Judiciary Law § 489 must also be dismissed. That provision of the Judiciary Law codifies the old doctrine of champerty, which is an equitable defense that was developed "to prevent or curtail the commercialization of or trading in litigation" (*Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 729 [2000]). "What the statute prohibits ... is the purchase of claims with the intent and for the purpose of bringing an action that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up ... in [an] effort to secure costs" (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 201 [2009] [internal quotation

marks omitted]).

Defendants do not assert, nor could they, that plaintiff commenced suit for the primary purpose of obtaining costs or to harass them. Defendants assert that plaintiff acquired the assignment for purposes of foreclosure; the law allows such an acquisition. "New York cases agree that if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation" (*Trust for Certificate Holders, at* 200). Plaintiff acquired the loan for the purpose of enforcing a legitimate claim, namely to obtain a judgment of foreclosure on a defaulted mortgage in a proceeding that was already under way.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11800 The People of the State of New York, Dkt. 10604C/12
Respondent,

-against-

Perry Board,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and Kaye Scholer LLP, New York (Navin K. Pant of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

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Judgment, Supreme Court, Bronx County, (Alvin Yearwood, J.), rendered March 22, 2012, convicting defendant, after a nonjury trial, of two counts of harassment in the second degree, and sentencing him to concurrent terms of 15 days, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations.

The court properly exercised its discretion in declining to admit into evidence photographs of the victim that were offered to show the victim's demeanor shortly before she testified, since

these photographs lacked sufficient relevance to any material issue in the case. In any event, the court, sitting as trier of fact, was indirectly made aware of the alleged contrast between the victim's demeanor before and during her testimony.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, JJ.

11801 Delilah Perez, Index 103275/09
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for appellant.

Cullen and Dykman LLP, New York (Joseph C. Fegan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered October 18, 2012, which granted defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to meet its prima facie burden of demonstrating that it did not create the alleged condition.

In addition, NYCHA failed to demonstrate it lacked constructive notice of the alleged condition. In order to establish its lack of constructive notice of the complained-of condition, NYCHA was required to offer specific evidence as to its activities on the day of the accident, including when the area where plaintiff fell was last inspected, which it failed to do (*see Guerrero v Duane Reade, Inc.*, 112 AD3d 496 [1st Dept

2013]). Furthermore, plaintiff testified that the snow and ice piled upon the curb was hard and a "little bit black," which is sufficient to infer that the condition had been there a sufficient amount of time for its employees to discover and remedy it (*see Wright v Emigrant Sav. Bank*, 112 AD3d 401, 401-402 [1st Dept 2013]).

The report of NYCHA's expert meteorologist was speculative, because it failed to take into account plaintiff's testimony that the snow and ice had been on the sidewalk for approximately four days after NYCHA employees had piled it up onto the curb, and only addressed the general conditions in the vicinity rather than the origin of the specific ice and snow condition on which plaintiff alleges she fell (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 566 [1st Dept 2011]; *Reagan v Hartsdale Tenants Corp.*, 27 AD3d 716, 718 [2d Dept 2006]).

Since NYCHA failed to satisfy its prima facie burden of

establishing its entitlement to summary judgment, plaintiff's opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11802 Ann Kreisberg, Index 158551/12
Plaintiff-Respondent,

-against-

Condon O'Meara McGinty & Donnelly LLP,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about June 18, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 31, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11803 Anthony DeJesus, et al., Index 108417/07
Plaintiffs-Appellants-Respondents,

-against-

888 Seventh Avenue LLC,
Defendant-Respondent,

R&R Scaffolding, Ltd.,
Defendant-Respondent-Appellant,

KBI Inc.,
Defendant.

- - - - -

888 Seventh Avenue LLC,
Third-Party Plaintiff-Respondent,

-against-

SMB Windows LLC,
Third-Party Defendant-Respondent.

_____

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for appellants-respondents.

McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone and James K. O'Sullivan of counsel), for respondent-appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Adam Kazansky of counsel), for 888 Seventh Avenue LLC, respondent.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for SMB Windows LLC, respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 12, 2012, which, to the extent appealed from as limited by the briefs, granted defendant 888 Seventh Avenue LLC's motion for summary judgment dismissing the complaint as against

it, denied plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim, denied defendant R&R Scaffolding, Ltd.'s motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it, granted R&R's motion for summary judgment dismissing 888 Seventh Avenue's cross claims for contribution and common-law indemnification against it, and granted third-party defendant SMB Windows, LLC's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to deny 888 Seventh Avenue's motion as to the Labor Law §§ 240(1) and 200 and common-law negligence claims as against it, to grant plaintiffs' motion as against 888 Seventh Avenue, to grant R&R's motion as to the Labor Law § 200 claim, to deny R&R's motion as to 888 Seventh Avenue's cross claims against it, and to deny SMB's motion, and otherwise affirmed, without costs.

Although plaintiff Anthony DeJesus was not operating the scaffold in his capacity as a window washer at the time of the accident, he was operating it for the caulkers who could not have safely discharged their duties without him. Since caulking is an activity of the sort enumerated in Labor Law § 240(1) (*see Rendino v City of New York*, 83 AD3d 540 [1st Dept 2011]; *Kielar v Metropolitan Museum of Art*, 55 AD3d 456 [1st Dept 2008]), plaintiff is entitled to the same statutory protection as the

caulkers, and his Labor Law § 240(1) claim against 888 Seventh Avenue should not be dismissed. Further, given the evidence that the lanyard and harness provided to plaintiff proved inadequate to shield him from falling through the rail track, plaintiff is entitled to summary judgment on the issue of liability on that claim (*see Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564 [1st Dept 2008]).

The protections of Labor Law § 241(6) are inapplicable to plaintiff's claims because he was not engaged in construction work at the time of the accident (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]). Similarly, Labor Law § 202 is inapplicable because plaintiff was not engaged in window cleaning at the time of the accident.

The testimony of plaintiff's supervisor that 888 Seventh Avenue's property manager had the authority to direct plaintiff's work raises a triable issue of fact whether 888 Seventh Avenue supervised or controlled plaintiff's work for purposes of the Labor Law § 200 and common-law negligence claims against it (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Giovengo v P&L Mech.*, 286 AD2d 306 [1st Dept 2001]).

The record presents a triable issue of fact whether R&R failed to exercise reasonable care in the performance of its duties under the agreement (*see Espinal v Melville Snow Contrs.*,

98 NY2d 136, 140 [2002]). However, plaintiff conceded that R&R is not liable under Labor Law § 200.

In light of our disposition of the claims against it, 888 Seventh Avenue's cross claims and third-party claims for contribution and common-law indemnification against R&R and SMB should not be dismissed, since there is evidence in the record that supports a finding of proportionate negligence among these parties (*see Chevalier v 368 E. 148th St. Assoc.*, LLC, 80 AD3d 411, 414 [1st Dept 2011]). Moreover, on this record, 888 Seventh Avenue may be entitled to contractual indemnification by SMB under their Windows Contract.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11804 Joyce Wong, etc., Index 108906/06
Plaintiff-Appellant, 590286/08

-against-

German Masonic Corporation, doing business as Dumont Masonic Home,
Defendant-Respondent,

Igor Israel, M.D., et al.,
Defendants.

- - - - -

German Masonic Corporation, doing business as Dumont Masonic Home,
Third-Party Plaintiff-Respondent,

-against-

Geriatric Services, P.C.,
Third-Party Defendant,

Nataliya Gorelko, M.D.,
Third-Party Defendant-Respondent.

_____

Tha Adam Law Office, P.C., New York (Richard Adam of counsel), for appellant.

Ptashnik & Associates, LLC, New York (Richard M. Fedrow of counsel), for German Masonic Corporation, respondent.

DeCorato Cohen Sheehan & Federico LLP, New York (Kari Merolesi of counsel), for Nataliya Gorelko, M.D., respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 22, 2012, which granted defendant German Masonic Corporation d/b/a Dumont Masonic Home's motion for summary judgment dismissing the complaint as against it,

unanimously affirmed, without costs.

Plaintiff's decedent, Fredeswinda Wong, was brought to Jacobi Hospital for treatment of smoke inhalation due to a fire in her apartment. Decedent suffered from, inter alia, hypertension and chronic obstructive pulmonary disease, and dementia due to Alzheimer's disease. In early February 2005, decedent was transferred from Jacobi to defendant Dumont Masonic Home for rehabilitation. Both Jacobi and Dumont had taken EKGs that revealed that decedent had tachycardia (rapid heartbeat). At about 3:15 a.m. on March 25, 2004, decedent was sitting up in her room, attempting to get dressed, and in an agitated state. The nurse contacted Nataliya Gorelko, M.D., the on-call physician, who prescribed 1 mg. of Haldol to be given intramuscularly for decedent's agitation. The Haldol was administered at 3:40 a.m., and decedent passed away at 5:05 a.m.

Defendant established prima facie entitlement to summary judgment, which plaintiffs, by their expert, failed to rebut. In arguing that decedent, among other things, should have been transferred to a hospital for adequate care of her heart condition, plaintiff failed to demonstrate that inadequate care was rendered to decedent at the Dumont Home. The record shows that decedent improved during her stay (*see Rivera v Greenstein*, 79 AD3d 564 [1st Dept 2010]). Further, while plaintiff's expert

pathologist performed an autopsy and concluded that decedent passed away from congestive heart failure, decedent's medical records at the nursing home showed no signs of congestive heart failure, although tests had been performed. Thus, even though plaintiff's expert found congestive heart failure in his autopsy, there is no basis for finding that Dumont or its staff should have had notice of it. As in *Rivera*, "the autopsy gives the benefit of hindsight that defendant, of course, did not have" (*id.* at 569).

Further, while plaintiff's expert opined in conclusory terms that Haldol was contraindicated for patients with tachycardia and arrhythmia, decedent did not have arrhythmia and, moreover, plaintiff's expert failed to demonstrate that the intramuscular injection of Haldol increased decedent's heart rate. The medical records show that after the Haldol was administered to decedent, her heart rate actually slowed down. Thus, plaintiff failed to demonstrate that any departure on defendant's part proximately

caused decedent's death (*see Sassen v Lazar*, 105 AD3d 410 [1st Dept 2013]).

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

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11805 Jeffrey Johnson, Index 102034/12
Plaintiff-Appellant,

-against-

S.W. Management, LLC, et al.,
Defendants,

78/79 York Associates, LLC,
Defendant-Respondent.

_____

Jeffrey Johnson, New York, appellant pro se.

Gartner & Bloom P.C., New York (Elizabeth Knapp-Demler of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered March 8, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on his second cause of action for a rent overcharge, unanimously affirmed, without costs.

Plaintiff's motion for summary judgment on his rent

overcharge claim was properly denied. Although the parties' lease erroneously stated that the subject apartment was not rent-regulated, plaintiff failed to establish as a matter of law that the rent charged exceeded the statutory legal regulated rent.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11806 The People of the State of New York, Ind. 3946/09
Respondent,

-against-

Kevin O. Hamilton,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and DLA Piper LLP, New York (Robert J. Czarnecki Jr., of counsel), for appellant.

Kevin O. Hamilton, appellant pro se.

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered August 24, 2010, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of eight years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The course of conduct of defendant and his companion demonstrated that defendant was "aided by another person actually present" (Penal Law § 160.10[1]) who acted, at least, as a lookout during the robbery. The evidence also established the element of physical injury (*see* Penal Law §§

10.00[9]; 160.10[2][a]), in that the victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and clearly caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: FEBRUARY 25, 2014

CLERK

CORRECTED ORDER - MARCH 5, 2014

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11807 In re Aldyfrell Gonzalez, Petitioner, Index 103193/12

-against-

Raymond W. Kelly, etc., et al., Respondents.

Strazzullo Law Firm PC, Brooklyn (Maria Patelis of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (**Allen A. Shoikhetbrod** of counsel), for respondents.

Determination of respondent Police Commissioner, dated March 26, 2012, which terminated petitioner's employment as a New York City police officer, 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 [Alice Schlesinger, J.], entered September 14, 2012), dismissed, without costs.

Substantial evidence supports the findings that petitioner placed false 911 calls reporting disturbances at a local establishment in retaliation for not being allowed entry while he was off-duty; that he lied when questioned about the incidents; that he contacted other officers involved with the investigation after being ordered not to do so; and that he was discourteous and exhibited unbecoming conduct when he left an obscene and

verbally abusive message for his former girlfriend, threatening her with being arrested and issued summonses (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Given the seriousness of the sustained charges, the penalty of termination does not shock our sense of fairness (*see Matter of Alvarez v Kelly*, 2 AD3d 219 [1st Dept 2003]; *see also Matter of Hopper v Kelly*, 106 AD3d 530 [1st Dept 2013]).

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

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11808 The People of the State of New York, Ind. 617/11
Respondent,

-against-

Martin Watson,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about May 3, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11810 The People of the State of New York, Respondent, Ind. 2486/07

-against-

Wesley Carter, Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about November 18, 2011, which adjudicated defendant a level three sexually violent predicate sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly exercised its discretion in denying a downward departure. The underlying offense is defendant's third felony sex crime conviction. Defendant committed the underlying crime after having already been adjudicated a level three sex offender for a crime committed against young children. Furthermore, defendant has also been convicted of a misdemeanor sex offense. The mitigating factors cited by defendant, including his relatively low point score on

the risk assessment instrument and his efforts at rehabilitation, are outweighed by defendant's record, which demonstrates a dangerous propensity to commit sex crimes (*see e.g. People v Jamison*, 107 AD3d 531 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]). *People v Poole*, 105 AD3d 654 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]).

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11811 Angela M. Solano, etc., et al., Index 108905/06
Plaintiffs-Respondents,

-against-

Ronak Medical Care,
Defendant,

Girish Patel, M.D.,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

The Adam Law Office, P.C., New York (Richard Adam of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered April 24, 2013, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Girish Patel, M.D. for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

In this medical malpractice action, plaintiffs allege that Dr. Patel failed to properly treat the decedent, Julian Solano, leading to a delay in the diagnosis of his laryngeal cancer, which condition ultimately caused his death. Dr. Patel's moving papers, including the expert affirmation of an internist, established his entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

While an expert medical opinion is generally required to defeat a summary judgment motion in a medical malpractice case (*see e.g. Alvarez* at 324), here, the deposition testimony of the decedent's daughter was sufficient to create a triable issue of fact. Significantly, Ms. Solano testified that, in September and/or November 2003, approximately one year before decedent was diagnosed with cancer, she accompanied him to visits with Dr. Patel, at which she reported that decedent's throat and ear pain were continuing, his voice was deteriorating, he was losing weight, and that he was bleeding at night from his mouth onto his sheets. Such testimony placed decedent's symptoms and complaints squarely within the parameters identified by Dr. Patel's expert as warranting referral to an otolaryngologist.

In light of the foregoing, we need not reach the issue of the admissibility and sufficiency of the opinion of plaintiffs' expert. Were we to do so, we would find that Dr. Patel's objections to the expert's qualifications go to the weight and not the admissibility of her opinion (*see Rojas v Palese*, 94 AD3d 557 [1st Dept 2012]; *Williams-Simmons v Golden*, 71 AD3d 413 [1st Dept 2010]), and that the court properly exercised its discretion by allowing plaintiffs to correct the procedural defect caused by their submission of an affirmation from an out-of-state physician (*see* CPLR 2106; *Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d

539 [1st Dept 2009]; *Matos v Schwartz*, 104 AD3d 650, 653 [2d Dept 2013]).

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

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11812 The People of the State of New York ex rel. Desiree Lassiter, on behalf of Yadira Hernandez, Petitioner-Appellant, Index 250568/13

-against-

Dora B. Schriro, etc., Respondent-Respondent.

The Bronx Defenders, Bronx (V. Marika Meis of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

Appeal from judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered June 10, 2013, denying the writ of habeas corpus and dismissing the petition, unanimously dismissed as moot, without costs.

The appeal is moot because petitioner is no longer incarcerated (*see People ex rel. Howell v Mitchell*, 225 AD2d 491 [1st Dept 1996]), and we do not find applicable the exception to the mootness doctrine set forth in *Matter of Hearst Corp. v Clyne* (50 NY2d 707, 714-715 [1980]). Petitioner is essentially seeking review of an underlying case-specific, discretionary decision by the bail court (Steven L. Barrett, J.), to increase petitioner's

bail (*see* 530.60[1]; *see also* CPL 510.30), and her arguments for applying the exception to the mootness doctrine are unavailing.

Were we not dismissing the appeal, we would affirm.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11814 Randolph Pryce, et al., Index 18342/00
Plaintiffs-Appellants,

-against-

Montefiore Medical Center,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered October 18, 2012, which granted defendant's motion pursuant to CPLR 3216 to dismiss the complaint, and denied plaintiffs' cross motion seeking to extend their time to file a note of issue, unanimously affirmed, without costs.

To avoid dismissal for failure to prosecute, "CPLR 3216(e) requires a showing of justifiable excuse and a meritorious cause of action when the party served with a 90-day notice 'fails to serve and file a note of issue within such ninety day period'" (*Grant v City of New York*, 17 Ad3d 215, 216 [1st Dept 2005]).

We agree with the motion court's conclusion that the affidavit of merit submitted by plaintiffs' expert was facially insufficient to establish a meritorious cause of action. We also find that plaintiffs failed to demonstrate a justifiable excuse

for their non-compliance.

Law office failure may constitute a reasonable excuse, particularly where there has not been a pattern of dilatory behavior (*see Polir Constr. v Etingin*, 297 AD2d 509 [1st Dept 2002]), or where the failures were caused by former counsel and substitute counsel has been obtained (*see Pagan v Estate of Anglero*, 22 AD3d 285 [1st Dept 2005]). However, where the claimed law office failure is "'conclusory and unsubstantiated'," it cannot excuse default (*Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]).

Here, there has been a decade-long pattern of dilatory behavior. While much of the delay was caused by prior counsel, it is notable that the pattern continued for over a year under substitute counsel's watch. Counsel's excuse that other casework obligations and family matters kept him from timely prosecuting the matter can only be seen as conclusory and unsubstantiated. Notwithstanding his knowledge that the matter had already been dismissed once before on a failure to respond to a 90-day notice,

counsel admitted that he decided not to respond to the notice, believing it wiser to attempt to commence settlement negotiations.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Gische, JJ.

11815N National Union Fire Insurance Company of Pittsburgh, Pennsylvania, et al., Plaintiffs-Appellants,

Associated Electric & Gas Insurance Services Limited, Plaintiff,

-against-

TransCanada Energy USA, Inc., et al., Defendants-Respondents.

- - - - -

TC Ravenswood, LLC, Plaintiff-Respondent,

-against-

National Union Fire Insurance Company of Pittsburgh, Pennsylvania, etc., et al.,, Defendants-Appellants,

Associated Electric & Gas Insurance Services Limited, Defendant.

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Foran Glennon Palandech Ponzi & Rudloff PC, New York (Malcolm J. Reilly of counsel), for National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Ace Ina Insurance and Arch Insurance Company, appellants.

Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman P.C., New York (Robert K. Scheinbaum of counsel), for Factory Mutual Insurance Company, appellant.

Anderson Kill P.C., New York (John M. O'Connor of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 19, 2013, which, inter alia, upon cross motions to confirm and to reject the special referee's finding that any documents that pre-date the rejection by National Union Fire Insurance Company of Pittsburgh, Pennsylvania, ACE INA Insurance, Arch Insurance Company (the market insurers), and Factory Mutual Insurance Company (with the market insurers, the insurance companies) of TransCanada Energy USA, Inc., TC Ravenswood Services Corp., and TC Ravenswood, LLC's (TransCanada) claims are not protected from disclosure, and a motion for a protective order, ordered the insurance companies to produce to TransCanada all the documents except certain specified ones, unanimously affirmed, with costs.

The motion court properly found that the majority of the documents sought to be withheld are not protected by the attorney-client privilege or the work product doctrine or as materials prepared in anticipation of litigation. The record shows that the insurance companies retained counsel to provide a coverage opinion, i.e. an opinion as to whether the insurance companies should pay or deny the claims. Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so "'merely because [the] investigation was conducted by an

attorney'" (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005]).

The common interest exception to waiver of the attorney-client privilege by disclosure is not applicable, since there was no pending or reasonably anticipated litigation in which the insurance companies had a common legal interest (*see Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London*, 176 Misc 2d 605, 612 [Sup Ct, NY County 1998], *affd* 263 AD2d 367 [1st Dept 1999], *lv dismissed* 94 NY2d 875 [2000]).

The insurers' argument that they actually denied TransCanada's claims before the date identified in the motion court's order, and that therefore any documents prepared after that date are protected attorney work product, is a factual argument improperly raised for the first time on appeal.

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

ENTERED: FEBRUARY 25, 2014

CLERK

Sweeny, J.P., Andrias, Moskowitz, DeGrasse, Gische, JJ.

11816N William I. Koch, Index 601220/08
Plaintiff-Appellant,

-against-

Acker, Merrall & Condit Company,
Defendant-Respondent.

_____

Hunton & Williams, LLP, New York (Shawn Patrick Regan of counsel), for appellant.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondent.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered July 9, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the complaint to assert new claims relating to an additional 211 bottles of allegedly counterfeit wine, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The original complaint alleged that, in four separate transactions in April, May and July 2005 and January 2006, defendant sold plaintiff "numerous bottles" of wine, of which "at least" five were counterfeit, and that "additional bottles [were] suspect, requiring further research." These allegations placed defendant on notice that, as a result of "further research" on the "numerous bottles" of wine that defendant had sold him (about 1,500, according to defendant), plaintiff might assert additional

claims relating to other bottles, such as the 211 additional bottles complained of in the amended complaint. Most of those additional 211 bottles were sold in the four transactions identified in the original complaint, and all of them were sold during the 10-month period identified in the original complaint. Thus, the original complaint gave defendant notice of the transactions or series of transactions to be proved pursuant to the amended complaint, and the new claims are deemed to relate back to the original complaint, for purposes of the statute of limitations (*see* CPLR 203[f]; *Jennings-Purnell v Jennings*, 107 AD3d 513 [1st Dept 2013]; *Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 [1st Dept 2013]).

The amendment of the complaint will not unduly prejudice defendant. "Prejudice does not occur simply because a defendant is exposed to greater liability or ... has to expend additional time preparing its case" (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st Dept 2009] [internal citation omitted]; *Giambrone*, 104 AD3d at 548). In any event, the motion court granted plaintiff leave to amend the complaint to add significant factual allegations relating to defendant's relationship with an allegedly criminal purveyor of wines (that

part of the order is not at issue on this appeal), which will require additional discovery. Absent any other prejudice, the fact that plaintiff waited until after resolution of the interlocutory appeals is not sufficient reason to deny his motion (*see Jacobson*, 68 AD3d at 655).

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

ENTERED: FEBRUARY 25, 2014

CLERK